

|                                      |   |
|--------------------------------------|---|
| <b>Title:</b>                        | <b>Guide to Compelling Reasons to not Take the 10% Holdback for Water Transfers Within the South Saskatchewan River Basin</b> |
| <b>Number:</b>                       | <b>ESRD Water Quantity, 2015, No. 1</b>   |
| <b>Program Name:</b>                 | <b>Approvals</b>  |
| <b>Effective Date:</b>               | <b>March 3, 2015</b>  |
| <b>This document was updated on:</b> |   |

## Introduction

This document has been prepared to provide guidance to all Directors under the *Water Act* in the South Saskatchewan River Basin (SSRB) when considering the 10% holdback on applications for water allocation transfers.

It needs to be recognized that despite the guidance provided herein, the Director retains the discretion to decide what may or may not be a compelling reason to not take the 10% holdback under the specific circumstances of an application.

## Legislation and Policy Considerations

- The *Water Act*, R.S.A. 2000, c.W-3, as amended.
- The Approved Water Management Plan for the South Saskatchewan River Basin (Alberta) dated August 2006 authorized water allocation transfers and water conservation holdbacks.
- SSRB Water Management Plan 10% Holdback – Interim Criteria Approval Document established a consistent criteria when considering water allocation transfers that facilitate the creation of regional treated water systems.
- Approvals Program Policy Guideline for Implementation of Water Conservation Objectives, as amended, established under the *Water Act*, in the South Saskatchewan River Basin (dated January 16, 2007) - established Water Conservations for the SSRB.

## Background

The Approved Water Management Plan for the South Saskatchewan River Basin (Alberta) (the “SSRB Plan”) authorizes the Director to consider applications to transfer water allocations, subject to sections 81-83 of the *Water Act* and the Matters and Factors in Table 1 of the SSRB Plan. This ability to change the point of diversion or point of use of a water allocation under a licence is necessary within sub-basins closed to new surface water licences to allow new developments to locate in these sub-basins.

Where a transfer is proposed, section 83 of the *Water Act* permits the Director to withhold up to 10% of the transferred water if the holdback is authorized under an approved water management plan, and the Director is of the opinion that withholding water is in the public interest to:

- a) protect the aquatic environment, or

- b) implement a water conservation objective (“WCO”).<sup>1</sup>

Section 2.7.2 of the SSRB Plan authorizes the Director to withhold up to 10% of the volume of a transferred allocation, and recommends that:

- the Director withhold 10%, unless there is a compelling reason to withhold less; and
- withheld water remain in the river through a WCO licence or become part of the Crown Reservation.<sup>2</sup>

Rivers in the SSRB are highly allocated and as a result, have been closed to further licencing except as permitted under Ministerial Order <sup>2</sup>. The holdback is provided by the SSRB Plan to help increase the flows of these rivers, by a small amount, or at least help offset increases in water use by transferees.

The practice of all Directors in the SSRB is to follow the recommendations of the SSRB Plan and withhold 10% of transferred licences as a rule.

Although the SSRB Plan does not provide any guidance, beyond what is set out in the Water Act, as what to might constitute a compelling reason for not withholding 10%, there have been some decisions where the holdback has not been taken. The decisions to not withhold 10% have been based on the Directors opinion that either a compelling reason exists, or the 2011 SSRB Water Management Plan 10% Holdback Interim Criteria Approval Document has applied.

## **Purpose of this guide**

The purpose of this guide is to summarize:

- 1) government direction on a compelling reason to not take the 10% holdback; and
- 2) past decisions where the 10% holdback was not taken.

The above will be used to outline general guidance where a Director might find a compelling reason to not take the 10% holdback. What is a “compelling reason” will be determined by the Director in the particular circumstances of each transfer. This guidance is not intended to fetter the Director’s discretion but assist with consistency of decision making where appropriate.

Overall, the language of the SSRB Plan does infer that the decision to not take the 10% holdback must be justified in the circumstances as serving a greater benefit to the protection of the aquatic environment or implementation of a WCO than it would if the holdback were taken. The consideration by the Director on whether a greater benefit would be gained does not apply just to volume, but to timing of the diversion and to the quality of the water returned to the system as well.

