RIVERS TEST AND ITCHEN AND CANDOVER STREAM

ABSTRACTION LICENCE INQUIRY

STATEMENT OF COMMON GROUND: LEGAL FRAMEWORK

Introduction

1. This Legal SOCG is agreed between Southern Water Services Ltd ("SWS") and the Environment Agency ("EA").

2. The document is divided into the following main parts:
   a. Overview of abstraction licensing regime.
   b. EU environmental obligations, specifically:
      i. Directive 92/43/EEC (the Habitats Directive),
      ii. Directive 2000/60/EC (the Water Framework Directive);
   c. Domestic environmental obligations.
   d. The supply duty and related obligations.
   e. Drought orders authorising abstraction and discharge.
   f. Restrictions on water use.
   g. Key legal issues in contention between the parties.

Overview of abstraction licensing regime

3. The abstraction licensing regime is contained in Part II of the Water Resources Act 1991 ("WRA 1991"), supplemented by the Water Resources (Abstraction and Impounding) Regulations 2006.

4. Subject to certain exceptions and to any drought order or permit, it is a criminal offence to abstract water from any source of supply otherwise than in accordance with an abstraction licence (section 24 WRA 1991).

5. Abstraction licence applications are ordinarily determined by the EA, unless the subject of an appeal or called in for determination by the Secretary of State under section 42 WRA 1991. A water company may apply to the EA to vary its own abstraction licence (section 51(1) WRA 1991). Applications to vary, and their variation,

are subject to the same provisions as those which govern applications for, and the grant of, licences (s.51(3)).

6. Licence applications are subject to publicity requirements, which include providing an opportunity for third parties to make written representations (section 37 WRA 1991 and the Water Resources (Abstraction and Impounding) Regulations 2006).

7. The EA's determination of a licence application is subject to certain mandatory considerations (section 38 WRA 1991). These also apply to the Secretary of State's determination of a called-in application (section 42).
   a. The EA and the Secretary of State must have regard to all the relevant circumstances when considering a licence application. They must have regard in particular to the requirements of the applicant (in so far as they appear to the EA or Secretary of State to be reasonable requirements), as well as to any written representations within a prescribed period (sections 38(3) and 42(3) WRA 1991).
   b. The EA and the Secretary of State must also have regard to minimum acceptable flows (sections 40 and 42(3)). Where no minimum acceptable flow has been determined, they must have regard to the considerations by reference to which, in accordance with sections 21(4) and (5), a minimum acceptable flow would be determined.
   c. When the application relates to groundwater, the EA and the Secretary of State must have regard to "*the requirements of existing lawful uses of water abstracted from those strata, whether for agriculture, industry, water supply or other purposes*" (sections 39(2) and 42(3)). The Secretary of State must also consider whether the grant of a licence would authorise abstraction so as to derogate from any protected rights under Chapter II (section 42(4)).

8. The EA and the Secretary of State may grant licences containing such provisions as they consider appropriate (sections 38(2) and 42(1)). Certain provisions must be included in abstraction licences. These include that a licence must specify the purposes for which water abstracted in pursuance of the licence is to be used (section 46(4)). A licence must also state the date on which it takes effect and the date on which it expires (section 46(5)).

9. The Secretary of State may hold an inquiry or hearing before determining a called-in application, but must do so if requested by the applicant or the EA (section 42(2)).

10. In addition to applications by the licence holder, the EA is able to formulate proposals for varying a water company's licence (s.52(1) WRA 1991). Such proposals must also

be publicised and third parties provided with an opportunity to make written representations (sections 52(4)-(7)). If the licence holder objects to the EA's proposals within a prescribed period, the EA must refer the proposals and notice of objection to the Secretary of State (s.53(4)).

11. Where the EA's proposals have been referred to the Secretary of State, the Secretary of State must consider the proposals, the licence holder's objection and any third party written representations made within a prescribed period, and determine whether the licence should be varied or revoked (s.54(1)). The Secretary of State must have regard to minimum acceptable flows under section 40 and where none are set the requirements set out in section 21(4) and (5). He must also consider whether the grant of a licence would authorise abstraction so as to derogate from any protected rights under Chapter II (section 54(3)). Where the application relates to groundwater, he must have regard to existing lawful uses in accordance with section 39(2).

12. Before determining whether the licence should varied or revoked, the Secretary of State may cause an inquiry or hearing to be held; however, he must hold an inquiry or hearing if requested by the licence holder or EA (s.54(2)).

13. Where the Secretary of State decides that the licence should be varied or revoked, he must direct the EA to vary or revoke the licence accordingly (s.54(5)).

14. Appeals against the EA's decision on a licence application, or its failure to determine the application within a prescribed time period, are made to the Secretary of State (section 43 WRA 1991). Where determining such an appeal, the Secretary of State "*may allow or dismiss the appeal or reverse or vary any part of the decision of the [Agency], whether that appeal relates to that part of the decision or not*" and "*may deal with the application as if it had been made to him in the first instance*" (section 44(1)).

