



Government of **Western Australia**
Department of **Water**

Operational policy 5.05 Giving an undertaking to grant a water licence or permit

(Previously Statewide policy 8 Giving an undertaking to grant a water licence or permit)

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Contents

| | |
|--|----|
| Summary | 1 |
| 1 Policy statement | 2 |
| Undertakings in relation to section 5C licences | 2 |
| Undertakings to grant a permit or a licence to construct a bore..... | 2 |
| 2 Background | 3 |
| 2.1 Issue | 3 |
| 2.2 Intent | 3 |
| 2.3 Policy links | 3 |
| 2.4 Legislation..... | 3 |
| 3 Implementation..... | 5 |
| 3.1 Application | 5 |
| 3.2 Letters giving undertakings | 5 |
| 3.3 Correspondence..... | 6 |
| 3.4 Conditions are not met..... | 6 |
| 3.5 Conditions are met..... | 7 |
| 3.6 Extending the time of undertakings | 7 |
| 3.7 Undertakings are not transferable | 7 |
| 4 Review | 9 |
| Glossary | 11 |
| References | 12 |
| Regional enquiries..... | 13 |

Summary

Most developments in Western Australia require secure access to a reliable source of water if they are to proceed. The Department of Water, Western Australia's primary water resource management agency, grants licences and permits to access water to proponents who have met all the legal and the Department of Water criteria.

However, on occasion, proponents may need assurance that they will be given a licence or permit prior to having met all the required criteria.

To support state development, the Department of Water may give a proponent a 'letter of undertaking' that it will grant the necessary approvals at a later time, if certain criteria are met.

This policy outlines the approach the Department of Water will utilise when giving an undertaking to:

- grant a licence to take and use water
- grant a licence to construct a new bore or alter an existing bore
- issue a permit to interfere with a watercourse
- approve a water entitlement transaction (trade, transfer, agreement/lease).

It details the circumstances under which undertakings will be issued, the correspondence with applicants and what the Department of Water will do if holders of undertakings do not meet the requirements.

1 Policy statement

Undertakings in relation to section 5C licences

The Department of Water may give an undertaking in relation to section 5C of the *Rights in Water and Irrigation Act 1914* to an applicant to:

- grant a new licence
- approve the transfer of a part or the whole of an existing water entitlement to the new owner of the same property
- approve the transfer of a part or the whole of an existing water entitlement to a new location
- approve an agreement for the leasing of a part of or the whole of a water entitlement for a period of time

when the application meets all of the criteria for the grant, except that the applicant is currently not a person eligible to hold a licence (i.e. no legal access to land) as per Schedule 1, clause 9 of the *Rights in Water and Irrigation Act*.

By giving an undertaking, the Department of Water undertakes to grant a new licence or approve the transaction of an existing entitlement, when the applicant acquires legal access to the land under the terms of Schedule 1, clause 3 of the *Rights in Water and Irrigation Act* within the stated timeframe. Undertakings given by the Department of Water are valid for a short period of time and are not transferable.

Undertakings to grant a permit or a licence to construct a bore

Under the *Rights in Water and Irrigation Regulations 2000*, the Department of Water may issue a letter of undertaking to an applicant to:

- grant a permit to interfere with a watercourse, under *section 17* of the *Rights in Water and Irrigation Act* or
- grant a licence to construct a new bore or alter an existing bore, under *section 26D* of the *Rights in Water and Irrigation Act*.

The applicant does not need to have fulfilled all the criteria for being granted a permit under section 17, or a section 26D licence before the Department of Water considers giving an undertaking. However, the undertaking may include conditions that the applicant will need to meet (including but not limited to having legal access to the land the structure is to be built) if the Department of Water was to grant the permit or licence.

2 Background

2.1 Issue

The Department of Water is responsible for managing and allocating Western Australia's terrestrial water resources. The Department of Water grants the right to take water from these resources by issuing licences with water entitlements, under the *Rights and Water Irrigation Act 1914*, to individuals or companies who meet all the Department of Water criteria. The applicant must also indicate the purpose the water is to be used for.

