

THE WATER ACT 2003 AND SUSTAINABLE ABSTRACTION

PENNY SOWTER, PETER HOWSAM

Natural Resources Department, Cranfield University

INTRODUCTION

This paper traces the development of the abstraction licensing system in England and Wales from the perspective of changes to water rights. It assesses the relative effectiveness of recent changes to supporting legislation in achieving a sustainable water resource balance. Particular emphasis is placed on actions to address problems caused where licensed abstraction results in environmental damage to designated sites.

Water law in England and Wales, as elsewhere, is changing, in response to increasing societal, economic and environmental pressures on the finite water resource, including those recently identified relating to climate change. The Water Act 2003 is the most recent legislation aimed at ensuring sustainable use of water resources.

The 1963 Water Act was the first to require that the right to abstraction of surface or groundwater (with some exemptions) was subject to a licence. 'Permanent' licences conferring legal rights to take water were issued to riparian occupiers (whose right to water had hitherto been considered part of their right to land), on a 'first come, first served' basis, without formal guidelines for justification of required quantities. This reflected the perception of water as a free and plentiful resource, and followed the long established 'riparian rights' principle.¹ These riparian rights, and corresponding obligations, which had been shaped by case law, are described by Hodgson² as "an integral part of the right of ownership of the land in question", and as such, the loss of that right would justify some form of compensation.

Successive rounds of legislation since 1963, notably the Water Resources Acts (1989, 1991), Environment Act 1995 and most recently the 2003 Act, have increased regulatory control over abstraction (and discharges) to protect the environment as well as the rights of existing abstractors. This has been broadly in response to greater awareness of environmental impacts, the obligation to comply with European Directives, and increasing demands on water resources from a greater and more affluent population. However, none of these laws has challenged the 'licence of right' concept, despite the considerable (and partly unused) quantities of water 'tied up' in them which could arguably in some cases be more appropriately assigned for other purposes. Caponera³ suggests that modern water legislation needs to:

"replace existing....common law principles with written rules which will facilitate the most rational use of available water through appropriate administrative action".

Hodgson⁴ uses the term 'modern water rights' for this introduction of formal and explicit water rights, and states that this approach is of benefit to all: (a) society by permitting "the orderly allocation and sustainable use of valuable water resources"; (b) the user, by providing "the necessary security to invest in activities entailing the use of water" and (c) the regulator because the system is "legally backed".

¹ Evans, B. and Howsam, P., (2005). A critical analysis of the riparian rights of water abstractors within England and Wales. *Water Law*, (16), p. 90-94.

² Hodgson, S., (2006). *Modern Water Rights, theory and practice*. Food and Agriculture Organisation, Rome. p.11.

³ Caponera, D., (1992). *Principles of water law and administration National and International*. A.A.Balkema, Rotterdam.

⁴ Note 2, p.1.

RECENT DEVELOPMENTS

There is clear evidence that UK water law is moving towards the modern water rights perspective. The Environment Act 1995⁵ sets out in law the duties of the Environment Agency (EA) in England and Wales. It requires (in Section 2) the regulator to “take such actions” necessary for “conserving, redistributing or otherwise augmenting” and “securing the proper use” of water resources. It also clearly defines the link to international obligations in Section 40, where it empowers the EA by assigning to it a duty ‘to comply with any direction given by “a Minister of the Crown” where “the appropriate Minister” is empowered to direct the regulator in satisfying: “any obligations ...under the Community Treaties... and any international agreement to which the United Kingdom is for that time being a party”’.

In 1999, DETR published a paper, ‘Taking Water Responsibly’, which set out the Government’s intended changes to abstraction laws using regulatory measures. It specified that all new licences would be issued subject to a time limit, (ending the facility for permanent licences) and that right of access to an abstraction point would entitle anyone to make an application (ending riparian rights, which depend on occupation). It set generous time limits, linked to the Catchment Abstraction Management Strategy end dates⁶, generally of 12 years, (unless environmental concerns dictated otherwise) and gave licence holders presumption of renewal and a further six years notice of curtailment if the renewal was refused⁷. However, it still fell short of a blanket policy to set time limits on existing permanent licences, preferring a voluntary approach:

“Government remains of the view that truly responsible abstractors should have little need of persuasion that voluntary conversion to time-limited licences is an essential ingredient of their environmental credentials”⁸

There was, however, backing for financial incentives, to encourage converting, through the existing charges scheme⁹:

