



Water Amendment Act (Bill 7): Review, analysis and recommendations

The Water Amendment Act (Bill 7) was tabled on October 30, following earlier government consultation on proposals to increase water availability in the province. Most of the proposed amendments that were consulted on were brought forward into the Bill. This brief highlights these amendments, the risks and potential impacts of those amendments and recommendations (where appropriate). A summary of recommendations is set out immediately below with more analysis and details regarding recommendations provided in the body of this brief.

Recommendations

Provisions related to amalgamating river basins and “lower risk” water transfers should be removed from the Bill as interbasin transfers should remain rare due to the risks associated with them and the potential to impact the long-term integrity of river basins. If an alternative approach to interbasin transfers is required amendments should only be contemplated after further consultation and the development of guardrails.

Provisions in the Bill that extend point of use or point of diversion beyond those set out in the original licence should be removed and further consultation should take place with consideration of whether water allocation transfers are a more appropriate approach to address these areas.

The Bill’s provisions that may be used to set time restrictions on decisions (licences, temporary diversions licences, licence amendments, and licence allocation transfers) should be removed from the Bill.

Proposed specific amendments

The Bill should be amended as follows:

- In s. 54(1)(b)(vii) after the word “environment” add: “after considering both flows and water quality and the impact on the meeting of water conservation objectives.”
- Add: s.54(d) For the purpose of determining whether a term or condition is outdated in (c)(i) and (iii), the Director must determine that the term or condition or the return flow reduction will not result in adverse effects on the aquatic environment.
- Add: s.54(6). The Director shall, in making a determination under s.54(1)(b)(vii) or s.54(1)(c)(i) and (iii), provide written reasons as to how the reduction of return flows will be beneficial to the aquatic environment.
- Add: s.54(6)(2) The Director must post the written reasons under (1) on the Registry under s. 167.1 and the date of posting shall be deemed to be the notice for the purpose of s.116(b)
- Add: s.115(1)(s) if the Director makes a determination under s.54(6), by any person.
- Amend s.15 the Water (Administration) Regulation to include disclosure of the reasons for a decision under s.54(6).



- Add s. 167.1. The Minister shall establish a public water registry that will provide the public with access to information relating to the Act and as prescribed by Regulation, by January 1, 2027.
- Add: s. 169(h) prescribing the content and form of information provided in the registry under s.167.1.

Sections 1-5 below, in the opinion of the Environmental Law Centre, are the most pressing for reconsideration or amendments.

1. Interbasin Transfers

The Bill changes interbasin transfers in two significant ways. The Bill:

1. Unifies the Peace/Slave River Basin with the Athabasca River Basin.(Bill s.2)
2. Sets up an authorization process for “lower-risk” transfers between basins, where currently this requires the passage of an Act of the legislature. (Bill s.8)
 - a. In so doing, the amendments limit the “lower risk” transfer in the following instances:
 - i. In the opinion of the Director, the transfer will not result in (the transfer of an invasive species under the Fisheries (Alberta) Act)
 - ii. The rate of diversion does not exceed 0.1 m³/s for the Milk and Beaver River Basins, 1.0 m³/s for the Hay River Basin, and 4 m³/s for all other basins, unless a lower rate is set by regulation.
 - iii. Transfers must meet any limitations, criteria or conditions set out in regulation.
3. The process for “lower-risk” transfers is the Minister issuing an order allowing the Director to issue a licence for those purposes. (Bill s. 8)
4. For “lower-risk” transfers (as well as with normal transfers) the Minister must “consult with the public” in a “manner and form satisfactory” to the Minister. (Bill s.8)
5. Regulations may include “prescribing rates and further criteria, conditions or limitations applicable to lower-risk transfers”(Bill s.29).

Analysis

There are a variety of risks raised in relation to the interbasin transfers.

1. There are no limits or public oversight mechanisms for interbasin transfers in the newly contemplated Peace-Athabasca-Slave river basin. The process for interbasin transfers between two basins that cover approximately half the province can proceed as a normal licence, with only standard participation in the licencing decisions by those who are directly affected. In this new “river basin” there is no prescribed consideration of the long term and cumulative effects of these transfers. The risks of invasive species and other aquatic risks



are heightened by this amalgamation. The original separation of basins the Water Act and the requirement for a special act of the legislature is reflective of principles around watershed management and water conservation and the risks that interbasin transfers entail. The rationale for this more onerous process of interbasin transfers has not substantively changed since 1999.

2. The phrase of “public review” is not set out in the Act. This is problematic as for existing water allocation transfers there was a requirement for “public review” by the Director, and it appears that has historically been limited to notice of an application, which should not be viewed as constituting “public review”.
3. The cumulative threshold of diversions is not set, although it could be in the regulation. There are limits to individual “lower-risk” transfers, however a cumulative threshold is not created. This can have significant impacts on the environment and the priority of other users in the water exporting basins. These amendments seem focused on streamlining where long term impacts of transfers can carry significant risk.