On occasion, even before all the criteria to grant a licence have been met, applicants have asked the Department of Water to give an undertaking that a licence will be granted when all criteria are met. These requests were mainly to assist applicants negotiating finance for a proposed project or seeking other government approvals.

2.2 Intent

The intent of this policy is to define the circumstances under which the Department of Water will give undertakings to grant licences to take water, permits to interfere with a watercourse, licences to construct a bore, and approve transactions with respect to water entitlements.

2.3 Policy links

The following Department of Water policies are relevant to this policy:

- *Statewide policy 6 Transferable (tradeable) water entitlements*
- *Statewide policy 9 Water licensing – staged developments*
- *Statewide policy 10 Use of operating strategies in the water licensing process*
- *Operational policy 1.2 Policy on water conservation/efficiency plans*
- *Operational policy 5.11 Timely submission of required further information*
- *Operational policy 5.12 Hydrogeological reporting associated with a groundwater well licence*

2.4 Legislation

The *Rights in Water and Irrigation Act 1914* and related *Rights in Water and Irrigation Regulations 2000* provide a legislative framework for groundwater and surface water allocation in Western Australia and vests with the Crown the right to the use, flow and control of water sources.

The Department of Water is responsible for discharging specific water-resource management powers and functions set out in the legislation, as delegated by the Minister for Water Resources.

The *Rights in Water and Irrigation Act 1914* requires the licensing of all artesian bores throughout the state. In addition, under section 26D, all non-artesian bores located within proclaimed groundwater areas are also required to be licensed under the *Act* (except where exempted, for example domestic and stock bores). Within proclaimed surface water areas, the Department of Water may license all surface water abstractions that are not considered to be riparian. Permits are issued under section 17 of the *Rights in Water and Irrigation Act 1914* if a watercourse is to be interfered with.

The *Rights in Water and Irrigation Act 1914* allows the Department of Water to give an undertaking to grant a licence to take water at a future date, or approve the transfer of a water entitlement or lease agreement, but only to applicants that have met all the criteria but have not yet obtained legal access to the land the water is to be taken from.

The *Rights in Water and Irrigation Regulations 2000* also gives the Department of Water the power to give undertakings to issue permits to interfere with a watercourse under section 17 and licences to construct or alter bores under section 26D of the *Rights in Water and Irrigation Act 1914*.

3 Implementation

3.1 Application

This policy applies statewide to applicants that do not yet have legal access to the land that the water is proposed to be taken from, and are seeking:

- a new licence to take water from a water resource
- to transfer part of or the whole of an existing water entitlement to a new owner of the same property (for example a transfer)
- to transfer part of or the whole of an existing water entitlement to a new location (for example trade)
- the approval of a leasing agreement for a water entitlement.

The policy also addresses applicants seeking an undertaking to be granted:

- a permit to interfere with a watercourse
- a licence to construct a new bore or alter an existing bore.

Water allocation plans for groundwater or surface water areas may contain specific requirements that override some components of this policy.

3.2 Letters giving undertakings

To be issued a letter of undertaking, the proponent must first apply for the required licence or permit to the Department of Water. After assessing the application and if the Department of Water considers it is appropriate to give an undertaking, it will send a letter to the applicant:

- giving an undertaking to issue the applicant with the instrument sought (licence, permit or transaction approval) within the period specified in the undertaking
- stating the conditions that the applicant will need to meet for the Department of Water to grant that instrument
 - If the applicant has requested a licence to take water under section 5C of the *Act*, the letter will include a statement that proof of legal access must be provided by the applicant before the licence can be granted will be included.
 - If the applicant has requested a licence with respect to constructing a bore or a permit to interfere with a watercourse, the conditions may not be limited to legal land access. They are likely to be broader and include a variety of matters that the applicant will need to address.
- specifying the term of the undertaking (up to 12 months, depending on the proposed project's timetable).

Undertakings for a licence to construct or alter a bore or for a permit, that are linked to a licence to take water (not for investigation or exploration purposes) may include

a condition specifying that the undertaking is valid only if the Department of Water grants the applicant a licence to take and use water.