“The Government expects the Environment Agency to give consideration to establishing financial incentives for conversion through the existing abstraction charging system.”¹⁰

The 1999 paper should have included intended economic measures, to support the regulatory ones, but “mixed responses” at the consultation stage coupled with “paucity of information”¹¹ led to this part of the review being postponed. This second paper, ‘Tuning Water Taking’ was issued in June 2001, and set out measures to facilitate trading of licensed rights, as well as instructing the EA to review the charges scheme to include:

- the costs of compensation for curtailing damaging licences.¹²
- incentive for efficient use of water by “more innovative use of its charging powers”¹³

⁵ HMSO, (1995). The Environment Act 1995 (c.25).

http://www.opsi.gov.uk/acts/acts1995/ukpga_19950025_en_1.

⁶ EA, (2002) Managing Water Abstraction, the Catchment Abstraction Management process, updated July 2002. http://www.environment-agency.gov.uk/commondata/acrobat/mwa_english.pdf; p.32, Table 5.

⁷ Note 6, p.29.

⁸ DETR, (1999). Taking water responsibly: government decisions following consultation on changes to the water abstraction licensing system in England and Wales. Department of the Environment, Transport and the Regions, London, para 1.11.

⁹ The cost of administering the EA water resources regulatory function is met by charges made to abstractors. see Environment Agency website: <http://www.environment-agency.gov.uk/business/444669/587179/1734110/505764/> for more details.

¹⁰ Note 8, para 7.13.

¹¹ Note 8, para 2.3.

¹² DEFRA, (2001) Tuning Water Taking: Government decisions following consultation on the use of economic instruments in relation to water abstraction.

http://www.defra.gov.uk/Environment/water/resources/tuning/pdf/tun_wat.pdf; para.2.1.10.

The EA was expected to report on the review findings by June 2002.

Interestingly, there is no mention of financial incentives to encourage the conversion of existing licences of right to time limited status in 'Tuning Water Taking'. Indeed, despite the requirement for an additional charge to cover compensation recovery (mentioned above), it restricts flexibility on changes to the charging scheme:

"The Environment Agency's income from water abstraction licence charges is currently limited to year on year recovery of the cost of the Agency's water resources management functions. The Government intends to retain that limitation".¹⁴

"The charging scheme will be designed to avoid an excessive accumulation of funds, while at the same time minimising year-on-year variations in charges."¹⁵

Whether or not these expectations were reasonable or practicable will be considered further.

The directions set out in the two papers were formalised in the Water Act 2003¹⁶, which amended parts of several existing Acts, including the Environment Act 1995, Water Resources Act and Water Industries Act 1991.

THE 2003 WATER ACT

Heralded as a major step towards sustainable water management, the Act includes clauses which:

- require time limits on all new licences;
- promote efficient use of water;
- reduce the period from 7 years to 4 after which licences can be revoked for non use;
- set a date after which there will be no right to claim compensation for revocation (permanent licences only) where abstraction is causing 'serious damage'.
- remove exemptions from licensing for a range of purposes. Because water taken under these exemptions has not required a licence (irrespective of quantity) existing users have a protected right to the supply, and would therefore be eligible for compensation if the refusal of a licence application removed that right.

While welcomed, it can be argued that these provisions have limitations in terms of environmental benefit. For example, on the second point, efficient use is one of the tests for renewal of time limited licences, but permanent licences would not be subject to any periodic test for efficiency. On the third point, the regulator had never revoked licences for non use, despite a large number being eligible, as publicity generated by taking such action could well cause other non users to abstract water simply in order to prevent such revocation, potentially worsening environmental damage. On the fourth point, 'serious damage' is a relative term which could be difficult to define in a disputed case.

In 1999, the EA set up a programme, 'Restoring Sustainable Abstraction' (RSA)¹⁷ to identify (by process of elimination) and take action on sites where it could not be proved that licensed abstraction was causing 'no adverse effect'. This was necessary to satisfy obligations for:

- Special Areas of Conservation (SAC) and Special Protected Areas (SPA) under the European Habitats and Birds Directive (transposed by Habitats Regulations 1994). The driver was Review of Consents¹⁸, which needs to be completed by March 2010 to avoid the risk of non compliance.

¹³ Note 12, para 2.3.6.

¹⁴ Note 12, Summary

¹⁵ Note 12, para.2.1.13

¹⁶ HMSO, (2003). Water Act 2003, Ch.37; http://www.opsi.gov.uk/acts/acts2003/ukpga_20030037_en_1

¹⁷ DEFRA, (2005) Restoring Sustainable Abstraction Programme.