The consultation on this approach used various examples of lower-risk transfers rather than a volumetric limit, however, it would seem that where interbasin transfers are being considered there should be a value judgement and justification of the increased risks inherent in interbasin transfers.

Recommendations

The government should do more robust consultation on the nature of interbasin transfers and the amalgamation of the Peace – Athabasca - Slave basins, including consulting through the Alberta Water Council, to consider alternatives to blanket interbasin transfers or maintenance of the current system of requiring legislation. This consultation should canvass alternatives such as limited classes of interbasin transfers, rather than broad enabling provisions as set out in Bill 7.

In addition, the “public review” should be defined to provide at a minimum, disclosure of all information that is part of the application for a lower-risk transfer, a minimum of 30 days public participation period, and public notice of interbasin transfer in both river basins involved.

2. Water for reuse

Water for reuse is defined as a “water based liquid that is prescribed by regulation as eligible for reuse, arises from a diversion under a licence that did not result from wastage of water, and is supplied by a licensee to another person for reuse” (Bull ss. 2), The Bill augments the existing licence amendment provisions of the Act by including a provision that can result in a reduction of



“the return flow requirement for the purpose of enabling water for reuse, where reuse is, in the opinion of the Director, beneficial to the aquatic environment”.(Bill s. 11)

The Bill also enables regulation-making powers in relation to “water for reuse” including setting out what types of water may be eligible and respecting conditions and limitations and responsibilities of the licencees.(Bill s.29)

Analysis

There is insufficient transparency in relation to the Director’s determination of a benefit to the aquatic environment. Further, the nature of benefit is not defined, nor is “wastage” defined. There is a need to ensure that there is a level of “additionality” to how reuse will benefit the aquatic environment, i.e. that water treatment obligations are not curtailed or undermined by reuse opportunities. Further, there should be consideration given to both water quality and quantity issues when discerning a benefit.

Recommendation

Amend section 54(1)(b)(vii) to include after “environment” “after considering both flows and water quality and the impact on the meeting of water conservation objectives.”

Add: s.54(6) The Director shall, in making a determination under s.54(1)(b)(vii) or s.54(1)(c)(i) and (iii), provide written reasons as to how the reduction of return flows will be beneficial to the aquatic environment.

Amend s.15 of the Water (Administration) Regulation to include disclosure of the reasons for decision under section s.54(6).

3. Change in point of use and point of diversion.

The Bill allows for amendments to a licence to change the point of use or add another point of use of the diverted water and the point of diversion (Bill s.11). This is qualified by:

1. The use [new point of diversion] is located on the same land specified in the land or in the plan attached to the licence;
2. The use [new point of diversion] is “associated with, and is an extension of, the land specified in the licence or plan attached to the licence; or
3. The use [new point of diversion] is associated with and is an extension of the project or undertaking specified in the licence of the plan attached in the licence.(Bill s.11)

The director may only grant an amendment if, in the “director’s opinion, there is no or will be no adverse effect on the rights of a household user, other licences or traditional agricultural user, and the proposed change will not adversely affect the ability to conserve or manage a water body”.



Further, in relation to changes in use and points of diversion the Bill contemplates a process of obtaining consent of the landowner where the amendment is to be appurtenant (i.e. connected to a specified piece of land) (Bill s.11). The existing purpose of the licence is not allowed to change as part of the amendment process. (Bill s.11)

Analysis

This part of the Bill is problematic as it appears to undermine the appurtenance provisions of the Act and thus may have a practical impact on how and when priority may be called. While it does not increase the licenced volumes of the licence it seeks to extend the opportunities to use more water to a licence holder. This in turn may have a knock-on effect depending on the licence priority. It should be noted that while such a change may not impact “rights” of the other users, the implications are that the more water that is used through time the more likely priority may be called or that an alternative volunteer mechanism will be needed to address water shortages.

Further, in relation to the impacts on “conserving or managing a water body,” the Act remains quite unclear and lacking in accountability mechanisms for maintenance of water conservation objectives or for meeting the Act’s definition of “conservation” including preserving and protecting water resources.

Finally, on its face, this provision is most likely applicable to large licence holders that are in a closed basin that may expand while maintaining the same purpose. This in turn carries additional ecological risks in relation to conversion of native grasslands. There is a need to ensure that regulatory clarity in the maintenance of native grasslands remains a priority and that water licencing is linked for a more integrated approach to resource management and ecological protection of at-risk ecosystems.

Recommendation

This amendment should be the focus of further consultation with Albertans, with a focus on understanding the intent, the likely use, and the implications of augmenting the points of use and points of diversion, both in terms of licence priority and in terms of ecological concerns.

