

# TEMPORARY QUALIFICATION OF RIGHTS TO SURFACE WATER

## Responsibilities of the Proponent: a guide for water corporations

### 1. Introduction

Rights to water are clearly specified in bulk entitlements, environmental entitlements, water shares and licences. Water corporations and individuals are obliged to plan their water use within the entitlement provisions.

The Minister for Water (the Minister) has emergency powers under section 33AAA of the *Water Act 1989* (the Act) to declare that a water shortage exists and qualify rights to water. The Act sets out the notification procedures applying to qualifications as well as the conditions that may be imposed on the holder of an entitlement that is qualified.

The qualification provisions of the Act are very broad and could be applied in many different situations and to entitlements from surface water and groundwater. This flexibility is a strength of the qualification provisions but it also drives the need for guidance on how the provisions would be applied.

This document outlines the Department of Environment, Land, Water and Planning's (DELWP) expectations of entitlement holders requesting a qualification of rights to water under Section 33AAA of the Act. While the Act does not require that the Minister receive a request in order to qualify rights, notification from the responsible water corporation of an imminent water shortage supports the Minister's consideration of a potential need to qualify rights to water.

The guidelines were developed through experience in completing a number of qualifications to surface water entitlements during the extremely dry period between 2006 and 2009 with the aim of reducing the time and effort required to prepare and implement qualifications if required in future and to provide a consistent approach to considering the need to qualify rights.

These guidelines apply only to temporary qualification of rights to surface water and have been prepared with water corporations holding bulk entitlements primarily in mind, although the general principles in the guidelines could be applied to other entitlement holders. In this respect, the term 'proponent' has been used throughout the document to denote the water corporation instigating the request to the Minister for the qualification. In the few instances where the proponent, or its individual customers, is not the beneficiary of the qualification, the term proponent should be taken to mean the beneficiary or beneficiaries of the qualification.

For the benefit of parties associated with a qualification, this document explains roles and responsibilities, and in particular, the proponent's responsibility to:

- provide information when requesting a qualification to enable the Minister to consider the request; and
- when the Minister qualifies rights, implement the qualification and manage any impacts on affected parties.

Figure 1 is a summary flow chart of the qualification process with reference to the more detailed information contained in this document.

### 2. Water shortages

Section 33AAA(2) of the Act provides for the Minister to declare that a water shortage exists in an area or water system if "*he or she is of the opinion that the volume or quality of water available in the area or system to satisfy any rights to water ... is or shortly will be inadequate for any reason*".

The Act therefore does not provide a definition of a "water shortage", but the Minister can declare one if there is an inability to adequately satisfy rights to water, either at that point in time or in the near future, where these rights are as provided for under the Act and include bulk entitlements, environmental entitlements, water shares and licences.

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This allows for the circumstances of unforeseen and emergency events to be considered on a case by case basis, and responses to be tailored appropriately. This is consistent with the enabling, rather than prescriptive, nature of water legislation in Victoria.

Examples of instances which have lead the Minister declaring a water shortage and temporarily qualifying rights include:

- A regional urban water corporation with depleting storages and residential customers on Stage 4 restrictions, is at risk of their major industrial customer(s) having to temporarily close down with consequent economic disruption in the region. The qualification allows the water corporation to pump additional water from the river at a new location, and/or reduce passing flows at its normal off-take.
- Bushfire activity is causing water quality problems in a town's water supply or fire-fighting activity is depleting an urban storage. Another water corporation's bulk entitlement is qualified to reduce passing flows to delay the travel time of the poor quality water or to slow the depletion of the storage.

### 3. Notifying DELWP

The proponent should notify DELWP as soon as the need for a qualification of rights has been identified, and liaise with DELWP's case manager during the development of a proposal.

DELWP will nominate a case manager to:

- liaise with the proponent throughout the preparation of the request to the Minister for the qualification, including advising on the requirements for supporting information and data;
- prepare the briefing for the Minister (and Minister for Environment and Climate Change where relevant);
- co-ordinate input from other divisions of DELWP and other agencies including CMAs, EPA as required; and
- liaise with the Department of Jobs, Precincts and Regions (agriculture) on the draft briefing.