<http://www.defra.gov.uk/Environment/water/resources/abstraction/index.htm>;

¹⁸ National Habitats, (2004) Update paper on the Environment Agency's Review of Consents.

- Sites of Special Scientific Interest (SSSI) under the Countryside and Rights of Way Act 2000.
- Sites designated for species listed under Biodiversity Action Plans (BAP) following earlier signature of the Biodiversity Convention, Rio Earth Summit, 1992.
- Sites without formal designation, but where environmental damage has been reported by individuals or groups in the locality. These are termed 'local' designation

The EA already had powers, under Section 52 of the Water Resources Act 1991, to revoke or vary licences subject to direction from the Secretary of State, and Section 61 of this Act provided for compensation to the licence holder in the event of such direction¹⁹. These powers, however, had never been used because the charges scheme did not allow for accumulation of funds such as would be required to pay compensation, and no other source for compensation funding had been identified.

As already stated, 'Tuning Water Taking' instructed the EA to review its charges scheme. However, in practice this was a considerable challenge given the constraints already discussed. It was difficult to ensure:

- reasonableness; Should compensation be recovered on a national or regional basis? How could the 'polluter pays' principle be incorporated? Should water companies pass the cost they incur on to customers?
- effectiveness of scheme to cover compensation cost without considerable year on year variations,
- clarity to charge in a way which could be understood and administered.
- recovery of the correct revenue within each year to meet compensation needs for that year, given that remediation may require long term building projects with shifting completion dates.

The 'mixed responses' which had delayed this paper remained unreconciled. In understanding why, it is worth looking at an example of these responses to appreciate the wide range of views. The following concern the recovery of compensation costs through the charging system and appear in 'Tuning Water Taking':

"Many respondents, and notably water companies and agricultural groups, argued against the principle that compensation payments should be recovered by charges levied on abstractors. Their view was that the cost of environmental benefits from reduced water abstraction should be met by the beneficiaries. As it was felt that the beneficiaries are the wider public, it was suggested that compensation costs should be met by the Exchequer."²⁰

"Some respondents felt that abstractors who are not causing environmental damage should not have to compensate those that are causing damage, as this would conflict with the 'polluter pays' principle."²¹

"The point was made that as the acquisition of abstraction rights in the past was largely on a 'first come, first served' basis, it seems appropriate for current licence holders to bear the costs of compensation."²²

"Some environmental groups thought that the recovery of compensation costs was not enough, and that Government should raise revenues above cost recovery to provide a source of hypothecated revenue to fund work such as water efficiency, river and wetland habitat restoration/creation projects and educational schemes."²³

November 2004; <http://www.defra.gov.uk/wildlife-countryside/ewd/natura-ramsar-forum/meetings/pdf/041125p8.pdf>

¹⁹ EA, (2005) Compensation Guidelines for changes to water abstraction licences, May 2005 (unpublished report). http://www.environment-agency.gov.uk/commondata/acrobat/compguidelines_1116870.pdf

²⁰ Note 12; para 2.1.3.

²¹ Note 12; para 2.1.5.

²² Note 12; para 2.1.7.

²³ Note 12; para 2.1.8.

Similar diversities of view were represented in response to the more recent consultations. It remains to be seen whether a compromise can be reached, or whether a firm decision will be challenged in court, and case law will have the final say.

Until the charges scheme issue is resolved, and a source of compensation secured, two major environmental schemes, cannot be commenced. One is the RSA programme, which cannot progress beyond the detailed identification stage (preventing implementation of improvements), and the other, targeted specifically in the 2003 Act, is the removal of exemptions for a range of abstraction purposes including dewatering, transfers for navigation, and trickle irrigation, some of which are known to be causing environmental damage. Article 11 of the Water Framework Directive²⁴ requires member states to “promote an efficient and sustainable water use”. There is a strong argument that this problem could cause England and Wales to fail in that duty.

Efforts to find a workable solution are continuing, but at a slower pace than intended, partly due to the complexity of the challenge. The initial review of the revised charges scheme was issued in 2004, a second in 2005 and a third consultation in September 2007, undertaken as a result of “finely balanced arguments made in response to the second consultation”²⁵. The response to this third consultation was issued in May 2008 and this states that the new scheme has been approved²⁶.