4. Director initiated amendments

The Bill enables the Director to initiate licence amendments in various instances. Specifically, the Bill allows the Director to initiate amendments to “terms or conditions related to environmental objectives, if, in the opinion of the Director, the term or condition is outdated, the amendment enables greater access to the licences allocation and amendment benefits the licensee.” (Bill s. s.11)



Further it allows the Director to “add or amend a return flow term or condition” and to “reduce a return flow requirement if, in the opinion of the director, water has been conserved and the return flow requirement is outdated”

Analysis

This portion of the Bill is highly problematic as it is unclear how the term or condition is outdated and how its cancellation will increase access to the licenced allocation while not undermining the stated environmental objective. The term “outdated” is not defined and it is not clear at all how this will be guiding of the Director’s decision.

Recommendation

Add: s.54(1)(d) For the purpose of determining whether a term or condition is outdated in (c)(i) and (iii), the Director must determine that the term or condition or the return flow reduction, will not result in adverse effects on the aquatic environment.

Add s.54(6)(1) The Director shall, in making a determination under s.54(1)(b)(vii) or s.54(1)(c)(i) and (iii), provide written reasons as to how the reduction of return flows will be beneficial to the aquatic environment.

Add: s.54(6)(2) The Director must post the written reasons under (1) on the Registry under s. 167.1 and the date of posting shall be deemed to be the notice for the purpose of s.116(b)

Add s.115(1)(s) if the Director makes a determination under s.54(6), by a person, by any person.

Amend the Water (Administration) Regulation to include disclosure of the reasons for decision under section s.54(6). (at section 15 of the Regulations)

5. Time periods for review of applications

The Bill states that regulations may be passed to set time periods for reviewing applications and issuing decisions and respecting limitations on request for additional information (Bill ss. 7, 9, 15, 21), This includes licence decisions and transfer decisions.

Analysis

The use of timelines and limits on requests for additional information are not conducive to informed decision-making. It appears the Bill presumes that the requests for additional information are not required, regardless as to whether the applicant has provided sufficient information to make an informed decision. The approach risks undermining the decision-making process overall, which can have consequences for surrounding landowners, other water users and the environment.



Further, while timelines are not inherently bad, there is a need to ensure there is resource capacity to ensure applicants receive a thorough review.

Time limits may arbitrarily and unnecessarily limit informed and effective decision-making.

Recommendation

The Bill's provisions that may be used to set time restrictions on decisions (licences, temporary diversions licences, licence amendments, and licence allocation transfers) should be struck from the Bill.

6. Public disclosure

The Bill states that “the Director may, in accordance with the regulations, make public any information...respecting measurement monitoring, or reporting requirements in relation to licencees (including TDLs), (Bill s.12)

Analysis

Access to information under the Water Act is set out in the regulation. As such it is important to ensure that monitoring information and reporting is included in the *Water (Ministerial) Regulation*. Further, to overall public access to information is somewhat constrained through the transition to the Digital Regulatory Assurance System. A publicly available registry of the various items currently listed in s. 15 of the Regulation is needed.

Recommendations

Add 167.1 The Minister shall establish a public water registry that will provide the public with access to information submitted to the Director and Minister, and as prescribed by Regulation, by January 1, 2027.

Add s. 169(h) prescribing the content and form of information provided in the registry under s.167.1.

7. Licence amalgamation

The Bill carries forward the proposal to allow for amalgamation of licences, with the original allocations and priorities of the pre-amalgamated licences (Bill s. 13). The licensee can request to have the highest priority number (i.e. lowest priority) applied to the amalgamated licence (Bill s.13).



Analysis

The Bill allows for easier amalgamation of various related licences and may be both easier and more complex to oversee. Easier insofar as it is all in one licence document, more complex as you have to manage and report around different diversions and extraction points. This is likely why there is the option to allow for the licence holder to request that just one priority number be used.

Recommendations

None

8. Reporting and monitoring (deemed licences)

The Bill sets out that the Director may, on their own initiative and notwithstanding a potential conflict with a term of a deemed licence, amend a licence to include “measurement, monitoring reporting and inspection requirements of the use of division of water or the monitoring reporting or inspection requirements for reuse” (Bill s.3). This is supported by the ability to make regulations in relation to these amendment provisions (Bill s.29).

Analysis

Under the current Act, the terms and conditions prevail over the Act in the case of an inconsistency with the Act. These amendments clarify the ability of the government to require certain steps be taken for measurement, monitoring and reporting for all licences, deemed or those issued under the Act.

Recommendation

None

9. Definition of Water

The Bill changes the definition of “water” to apply to water “on or under the surface of the ground, whether in liquid or solid state” and “precipitation above the ground and captured by works” (Bill s.2). Works is already defined in the Act to include “any structure, device or contrivance made by persons or part of it, including a dam and canal, and the land associated with it and mitigative measures associated with it (Water Act s.1).