This guide is meant to be a living document. It identifies situations where the Director may decide that there is a compelling reason not to withhold 10% based on past decisions. There may be future decisions, however, where a specific situation will present a compelling reason that is not based on the categories that are identified in this Guide. The guide will therefore be updated from time to time as appropriate to reflect these future decisions.

This guide is based on considerations around the issuance of transfers within the SSRB as enabled by the SSRB Plan. At the time of this writing, the Water Management Plan for the Battle River Basin has recently been approved which enables

---

<sup>1</sup> See the *Water Act* for the definition of a WCO; see the SSRB Plan for the WCOs for the sub-basins.

<sup>2</sup> See section 35 of the *Water Act* and the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, Alta Reg 171/2007.

transfers and a 10% holdback. There may be other water management plans for specific basins approved in future. This document is not intended, at this time, to provide guidance regarding the 10% holdback under other approved water management plans.

**Note:** This Guide addresses taking 10% or nothing; no guidance has been developed to take less than 10% (i.e. 1-9% holdback).

### **Specific Policy Direction on When to Not Take the 10% Holdback – Regional Water Lines**

The current Government of Alberta guidance on what constitutes a compelling reason to not take the 10% holdback was developed in 2011 in response to the establishment of a number of regional drinking water systems within the SSRB. At that time, the Government of Alberta was actively funding several of these systems which are sanctioned as a key action within the *Water for Life Strategy* – “Design and implement regional drinking water and wastewater solutions”.

Regional water lines are designed to supply smaller municipalities with drinking water via a pipeline system from a single water treatment plant. Efficiencies are gained as small municipalities no longer need to build, upgrade or maintain their own treatment plants, provide trained and certified operators, or assume all of the costs of monitoring and reporting. Some water use efficiencies may also be gained as the number of treatment plants are reduced to a single centralized facility. For example, a reduction of water used for filter maintenance could occur as less water would be required for testing, conditioning or backwashing activities. A reduction in evaporative or seepage losses could occur due to a reduction in the number of individual raw water reservoirs.

Regional systems also result in lower costs overall due to reduced public funds required for upgrading existing facilities to meet new standards.

When regional water lines are established, the source of water most often moves to the single point of diversion for the central water treatment plant. As a result, municipalities that have connected to the regional water line need to move their points of diversion to the central location via a transfer application so that an adequate quantity of water is available to the system. In these situations, the points of diversion are the only change to the appurtenance of the licence. The points of use remain the same.

Because of the efficiencies gained in water use, the cost savings, and the benefits to rural municipalities and residences, the government encourages and funds municipalities to adopt a regional approach to drinking water systems. To be consistent with this direction, consideration was given to viewing allocation transfer applications that facilitated regional drinking water system as having a compelling reason not to take the 10% holdback.

As a result of this, a policy was adopted with narrow criteria in order to provide guidance to Directors when making decisions on these specific types of transfer applications. The policy – the SSRB Water Management Plan 10% Holdback Interim Criteria Approval Document – is reproduced in **Appendix 1**.

### **Past Decisions Where the 10% Holdback Was Not Taken**

There have been a number of individual decisions since transfers were first enabled in 2002 where the 10% holdback was not taken. Some of these decisions are summarized in **Appendix 2** and help identify **four** broad categories as follows where a compelling reason may currently exist:

**ESRD Guide to Compelling Reasons to not Take the 10% Holdback for Water Transfers  
Within the South Saskatchewan River Basin  
ESRD Water Quantity, 2015, No. 1**

---

- 1) **There is either no WCO or the WCO is being met** in the watercourse during the time of diversion (Decisions 1, 5, 6, & 8). It should be noted that WCO's now exist in all rivers of the SSRB, therefore the "no WCO" examples would no longer apply (Decisions 1, 5 and 6). It is expected that the WCO would have to be met at all downstream points of the watercourse within Alberta in order for the "WCO is being met" example to be considered, not just in the reach of the river where the point of diversion is located. Decisions 3 and 4 were made based on the WCO being met only at the diversion point so would not meet this current criteria.