The letter may also contain advice regarding relevant conditions that would be contained in the licence or permit if issued.

3.3 Correspondence

It is the applicant's responsibility to ensure that the conditions of the undertaking are met within the timeframe indicated in the undertaking.

The Department of Water may write to the applicant requesting a status report on how the applicant is meeting the conditions of the undertaking prior to 21 days before the undertaking is due to expire. The applicant is also likely to be reminded in that letter that if the conditions of the undertaking are not met in full by the time the undertaking expires, the application will be deemed void (incomplete) by the department and it will be returned to the applicant.

Even if the Department of Water does not write to the applicant, the applicant must submit correspondence to the Department of Water demonstrating compliance with conditions of the undertaking prior to the expiry of the undertaking.

3.4 Conditions are not met

If the applicant does not respond to the Department of Water, or is unable to meet all the conditions by the time the undertaking expires, the Department of Water will conclude that the applicant no longer wishes to proceed with the application, and:

- for a licence application to take and use water, the Department of Water will return the application as incomplete, informing the applicant that because of the expiry date and/or inability to demonstrate legal access to the property pertaining to the application, they are not a person able to hold such a licence under the *Rights in Water and Irrigation Act 1914*
- applications for a licence to construct or alter a bore or for a permit that are linked to an application to take water, will be returned to the applicant, if by the time the undertaking expires, the applicant has not yet been granted a licence to take and use water, as the applicant is unable to further pursue the development and has not complied with the terms and conditions of the undertaking
- applications for a licence to construct or alter a bore or for a permit, that are not related to a licence to take water, will be refused on the basis that the applicant is not a person willing or able to comply with the terms and conditions to be included in a permit or a section 26D licence.

3.5 Conditions are met

If the applicant submits evidence that all the conditions have been met before the undertaking expires, the Department of Water will grant the licence or the permit or approve the transaction of an existing water entitlement in accordance with the terms of the undertaking.

3.6 Extending the time of undertakings

The Department of Water may consider extending the period of the undertaking if the applicant requests a time extension before the undertaking expires.

Any request for an extension will need to be supported with reasons acceptable to the Department of Water, as to why the applicant is unable to comply with the original expiry date.

Requests for extending an undertaking will not be accepted if the requests are received by the Department of Water after the original undertaking expires. The request can be presented as a letter to the Department of Water, clearly outlining the reasons for requesting an extension and providing evidence to substantiate that case.

Satisfactory reasons for extending the time of the undertaking are reasons that are beyond the applicant's control; for example, delays in legal proceedings, or in obtaining government authorisations. Evidence should be provided to confirm any statements.

If any extension is granted, it will only be granted once and for a period of not more than an additional six months. This time is deemed to be reasonable for the applicant to address any outstanding issues.

3.7 Undertakings are not transferable

A letter providing an undertaking is issued:

- to the specific entity (for example person, company or organisation) that formally applied to take water, construct a bore or interfere with a watercourse or transact a water entitlement
- from a specific water resource (for example the superficial aquifer)
- for a specific purpose
- for a specified property or properties.

Alterations to any of these details will require the lodgement of a new application.

A letter giving an undertaking to grant a licence to take water under section 5C of the *Rights in Water and Irrigation Act 1914* is not a water entitlement. The letter refers to the possibility of granting an entitlement in the future and therefore the undertaking cannot generally be transferred to another person.

However, if a company holding an undertaking changes its name or is purchased by another company, the Department of Water will consider giving the new entity the same undertaking, if the purpose the water is to be used for does not change.

Similarly, licences to construct bores or permits to interfere with watercourses are not legally transferable.

4 Review

The Department of Water oversees water licensing policy development, including the review of existing policies. Policies are regularly updated to ensure their relevance to the department's licensing processes.

This document, *Operational policy 5.05 Giving an undertaking to grant a water licence or permit*, will be reviewed by 2015.