15. Where the decision on a section 43 appeal is that a licence is to be granted or varied or revoked, the decision must include a direction to the EA to grant a licence containing specified provisions, to vary the licence so as to contain specified provisions, or to revoke the licence (section 44(6)).

16. When the EA itself is applying for a licence, it must follow the process in Schedule 2 to the 2006 Regulations, which includes the following provisions:
    a. require the EA to send its application and draft licence to the Secretary of State (paragraph 1);

b. require the EA to advertise the application and serve a copy of it on (amongst others) the relevant water undertaker (paragraph 2);
c. require the EA to notify the Secretary of State that it proposes to proceed with the application after considering representations made in response to advertising (paragraph 5);
d. require the EA to refrain from granting a licence to itself where the Secretary of State calls in the application under section 41 of the WRA; (paragraph 6); and
e. apply section 42 of the WRA to the call-in and thus gives the Secretary of State power to determine either that a licence shall be granted on such conditions as he considers appropriate, or (if he considers it necessary or expedient to do so) determine that no licence shall be granted; and to hold an inquiry to be held before making the determination (paragraph 7).

17. The EA and the Secretary of State must comply with a number of additional statutory duties when making decisions in respect of abstraction licences. These relate in particular to environmental obligations and to water companies' duty of supply. They are summarised in the next two sections.

EU environmental obligations

Supremacy of EU law over domestic law

18. EU law is supreme over domestic law. As a result, Habitats Directive and WFD requirements take precedence over any conflicting domestic legislation, including the WIA 1991 supply duty, subject to any derogations or exemptions.

19. Tension between EU environmental and domestic legislative duties is resolved through the framework of EU law. In the Habitats Directive, this is under Article 6(4), and in the WFD, this is in Article 4(6).

EU Habitats regime

20. The Habitats Directive 92/43/EEC, as transposed by the Conservation of Habitats and Species Regulations 2017[1], imposes a general duty on the Secretary of State, the EA and SWS. As regulation 7 competent authorities, they must, in exercising their functions, have regard to the requirements of the Habitats Directive "*in so far as they may be affected by the exercise of those functions*" (regulation 9(3)). In addition, the

[1] These came into force on 30 November 2017, primarily to consolidate amendments to the Conservation of Habitats and Species Regulations 2010. In all respects relevant to this inquiry the Regulations are in the same terms.

Secretary of State and Natural England (NE) must exercise their functions which are relevant to nature conservation *"so as to secure compliance with the requirements"* of the Habitats Directive (regulation 9(1)).

21. More significant for the inquiry than these general duties is the obligation in Article 6(3) Habitats Directive. As transposed by regulation 63(1), Article 6(3) requires a competent authority to make an appropriate assessment of any plan or project likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and which is not directly connected with or necessary to its management. An appropriate assessment must involve consultation with NE (regulation 63(3)). In light of the assessment's conclusions, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site (regulation 63(5)).

22. The Court of Appeal has recently summarised the key Article 6(3) principles, focusing on the trigger for an appropriate assessment:[2]

> "30 The relevant principles in European and domestic case law are well established and familiar. Article 6(3) of the Habitats Directive must be applied consistently with the "precautionary principle": see in *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710, para 12, per Lord Carnwath JSC. The need for an "appropriate assessment" is triggered by a risk that the plan or project in question will have a significant effect on a European site. Such a risk will exist if, on the basis of objective information, the possibility of a significant effect cannot be excluded: see the judgment of the Grand Chamber of the Court of Justice of the European Communities in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw (Coöperatieve Producentenorganisatie van de Nedelandse Kokkelvisserji UA intervening)* (Case C-127/02) [2005] All ER (EC) 353 , para 44, and the opinion of Advocate General Sharpston EU:C:2012:743 in *Sweetman v An Bord Pleanála (Galway County Council intervening)* (Case C-258/11) [2014] PTSR 1092 , points 47–50. It is for a third party who asserts that there is a risk which cannot be excluded on the basis of objective information to produce credible evidence to the court that the risk is a real one, and not merely hypothetical: see *R (Boggis) v Natural England* [2010] PTSR 725 , para 37, per Sullivan LJ. Where the need for an "appropriate assessment" is not obvious, the competent authority must decide whether it is necessary: see *Champion's* case, para 35, per Lord Carnwath JSC. The views of Natural England may—though not must—be given considerable weight in this exercise: see, for example, *Shadwell*

[2] R. (on the application of DLA Delivery Ltd) v Lewes DC [2017] EWCA Civ 58; [2017] P.T.S.R. 949

Estates Ltd v Breckland District Council [2013] EWHC 12 (Admin) at [72], per Beatson J.