### 4. Preparing a request for a qualification

The proponent's request to the Minister to qualify rights must include the supporting information outlined in the points below.

#### 4.1 Justification

##### ***a) Demonstrating a water shortage***

Analysis that supports evidence of a water shortage primarily involves developing storage trace projections to assess the water resource status for a water supply system as a whole, both at a point in time and into the future, under a range of planning scenarios – including different inflow scenarios (based on climate or weather forecasts) and different demand scenarios (based on extent of demand reduction or restriction programs). The availability of water from sources other than water in storage should also be factored into this analysis, where appropriate. Given that a water shortage can also be the result of insufficient quality of water available, data on current and projected water quality under different planning scenarios is also required as supporting evidence.

From this analysis, conclusions can be drawn about the current and ongoing risk to water supplies and therefore the actual or potential inability to adequately satisfy rights to water in that water supply system.

Whilst water for essential human and stock needs generally takes precedence over other uses of water, qualification of rights to increase supply to towns by reducing the water available to rural water users or the environment is seen as an emergency response.

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To demonstrate a water shortage, the proponent must provide information on:

- forecast storage levels, forecast water quality, restriction levels to customers and current and ongoing risks to water supplies;
- the breakdown of demands between domestic and major industrial users where applicable;
- existing contingency measures in place (including restriction levels to customers) and the timing of proposed contingency measures, including the demand reduction or amount of water provided by these existing and proposed contingency measures; and
- current and forecast daily demands over the likely period of the qualification.

## ***b) The role of water resource planning***

A qualification of rights is considered to be an emergency measure to avoid unacceptable water shortages for entitlement holders. It is a measure of last resort and therefore beyond the reasonable scope of a water corporation's water resource and contingency planning activities undertaken as part of conducting its business and as specified in its current Statement of Obligations. These activities include the:

- Regional Sustainable Water Strategies;
- Urban Water Strategies;
- Water Supply Demand Strategies;
- Annual Water Outlooks;
- Drought Response Plans for Urban Systems, applying to urban water corporations; and
- Water Allocation and Reserve Rules applying to rural corporations and water corporations that provide water for domestic and stock purposes, except Melbourne Water.

In any request to the Minister for a qualification, the water corporation would be expected to demonstrate the qualification is beyond the reasonable scope of its water resource and contingency planning activities.

The proponent must demonstrate all possible means of addressing the current and ongoing risk to water supplies and therefore the actual or potential inability to adequately satisfy rights to water have been (or are being) implemented, or found to be not feasible. For example, a qualification would not normally be considered unless the benefiting towns are subject to Stage 4 restrictions (or equivalent) and the proponent was unable to meet demands through trade or other feasible contingency measures.

## ***c) Details of the proposed qualification***

The proponent must provide details of the proposed qualification, including:

- proposed changes to entitlements, including changes to volumes, rates and timing of taking water and any changes to environmental flow / passing flow rules; and
- the period over which the qualification of rights would apply, including any triggers (e.g. storage level against time of year or level of seasonal allocation) for the commencement and cessation of the qualification of rights.

## **4.2 Assessing risks of the qualification**

Qualifications by nature involve a temporary change in water sharing arrangements in a given system and they generally reduce one user's or class of users' rights to water in order to provide more water to another user or class of user. For example, a qualification of rights may involve temporarily increasing the proponent's access to water in a waterway for urban supplies by reducing the required minimum passing flows downstream of the relevant harvesting point (a condition of the proponent's bulk entitlement). Another qualification may involve temporarily reducing rural water users' access to water in one system in order to increase an urban water corporation's access

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to water in another, connected system. Therefore, a critical aspect of the qualification of rights process is a risk assessment to determine the potential impact of the proposed changes on all water users.

For any qualification, the proponent must, at its own cost:

- i. in consultation with the relevant waterway manager (usually a CMA), arrange for the preparation of an environmental risk assessment by an independent expert, where the qualification may have an adverse impact on the Victorian Environmental Water Holdings (as defined in the Act) or the environmental values and health of water ecosystems ; and
- ii. in consultation with the relevant licensing authority/storage operator, identify rural landholders whose water supply may be affected by the qualification; and
- iii. in consultation with the relevant urban water corporation(s), identify any other water users whose water supply may be affected by the qualification.