Glossary

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| Agreement | A form of lease and occur via the temporary 'assignment' of a licensed entitlement, or part thereof, to another party. This second party is then able to operate under the licence for the period of the agreement. Usually under agreements the water is taken from a new location, requiring an assessment of the likely impacts. Also called a 'temporary transaction'. |
| Licences to construct or modify a bore | Section 26D of the <i>Rights in Water and Irrigation Act 1914</i> requires the licensing of bore construction and modification. This includes all artesian bores, and non-artesian bores in areas proclaimed under the <i>Act</i> . The <i>Act</i> allows for the exemption of certain bores from licensing. |
| Licences to take and use water | The Department of Water issues licences granting the right to take water from a specified resource and a specified location under section 5C of the <i>Rights in Water and Irrigation Act 1914</i> . Those licences state the maximum volume of water (the water entitlement) a licensee can take per 12-month period. Conditions included in licences outline a licensee's responsibilities for managing the water resource. |
| Permits to interfere with a watercourse | Permits are issued by the Department of Water under section 17 of the <i>Rights in Water and Irrigation Act 1914</i> to applicants wishing to interfere with a watercourse. This allows for the regulation of any form of interference with that watercourse, including the construction of dams or reservoirs, and aims to protect the environment and users of that watercourse. |
| Trade | Where an entitlement is permanently traded to another person and the water will be taken from another location. An example is where a licensee sells their water entitlement to another person who will take the water from a different location and possibly use it for a different purpose. |
| Transfer | Where an entitlement is permanently transferred to another person but the water will be taken from the same location. An example of a transfer is when a licensee sells their property operation (e.g. a market garden) together with the water entitlement to another person who will continue with the operation. |
| Water entitlement transaction | Is the term used to describe the ability of a licence holder to trade, transfer, or form an agreement (i.e. transact) for all or part of the licensed entitlement, to be taken by another person. In most cases a transaction involves a monetary exchange although in some instances transfers may occur without recompense (for example a deceased estate). |

References

- Council of Australian Governments 2000, Council of Australian Governments' Meeting, 3 November 2000, Canberra, Communique, Australian Government, Canberra.
- Department of Water 2007, *Western Australia's implementation plan for the National Water Initiative*, Government of Western Australia, Perth.
- Department of Water 2009, *Operational policy 1.2 Water efficiency plans – Achieving water efficiency gains through water licensing*, DWPF 1.2, Department of Water, Perth.
- Department of Water 2009, *Operational policy 5.11 Timely submission of required further information*, DWPF 5.11, Department of Water, Perth.
- Department of Water 2009, *Operational policy 5.12 Hydrogeological reporting associated with a groundwater well licence*, DWPF 5.12, Department of Water, Perth.
- Government of Western Australia 2007, *State water plan*, Department of the Premier and Cabinet, Perth.
- Water and Rivers Commission 2001, *Transferable (tradeable) water entitlements*, Water and Rivers Commission, Perth.
- Water and Rivers Commission 2001, *Use of operating strategies in the water licensing process*, Water and Rivers Commission, Perth.
- Water and Rivers Commission 2003, *Water licensing – Staged developments*, Water and Rivers Commission, Perth.

Regional enquiries

Please direct any enquiries relating to the implementation of this policy or to management of water resources in the regions to the following regional offices:

Kimberley Region

27 Victoria Highway

Kununurra WA 6743

Telephone 08 9166 4100

Facsimile 08 9168 3174

Swan Avon Region

7 Ellam Street

Victoria Park WA 6100

Telephone 08 6250 8000

Facsimile 08 6250 8050

Pilbara Region

Lot 4608 Cherratta Road

Karratha WA 6714

Telephone 08 9144 2000

Facsimile 08 9144 2610

Kwinana Peel Region

107 Breakwater Parade

Mandurah WA 6210

Telephone 08 9550 4222

Facsimile 08 9581 4560

South Coast Region

5 Bevan Street

Albany WA 6330

Telephone 08 9842 5760

Facsimile 08 9842 1204

Mid West–Gascoyne Region

94 Sanford Street

Geraldton WA 6530

Telephone 08 9965 7400

South West Region

35–39 McCombe Rd

Halifax WA 6231

Telephone 08 9726 4111

Facsimile 08 9726 4100