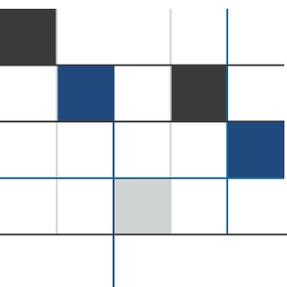


Policy

Giving an undertaking to grant a water licence or permit

Formerly operational policy 5.05

October 2020



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September 2020

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The Department of Water and Environmental Regulation (the department) has implemented a policy framework across all of its regulatory documents. The framework provides a clear and structured document hierarchy, which details how the department and its stakeholders should apply the different types of documents within the hierarchy.

As part of the implementation of this framework, this document has been updated with a new format to show how the document is classified within the framework.

The content of the document has not been changed and remains the department's position.

For more information on the policy framework refer to the department's website here: www.dwer.wa.gov.au.

This document was previously published in December 2019.



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Summary

Most developments in Western Australia (WA) require secure access to a reliable source of water if they are to proceed. The Department of Water and Environmental Regulation (the department), WA's primary water resource management agency, grants licences and permits to access water to proponents who have met all legal and departmental 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 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 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 will do if holders of undertakings do not meet the requirements.



1. Policy statement

Undertakings in relation to section 5C licences

The department may give an undertaking in relation to section 5C of the *Rights in Water and Irrigation Act 1914* (RIWI Act) 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 (that is, no legal access to land) as per Schedule 1, clause 9 of the RIWI Act. By giving an undertaking, the department 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 RIWI Act within the stated timeframe. Undertakings given by the department 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 may issue a letter of undertaking to an applicant to:

- grant a permit to interfere with a watercourse, under section 17 of the RIWI Act
- grant a licence to construct a new bore or alter an existing bore, under section 26D of the RIWI 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 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 was to grant the permit or licence.



2. Background

2.1 Issues

The department is responsible for managing and allocating WA's terrestrial water resources. The department grants the right to take water from these resources by issuing licences with water entitlements, under the RIWI Act, to individuals or companies who meet all the department 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 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 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 policies are relevant to this policy:

- Policy: Water entitlement transactions for Western Australia
- Statewide policy 9 Water licensing – staged developments
- Policy: Use of operating strategies in the water licensing process
- Policy: Water conservation/efficiency plans
- Policy: Timely submission of required further information
- Operational policy 5.12 Hydrogeological reporting associated with a groundwater well licence

2.4 Legislation

The RIWI Act and related Rights in Water and Irrigation Regulations 2000 provide a legislative framework for groundwater and surface water allocation in WA and vests with the crown the right to the use, flow and control of water sources.

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

The RIWI Act 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 RIWI Act (except where exempted, for example domestic and stock bores). Within proclaimed surface



water areas, the department may license all surface water abstractions that are not considered to be riparian. Permits are issued under section 17 of the RIWI Act if a watercourse is to be interfered with.

The RIWI Act allows the department 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 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 RIWI Act.



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. After assessing the application and if the department 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 to grant that instrument:
 - if the applicant has requested a licence to take water under section 5C of the RIWI 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 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 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 does not write to the applicant, the applicant must submit correspondence to the department 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, or is unable to meet all the conditions by the time the undertaking expires, the department 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 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 RIWI Act
- 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 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 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, 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 after the original undertaking expires. The request can be presented as a letter to the department, 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 RIWI Act 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 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 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.



Glossary

Term	Definition
Agreement	<p>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'.</p>
Licences to construct or modify a bore	<p>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 Act. The Act allows for the exemption of certain bores from licensing.</p>
Licences to take and use water	<p>the Department of Water and Environmental Regulation 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.</p>
Permits to interfere with a watercourse	<p>permits are issued by the Department of Water and Environmental Regulation 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.</p>
Trade	<p>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.</p>
Transfer	<p>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 (for example, a market garden) together with the water entitlement to another person who will continue with the operation.</p>



Term

Definition

Water entitlement transaction

is the term used to describe the ability of a licence holder to trade, transfer, or form an agreement (that is, 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).



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Water and Rivers Commission 2001, *Transferable (tradeable) water entitlements*, 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:

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Swan Avon Region

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Facsimile (08) 6250 8050

South Coast Region

120 Albany Highway

Albany WA 6330

Telephone: (08) 9841 0100

Mandurah

107 Breakwater Parade

Mandurah Ocean Marine

Mandurah WA 6210

Telephone (08) 9550 4212

Facsimile (08) 9581 4560

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