A request for qualification should include the findings from (i), (ii) and (iii) as relevant.

## 5. Determining a request for qualification

### 5.1 Lodging a request for a qualification

A request for a qualification should contain the information described in section 4 and be forwarded by email or post to the Minister with a copy emailed to the DELWP case manager.

### 5.2 Briefing the Minister

Once DELWP has received the proponent's request for the qualification and is satisfied that the proponent has supplied all necessary supporting information, the case manager will prepare a brief for the Minister's consideration, including a recommendation to approve/refuse the request.

Before the brief is forwarded to the Minister, the qualification process and proposed formal instruments must be endorsed by the DELWP's legal officers to ensure they are consistent with the Act.

In its briefing to the Minister, DELWP will recommend conditions or duties to be imposed on the proponent, and/or the beneficiary, in relation to the matters covered in sections 6 and 7.

At this stage DELWP would also brief:

- a) The Victorian Environmental Water Holder if the proposed qualification would impact on any of its Water Holdings.
- b) The Minister for Environment and Climate Change if an environmental risk assessment has been prepared (refer to section 4.2) and has identified significant risks of adverse environmental impacts due to the proposed qualification.

### 5.3 Notification of affected parties

Where the statutory requirement to notify affected parties applies to rural landholders, the proponent may be asked to arrange for local advertisement of the qualification and, where relevant, the process that landholders should follow to obtain assistance in maintaining a basic stock and domestic supply to their properties. A qualification does not come into effect until all affected parties have been advised.

### 5.4 Advising Minister's decision

After determining a request for qualification, the Minister would advise the proponent and other affected statutory bodies of his/her decision in writing. If approved, the advice would normally include any conditions and duties imposed on the parties in relation to the implementation of the qualification and reporting on its effectiveness – refer sections 6 and 7. At this stage, the Minister may also choose to publish information / evidence supporting his/her decision for declaring the water shortage and the terms of the qualification or rights, including the result of

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any risk assessments undertaken and any conditions imposed on the relevant bulk entitlement holder and/or beneficiary.

## 6. Managing the impacts and risks associated with qualifications

As a general principle, the proponent is responsible for assessing and where required, managing the impacts of a qualification, including the cost of managing the impacts.

Section 33AAD of the Act allows the Minister to impose one or more of the following conditions and duties on the holder of a bulk entitlement that has been qualified:

- a) *monitoring the impacts of the qualification and advising the Minister of the outcomes of the monitoring;*
- b) *requiring any program of works or actions to be carried out by the holder of the bulk entitlement for the purpose of mitigating any adverse effect or the risk of any adverse effect—*
  - i. *on the maintenance of the environmental water reserve in accordance with the environmental water reserve objective; or*
  - ii. *on the holder of any other entitlement, licence or right under the Act;*
- c) *requiring payments to be made to other Authorities for the purposes specified in the notice of qualification under section 33AAC, including conditions as to—*
  - i. *if any program of works is carried out by another Authority for a purpose specified in paragraph (b), payments that are to be made to reimburse the cost of the carrying out of the program; and*
  - ii. *the manner in which any payments are to be made;*
- d) *operating arrangements that are required as a result of the qualification.*

These conditions would be set out in the notice of the qualification. However, despite the current wording of the Act, they should only be imposed if the holder of the qualified bulk entitlement is also the beneficiary of the qualification, for example if the passing flows specified in the bulk entitlement were reduced to allow the holder to harvest/use more water. It would be inappropriate to impose these provisions on the holder of the qualified bulk entitlement if that holder, or its individual customers, was not the beneficiary of the qualification, for example if a rural water corporation's bulk entitlement was qualified to provide additional water to urban water corporations. In cases such as the latter, the notice of qualification should name the beneficiaries and state that the conditions are imposed on the beneficiary instead of on the bulk entitlement holder subject to the qualification.