This category also applies to most transfers where the licenced points of diversion (pre and post-transfer) are located completely within the same water storage reservoir. WCOs are not established for most reservoirs as these are managed systems with no natural flow or water level characteristics on which to base a conservation objective. Within storage reservoirs, withholding 10% as a result of a transfer would not serve the public interest to protect the aquatic environment, nor to implement a WCO in the most typical case.

- 2) **The net result of the transfer is a contribution of greater than 10%** of the licence volume back to the stream. Three possible scenarios are described below.
- a) **A residual licence donation** is made when a partial licence is transferred to a new licensee and the remainder of the licence is donated resulting in more than 10% of the transferred allocation being left in the stream (Decision 1 and 7). The applicant would apply to transfer the donated portion of the licence to the Crown and the Crown would apply for a WCO licence in order to establish the priority of a licence. Otherwise, lower priority users downstream could use up the water during a priority call.
  - b) **The licence is amended to add mandatory minimum flow conditions** (Decision 1 and 2). Many older licences were issued with no minimum flow requirements at the point of diversion based on an instream need or instream objective. Where no minimum flow existed before, a transfer might allow for a condition to be placed in the licence to implement a minimum flow. The minimum flow requirement must provide a greater benefit than returning 10% to the stream.
  - c) **Agreements with ESRD Operations Infrastructure Branch (OIB)** are made where the transfer results in amendments to OIB's operating plan or licence to require additional releases so that a greater benefit to the aquatic environment occurs than if 10% was withheld (Decision 9). The benefit is gained via an adjustment in seasonal releases during high demand periods, continual release to the watercourse regardless of demand, and releases are in addition to minimum release requirements of the structure or downstream re-location of the point of diversion so that benefits to more sensitive reaches are realized.
- 3) **The transfer occurs within a non-contributing basin** where the 10% holdback provides no benefit to a WCO, nor would it provide any protection of an aquatic environment (Decision 10). For example, if the transfer is within a hydraulically connected groundwater regime such as a spring where water normally does not make it to a surface watercourse, or if the sub basin in which the transfer occurs is terminal, with no contribution to the SSRB except during a significant flooding event (1 in 100 year flood event or greater).
- 4) **The transfer is forced to occur due to a natural cause and is necessary in order to deal with irreparable damage to an intake or to remove a safety hazard** (Decision 11). Extreme natural events may cause stream-bank damage

and erosion to the extent that safe access to water intakes or wells is restricted or the intake cannot be repaired. It may be necessary to move a diversion point to another location for these reasons. If that change in diversion point can only be facilitated by a transfer, the application of the 10% holdback could be viewed as not being in the public interest as a result of a safety hazard or the inability to access the water source. Review of the application should take into account that the relocation of the diversion point is necessary only because of a natural occurrence and only to the extent necessary to remove the hazard. The point of use would not be changing in these situations.

## **Other Principles Around Compelling Reasons**

**WCO** – The WCOs recommended in the SSRB Plan and accepted by policy (APPC, January 16, 2007<sup>3</sup>) remain the current documented flow standards which give direction on opportunities to increase flows in the highly allocated rivers in the SSRB. As defined in the Water Act, the WCO is the amount and quality of water established by the Director to be necessary for the protection of the aquatic environment as well as to protect other uses (tourism, recreation, waste assimilation, management of fish or wildlife).

The plan acknowledges that established WCOs are “subject to future reviews and refinement in light of improved knowledge and information about the aquatic environment and water quality”. Consideration of the WCO being met as a compelling reason on its own should be reviewed in the context of the site specific conditions surrounding the application at hand, and whether or not further protection of the aquatic environment is needed to the extent that the 10% holdback should be taken.

**De Minimis Concept** – The De Minimis concept is a legal principle where the subject matter at hand is considered too small to be of any consequence or to be bothered with. For example, a volume of water that is being transferred could be very low, so taking the 10% holdback might be thought of as insignificant or trifling enough to not be bothered with.

Using the De Minimis concept is not considered as a compelling reason to remove the holdback because there are no rules around when a transferred volume becomes too small to be bothered with. This could lead to misuse of this concept to justify any volume as being too small in relative terms, and thus creating a loophole.