There are several critical changes in the latest review which amount to a policy ‘U turn’ compared with the earlier Government papers:

- The decision has been made to abandon the time limiting factor (economic measure intended to provide incentive for conversion from permanent to time limited licences via differential charges). The review states: “However, it is essential for the future management of our water resources that we explore opportunities to convert. We are working with Government to investigate other mechanisms to encourage conversion”.²⁷
- Compensation costs will be split between water suppliers and other licence holders. Compensation funding for public water supply licences, held by water companies, which need to be changed to protect sites identified under Habitats Directive will be met through the price review (which may affect water company customer bills) rather than the charges scheme. This is a decision taken by the Government in consultation with OFWAT. The initial estimated costs are £310 million in England and £40 million in Wales. This leaves all designations, where licences are not held by water companies, at an estimated cost of £31 million, and the other designations for water company licences at £68 million (approximately £100 million altogether) to be funded from the charges scheme²⁸.
- The cost of compensation connected with removal of exemptions (estimated £98 million) will not be included in this charges scheme review. A high proportion of the new licences will be ‘transfer’ licences which are exempt from annual charges.

There could be several explanations for these changes. One is that the earlier proposals were too ambitious in their aims to be practicable, and a less challenging scheme may produce a workable outcome which will enable at least partial progress towards environmental goals. Another is that those whose interests would not be best served by giving up their permanent right are in a position of sufficient political and economic influence to be able to shape policy in their favour, and have succeeded in doing so. Whatever the reason, (and it is most likely that elements of those above are both partially right) it cannot be denied that if there was one clear system rather than two, (a legacy of attempts to modernise water rights while retaining the riparian based system), such problems would have had a more straightforward solution.

²⁴ WFD, (2000) Directive 2000/60/EC of the European Parliament and of the Council;
http://www.wfduk.org/about_wfd/WFD-legislative-text.

²⁵ EA, (2007) Review of the water abstraction charges scheme Third consultation September 2007.
http://www.environment-agency.gov.uk/commondata/acrobat/consultation_document_1856237.pdf; p.4.

²⁶ Review of the water abstraction charges scheme: Third Consultation response document. May 2008:
http://www.environment-agency.gov.uk/commondata/acrobat/nnn_2037921.pdf;
NB the new scheme applies as of 1st April 2008 – see Water Abstraction: Charges for 2008/09 factsheet;
http://publications.environment-agency.gov.uk/pdf/GEHO0308BNUE-e-e.pdf?lang=_e

²⁷ Note 25; p.6.

²⁸ Note 25; p.7.

WHAT NEXT?

In 2002, DEFRA set out its priorities for future water policies, stating:

“Sustainable development provides the framework for water policies. A key aspect of sustainable development is achieving integration of the economic, environmental and social dimensions of policy.”²⁹.

UK water law is moving towards such integration but as long as we tolerate the inequality of treatment between those with a permanent right to use water and those without, true integration is bound to remain compromised. It is clear that increasing demands for fresh water, and the added pressures of climate change, will cause the value of water (and therefore the value of water rights) to rise. This in turn will provide further justification for retention of the right for its potential value rather than the need for the water conferred by it, a justification compounded where some licences confer greater right (and hence have higher value) than others.

In its recently published long term strategy, “Future Water”, Defra³⁰ acknowledges the “genuine case for all licences to be given a time limit”. However, its proposed approach, to consult on this proposal with a view to incorporating the policy within the third cycle of Management planning for the Water Framework Directive (2021-2027), suggests that the need for action is seen as a long term aspiration rather than an urgent requirement. Furthermore, the stated approach could well reassure holders of permanent licences that their rights are safeguarded until 2021 at the earliest and possibly until 2027, doing nothing to encourage voluntary conversion.

The ‘legislative carrot’ has proved largely unpalatable; whether the European ‘legislative stick’ is threat enough to force real change remains to be seen. Ten years have passed since ‘Taking Water Responsibly’. It could be argued that despite considerable effort into introducing legislation to achieve a sustainable water environment, we are no further forward. “Time has overtaken the laws which give users a free hand on waters”.³¹. Can the environment afford to wait any longer?

²⁹ DEFRA, (2002) Directing the flow: Priorities for future water policy;
http://www.defra.gov.uk/environment/water/strategy/pdf/directing_the_flow.pdf. p.11.

³⁰ DEFRA (2008) Future Water: The Government's water strategy for England;
<http://www.defra.gov.uk/environment/water/strategy/pdf/future-water.pdf>. p.36

³¹ Note 3; p.3.