As a general rule, even under the current wording of the Act, the Minister could be expected to impose conditions on the beneficiary of the qualification that are very similar to those in section 33AAD of the Act. Therefore, for the purpose of these guidelines, the conditions from the Act as presented above should be read as if they applied to the beneficiary of the qualification.

Some examples of conditions imposed on proponents of qualifications during the 2006 to 2009 dry period are given below. Similar conditions to these examples could be expected to be applied in future cases of qualifications.

### **Example 1: Impact on stock and domestic supplies**

The proponent asked the Minister to qualify rights to reduce passing flows below a storage to protect urban supplies held in the storage, possibly affecting domestic and stock supply to farms on the river downstream.

The proponent was required to develop and implement measures at its cost to ensure that a basic domestic and stock supply was maintained to affected rural landholders.

The proponent was not responsible for maintaining a basic stock and domestic supply to rural landholders whose normal supply was not adversely affected by the qualification.

The licensing authority/storage operator was responsible for advising the proponent on:

- i. which water users would be impacted by the proposed qualification; and

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- ii. the measures needed to ensure adequate supply for essential domestic and stock requirements.

## **Example 2: Impact on the environment**

The proponent asked the Minister to qualify rights to reduce passing flows below a storage and access all or part of the environment's water held in storage under an environmental entitlement in order to harvest more water in storage for urban supplies.

The proponent was responsible for managing (including the cost of managing) the impacts of the qualification on the environment including enhancing ecosystem resilience and recovery of ecosystems after the qualification expired.

The actions required to manage the environmental risks identified in section 4.2 included:

- an environmental monitoring program;
- measures to minimise the environmental impacts including an emergency response plan;
- the preparation and implementation of a recovery plan where environmental assets were reduced, and for enhancing ecosystem resilience and recovery of ecosystems after the qualification expired; and
- a review of the effectiveness of the risk management program when the qualification expires, or annually if the qualification is in place for more than 12 months.

These actions would normally be required to be undertaken by an independent expert.

## **7. Reviewing, Reporting and Auditing Requirements**

### **7.1 Review of qualification**

When the qualification expires, or annually if the qualification continues for more than 12 months, the following reports must be prepared and submitted to the DELWP's Executive Director Water Resources:

- a) a report by the proponent reviewing the effectiveness of the qualification in meeting (or avoiding) emergency water supplies. The proponent must also provide evidence of the actions it is taking to prevent similar shortfalls in the future as part of its ongoing water resource and drought response planning;
- b) a report by the proponent reviewing the effectiveness of measures taken to reduce the effects of the qualification on other water users. This report is to be prepared in consultation with the relevant rural water authority; and
- c) a report reviewing the effectiveness of the environmental management program and any emergency responses after the qualification expires. This report is to be prepared by an independent expert nominated by the waterway manager at the proponent's cost.

If one or more of the above reviews recommends that additional actions should be undertaken, and DELWP's Executive Director Water Resources Strategy agrees with those recommendations, the proponent must implement those actions and report on their effectiveness.

### **7.2 Reporting**

As a general principle, information on the details of each qualification, its management and the outcomes achieved by the qualification should be publicly available.

#### **a) Proponent**

The Minister may, as part of his/her approval of a qualification, require the proponent to publish on its website;

- i. when the qualification of rights is approved, the information provided by the proponent under section 4 to support the request for the qualification; and
- ii. when the qualification expires, or annually if the qualification continues for more than 12 months, the reports required under section 7.1.



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Additionally, the proponent must report on qualifications affecting any of its bulk entitlements in its Annual Report. This is consistent with the reporting obligations of bulk entitlements, in which entitlement holders are required to report in their Annual Report on any existing or anticipated difficulties experienced in complying with their bulk entitlement Order and the remedial action taken or proposed.

## **b) DELWP**

DELWP will make all active declarations of water shortage and qualifications of rights publicly available on the Water Register website. DELWP will also report on the status of each current qualification in its annual Victorian Water Accounts. It is intended the accounts be published within 12 months of the end of the water year (July to June).

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Figure 1 – Summary of qualification process