---

<sup>3</sup> Alberta Environment. Regional Services Division. Approvals Program Policy Committee. January 16, 2007. Guideline for Implementation of Water Conservation Objectives, established under the Water Act, in the South Saskatchewan River Basin.

**Temporary Transfers** – Some transfers are designed to be temporary in nature, with the intent for the licence to revert back to the original licensee. The temporary nature of the transfer is not, in itself, considered a compelling reason to not take the 10% holdback.

The 10% holdback will need to be taken at some point and if it is not taken at the time of the original transfer, there is no guarantee that there will be another opportunity, for example when the transfer reverts back or if the licence does not revert back and is renewed for a longer term by the transferee.

## **Conclusion**

Each transfer application is considered on its own individual merits. The Director must be guided by section 83 of the *Water Act* – namely taking the 10% holdback if it is in the public interest to protect to the aquatic environment or to implement a WCO. The general rule is that the 10% is withheld as stated in the SSRB Plan.

## **Appendix 1: SSRB Water Management Plan 10% Holdback – Interim Criteria Approval Document**

Government of Alberta - Environment

### **SSRB Water Management Plan 10% Holdback Interim Criteria Approval Document**

Issue:

Criteria for the designated Director under the Water Act (the "Director") to consider when determining the "compelling reason" to not apply the 10% or less Water Conservation Holdback (WCH) enabled by the Water Act and the South Saskatchewan River Basin Water Management Plan (the "SSRBWMP").

#### **Authority:**

- Water Act, s. 81(1), WAs. 83(1)- provision for water transfer, and up to 10% WCH at the discretion of the Director if it is in the public interest to protect or to implement a water conservation objective (WCO) and if there is authorization in an applicable approved water management plan
- Water Act, s. 82(3)- transfer may only be approved if the Director is satisfied that:
  - (i) volume of water to be transferred does not exceed the volume of water under licence from which the transfer is made
  - (ii) rights of other users are not impaired, and
  - (iii) there is no significant adverse effect on the aquatic environment.
- SSRBWMP -section 2.7.2:-
  - (i) Authorized the Director "to withhold up to 10% of an allocation of water under a licence that is being transferred, if the Director is of the opinion that withholding water is in the public interest to protect the aquatic environment or to implement a Water Conservation Objective";
  - (ii) "Recommended that the Director withhold 10%, unless there is a compelling reason to withhold less";
  - (iii) "Recommended that the withheld water remain in the river through a WCO licence or part of the Crown Reservation".
- Water for Life Action Plan,- Key action 1.5: -
  - (i) "Design and implement regional drinking water and wastewater solutions".

The Act and the SSRBWMP provide the Director with discretionary powers to decide when to take the 10% WCH. The criteria for consideration by the Director being recommended in this document is by no means exhaustive of the situation in which a compelling reason to withhold 10% or less may be found by a Director.

#### **Rationale**

- Consistent use of the criteria by the Directors, when considering water allocation transfers in the South Saskatchewan River Basin, will facilitate the creation of regional treated water systems

**ESRD Guide to Compelling Reasons to not Take the 10% Holdback for Water Transfers  
Within the South Saskatchewan River Basin  
ESRD Water Quantity, 2015, No. 1**

---

**Criteria:**

*It is recommended that when reviewing a water allocation transfer application, in the South Saskatchewan River Basin to facilitate the creation of a regional treated water system, the Director is to consider the following criteria as possible compelling reasons to not apply or reduce the 10% WCH:*

- A) The established WCO of the supply source and downstream watercourses is currently being met,*
- B) The established WCO is not being met in the supply source and downstream watercourses but the following use consideration provides compelling reasons:*
  - (i) The applicant licensees i.e. municipality(ies) and/or cooperative(s) are transferring their existing licences to facilitate the creation of regional treated water systems i.e. move the points of diversion but maintain the existing points of use; and,*
  - (ii) The regional treated water system promotes the achievement of Water for Life key action item on design and implementation of regional drinking water solutions (Action no. 1.5).*

**Implementation:**

- These criteria are effective immediately after approval at Director level;
- The criteria will be forwarded at ADM level to all AENV ADMs.