Analysis

The definition change appears to clarify that captured rain and snow is also water that is owned by the Crown.



Recommendation

None

10. Reopening opportunity to registered agricultural water use (not part of the consultation)

The Bill proposes a “second chance” for agricultural uses that can now be registered and gain priority. The Bill sets out that the Minister may “by order, specify a period during which an application...to register a diversion that was not effected previously” (Bill s.19). The Bill states that the application is limited to include the “successor to a person who occupied “ the land. Further the Director “may amend a registration to add an additional source of water for the diversion” if the volume diversion of the diversion does not exceed the registration maximum (Bill s.20)

Analysis

The current Act had the original opportunity to register this use by December 31, 2001. If you didn’t register, the result would be that any successors of land would need to obtain a licence for that use. The Bill’s approach to this issue highlights the stark reality of legal requirements with the equitable consideration of allowing parties to ensure their traditional agricultural use, and related water use were recognized. As this provision may result in a real change in priority, there will be a need to be diligent in assessing use and the line of succession.

It is also of interest that the amendments allow for the change of the water source, which assumably indicates past sources are no longer reliable (in quality or quantity) for the purpose of the operation. This begs further question and investigation around how changes in water sources are shifting in time and whether these shifts have broader ecosystem and water management implications.

Recommendation

None

11. Augmentation of Disclosure of Information for Transfers and Assignments

The Bill sets out new types of disclosure for water allocation transfers and water assignments (proposed sections 81.1 and 33.1, respectively) (Bill ss. 5 and 22). This includes “a copy of every agreement, contract or other arrangement” in relation to the proposed transfer” (or temporary assignment), and any amendments or said agreements. If the contract is not in writing the



“applicant must submit a written statement of the terms, including consideration paid or exchanged” (Bill ss. 5 and 22). The Director may, subject to the regulations, make this information public (Bill ss. 5 and 22).

Analysis

This provision provides clarity in relation to the types of information that must be provided to the Director in relation to water allocation transfers and assignments of water under the Act. To date, these are types of information that the Director has had, and the public, has been limited. There is a need for further transparency in these transactions as they are being made directly with a publicly owned resource.

Recommendations

Public disclosure of information relevant to assignments and transfers should be integrated into a Water information registry, as outlined in the ELC-recommended s. 167.1 above.

12. Licence in good standing for transfer purposes

The Bill states that a “licence is not in good standing if the licensee has failed to comply in a material way with a term or condition” related to “measurement, monitoring reporting and inspection requirements” (Bill s.21). When determining this the Director “shall not treat the amount of water historically diverted by the licensee as, by itself, evidence that the works is capable of carrying only that amount”.

Analysis

The Bill sets out that determining a licence to be in “good standing” will involve a review of whether the licensee has complied with the monitoring and reporting requirements of their licence under the conditions of their licence and aligned with the regulation. But this is caveated by the allowance to consider the actual capacity of works versus the historical use. This caveat appears to be focused on enabling the Director to allow an increased transfer based on their own assessment of the capacity of the works and seems to downplay the current discretionary factor around considering the historical use as part of the transfer decision. In this way the amendments appear to be focused on driving the Director to exercise their discretion in a way that does not minimize transfers in the context of historical use.

Recommendations

None



12. Notice for applicants and authorization holders

The Bill allows for the distinguishment between “applicants” and “authorization holders” and expands the scope of notice required (Bill s.26).

Analysis

This provision expands notice to recognize that the applicant in a given instance may not be the authorization holder, and thus indicates when notice is required to both these parties.

Recommendations

None

13. Other regulation-making powers

The Bill amends regulation-making power in respect of “public disclosure of measurement, monitoring and reporting requirements in relation to licences...and respecting the form and manner” in which they are to be disclosed and submitted. These disclosure-related regulations may relate to assignment information, in relation to amendment applications, temporary diversion licences, and transfers (Bill s.29).

Analysis

As described above there is a need for transparency and public access to information under the Act.

Recommendations

We would recommend more positive obligations related to disclosure, as highlighted above through a public facing water information registry. The Registry should include information that is provided to the Minister or Director in support of an applications under the Act, information related to monitoring and reporting under authorizations, any administrative orders or enforcement orders, and the tracking of water conservation objectives.

14. Disclosure of agreements related to applicants for lands they do not own

The Bill sets out the requirement to disclose agreements, contracts or other arrangements where the applicant for a licence does not own the land for which the application is appurtenant (Bill s.10)



Analysis

None

Recommendations

None.

Exemptions

The consultation document in the lead up to the Water Act also contained a variety of exemptions that would be implemented by inclusion in the *Water (Ministerial) Regulation*.