**Recommendation:**

- Forward this interim policy at ADM level to all AENV ADMs and an appropriate ADM of Transportation and Municipal Affairs.

**Approved:**

Original signed by: \_\_\_\_\_

Date: May 31, 2011

John Taggart, Acting Director  
Science Project Team  
Environment and Sustainable Resource Development

## **Appendix 2: Transfer Decisions with No Holdback**

The following are summaries of some past decisions approving transfers where the 10% holdback was not taken based on a compelling reason. In some of the decisions given, the compelling reasons cited were valid given the time period and the circumstances surrounding the application but are not relevant today given the guidance provided in this document. They are added to give additional context to the compelling reasons cited overall.

It is important to note that the examples below are only summaries of the decisions made. The entire file relating to the decision should be reviewed to provide the proper perspective if the Director is considering it as a basis for decision.

Several decisions where the 10% holdback was not taken have been made in relation to regional municipal water systems. These decisions were made based on the Interim Criteria document (Appendix 1). Transfer decisions that have been based on the “Interim Criteria Approval Document” are not listed here because these criteria provide clear direction to the decision maker.

### **1. BGA Sales Ltd to Gouw Quality Onions Ltd. (Lethbridge Office 2004) (NOTE: WCOs were not established in the SSRB when this decision was made. Lack of a WCO, on its own would not be a compelling reason at this time because WCOs are now established)**

In the opinion of the Director, withholding 10% of the allocation of water under licence to be transferred was not in the public interest to protect the aquatic environment or implement a water conservation objective since no water conservation objectives were established for the Oldman River. The current Instream Objectives for the Oldman River were met by the operation of the Oldman River Dam and Reservoir. The new licence required that the Instream Objectives established for this particular reach of the Oldman River be met. Additionally, as a result of the transfer process, 41% or 119 acre-feet of the original licence were cancelled and the water remains in the river.

### **2. United Irrigation District to South-East Alberta Water Co-op (Lethbridge Office 2004)**

In the opinion of the Director, withholding 10% of the allocation of water under licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective. This was based on an examination of the flow exceedence curves in the reach during the time period of the diversion. In addition, the licensee agreed to a 33cfs minimum flow being attached to their licence, which previously had no minimum flow requirement, and which is greater than the 5cfs which is the flow rate that would represent 10% of the transferred allocation.

### **3. John Taylor to HB of Wildrose (Lethbridge Office 2005)**

In the opinion of the Director, withholding 10% of the allocation of water under licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective based on the flow in the reach exceeding recommended minimum flows during the time period of the diversion. Also, attachment of the conservation holdback at the existing point of diversion would provide no benefit to the aquatic environment since the existing point of diversion directly accesses the Twin Valley Reservoir which fills during a time when the WCO is being met or exceeded.

**4. Adrian Dykstra to Chinook Feeders Ltd. (Lethbridge Office 2006)**

In the opinion of the Director, withholding 10% of the allocation of water under licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective based on the flow in the reach exceeding recommended minimum flows during the time period of the diversion. Also, attachment of the conservation holdback at the existing point of diversion would provide no benefit to the aquatic environment since the existing point of diversion directly accesses the Twin Valley Reservoir which fills during a time when the WCO is being met or exceeded.

**5. Town of Coalhurst (Lethbridge Office 2006) (NOTE: WCOs were not established in the SSRB when this decision was made. Lack of a WCO would not be a compelling reason at this time because WCOs are now established)**

In the opinion of the Director, withholding 10% of the allocation of water under licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective since the diversion point was transferred to a location downstream and no water conservation objectives had been established for the Oldman River at the time. The current (2006) Instream Objectives for the Oldman River were met by the operation of the Oldman River Dam and Reservoir.

**6. County of Lethbridge (Hamlets of Shaughnessy, Iron Springs and Turin) (Lethbridge Office 2006) (NOTE: WCOs were not established in the SSRB when this decision was made. Lack of a WCO would not be a compelling reason at this time because WCOs are now established)**

In the opinion of the Director, withholding 10% of the allocation of water under the licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective since the water would remain in the stream between the old and new points of diversion. No water conservation objective had been established for the Oldman River at that time, and the Instream Objectives for the Oldman River would not be affected based on the modeling results for this project.

**7. D'Arcy Ranch (Calgary Office 2006)**

In the opinion of the Director, 10% of the allocation of water under the licence to be transferred should not be taken to implement a water conservation objective for the following reasons:

- a) The transfer resulted in cancellation of a portion of licence being transferred that was greater than 10% of the total licence.
- b) The existing licence belonging to the transferee was reduced by greater than 10% of the transferred licence.

**8. John Taylor to Hutterian Brethren of Wildrose (Lethbridge Office 2007)**

In the opinion of the Director, withholding 10% of the allocation of water under the licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective. Both the old and new points of diversion are both located on Twin Valley Reservoir. The only beneficiary of a 10% holdback would be a junior licensee downstream of the reservoir. All WCOs would be unaffected; therefore 10% was not withheld. Attachment of the conservation holdback at the existing point of diversion on Twin Valley Reservoir provided no benefit to the aquatic environment.

### **9. Town of Coaldale (Lethbridge Office 2009)**

In the opinion of the Director, withholding 10% of the allocation of water under the licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective based on the following:

- a) This transfer was a downstream movement of water such that the licensed withdrawal of water will occur at a point of diversion downstream of the original point of diversion resulting in a net benefit to the water body.
- b) The St. Mary Headworks licence was amended such that the allocation being transferred would be released from the Headworks at a higher rate in the summer and a lower rate in the winter resulting in a net benefit to the St. Mary River during the high demand parts of the year.
- c) The entire allocation of the transferred licence would be released whether the town requires the volume or not.
- d) The release from the St. Mary dam would be in addition to the minimum flow requirements as dictated by the conditions on the Headworks licence.
- e) A condition of the transferred licence would assign the point of administration of priority for the transferred allocations to the St. Mary River, protecting the water user along the Oldman River.
- f) The applicant has consented to the implementation of items (b), (c) and (d) based on no holdback being applied to the transfer.

If a 10% holdback was applied to the transfer without items (b), (c) and (d), the net benefit to the St. Mary River would be less than applying items (b), (c) and (d) with no holdback taken.

### **10. Town of Nanton (Lethbridge Office 2013)**

In the opinion of the Director, withholding 10% of the allocation of water under the licence to be transferred would not be in the public interest to protect the aquatic environment or implement water conservation objective based on the following:

- a) Since there is no effect of this transfer on any other water users or an aquatic environment, it was not considered in the public interest to withhold 10% of the allocation. The transfer was required to provide an allocation to an existing rural pipeline system from a groundwater spring source. No surface water system existed as a result of the development of the spring.
- b) There is no change to the point of diversion on the source of supply, only changes in the points of use. The transfer was required to provide clarification to the rights and obligations of the users on a system that had been in existence for over 50 years.
- c) The extenuating circumstances surrounding the Department's requirement for metering necessitated the transfer provisions of the Act to more clearly define the beneficial use of the project to rural water users.

### **11. Mountain Meadows Development Corporation (Lethbridge Office 2013)**

In the opinion of the Director, withholding 10% of the allocation of water under the licence to be transferred would not be in the public interest to protect the aquatic environment or implement a water conservation objective based on the following:

**ESRD Guide to Compelling Reasons to not Take the 10% Holdback for Water Transfers  
Within the South Saskatchewan River Basin  
ESRD Water Quantity, 2015, No. 1**

---

- a) Since there was a significant public safety issue regarding the existing well, it was not considered in the public interest to withhold 10% of the allocation.
- b) The extenuating circumstances surrounding the access issue resulted in the new well being located in close proximity to the old well, but on a new quarter section. This necessitated the transfer provisions of the Act to be considered rather than the new well being considered a replacement well and treated as an amendment to the existing licence.
- c) The new well was drilled in the same aquifer and is accessing the same source of supply with no changes to the source of supply.

Original signed by: \_\_\_\_\_

Date: March 5, 2015

Andy Ridge, Director  
Water Policy Branch  
Environment and Sustainable Resource Development