31 A decision-maker considering whether a significant effect can be ruled out may take into account mitigation: see *R(Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P & CR 16 , paras 54–76, per Sullivan J. Where mitigation measures are relied upon, the question will be whether there was "sufficient information at that stage" to enable the decision-maker to be satisfied "as to the achievability of the mitigation": see *No Adastral New Town Ltd v Suffolk Coastal District Council* [2015] Env LR 28, para 72, per Richards LJ (with whom Underhill and Briggs LJJ agreed)."

23. In order to authorise a plan or project under Article 6(3) following an appropriate assessment, the competent authority must be "*certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects*".[3]

24. As to the nature of an appropriate assessment, the Supreme Court has held as follows:[4]

> ""Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set in the article. As the court itself indicated in Waddenzee the context implies a high standard of investigation. However, as Advocate General Kokott said in *Waddenzee* [2005] All ER (EC) 353, para 107:
>
> > "the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of article 6(3) of the Habitats Directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will be no adverse effects even though, from an objective point of view, there is no absolute certainty."

[3] Sweetman v An Bord Pleanála (Galway County Council intervening) (Case C-258/11) [2014] PTSR 1092 at [40]

[4] R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710

In short, no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority."

25. The Article 6(3) obligation is subject to the Article 6(4) derogation (transposed by regulation 64). If the relevant competent authority is satisfied that, there being no alternative solutions, a plan or project must be carried out for imperative reasons of overriding public interest ("IROPI"), it may agree to the plan or project notwithstanding a negative assessment of the implications for the site. Where a site hosts priority natural habitats or species, the available reasons are limited to those relating to human health, public safety or beneficial consequences of primary importance to the environment, unless the competent authority obtains and has regard to an opinion from the European Commission. Where there are no priority habitats or species, the reasons may be of a social or economic nature.

26. In Solvay v Region Wallonne (C-182/10) [2012] 2 C.M.L.R. 19 the CJEU held as follows with regard to Article 6(4):

> "73 Article 6(4) of that directive [the Habitats Directive] must, as an exception to the criterion for authorisation laid down in the second sentence of art.6(3), be interpreted strictly (see Commission v Italy [2007] E.C.R. I-7495 at [82]).
>
> 74 Moreover, it can apply only after the implications of a plan or project have been studied in accordance with art.6(3) of the Habitats Directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of art.6(4) , since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (see Commission v Italy [2007] E.C.R. I-7495 at [83]).
>
> 75 An interest capable of justifying, within the meaning of art.6(4) of the Habitats Directive , the implementation of a plan or project must be both "public" and "overriding", which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora."

27. As stated by the CJEU in Solvay, it must be shown that there are no alternative solutions.[5]

28. European and domestic case law has established that protection of the supply of drinking water and irrigation can in principle constitute an overriding public interest.[6]

29. In R (Wilkinson) v South Hams DC [2016] EWHC 1860 (Admin) at [35], Hickinbottom J provided guidance on the nature of this exercise and the role of the national authority (in this case, the Secretary of State):[7]
    a. The decision as to whether there are IROPI involves balancing the adverse impacts against the public interest benefits of the proposal if implemented, to assess whether the benefits justify the adverse impact. In terms of benefits, the focus is on those that are in the *public* interest.
    b. Given that the public interest is involved, a wide margin of appreciation is afforded to the relevant national authority. However, this assessment involves the particular consideration and weighting of the interests protected by the Habitats Directive, and is not a simple balancing exercise. That is implicit in the use of the terms "imperative" and "overriding".
    c. The balancing exercise is fact-specific and must be performed in the context of the specific situation. It may be easier to show IROPI where the proposal is of a regional or national scale, because the public interest in going forward may be very great. However, simply because the project is relatively modest does not mean there will not be IROPI if, for example, the adverse impact is negligible or otherwise very small.
    d. Given the wide margin of appreciation allowed, courts should be slow to interfere with the assessment of the relevant national authority, which is expert and assigned by Parliament to the task.

30. Where a plan or project is authorised on the basis of IROPI, the Secretary of State must secure that compensatory measures are taken to ensure that the overall coherence of the network of European designated sites – known as Natura 2000 – is protected (regulation 66). Compensation may be provided in the same site as that affected by the plan or project in question.[8]

---

[5] Solvay at [77]

[6] Nomarchiaki Aftodioikisi Aitoloakarnanias v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon (C-43/10) [2013] Env. L.R. 21 at [122].

[7] Note that the decision in Wilkinson concerned an Article 16 derogation from Article 12 European protected species obligations. However, since Article 16 also refers to IROPI, the guidance is relevant to the application of Article 6(4).

[8] Briels v Minister van Infrastructuur en Milieu (C-521/12) at [38].

31. Defra guidance notes that competent authorities and Natural England should ensure that compensation requirements "*are flexible enough to ensure adequate compensation without going further than necessary. This recognises that in some cases compensation requirements will need to cater for uncertainty over the harm that might be caused by a proposal or the effectiveness of compensation measures, or to account for any time lag before compensatory habitat becomes established*."[9]

32. Compensatory measures are different to mitigation. Compensation does not prevent harm from occurring; instead, it provides some form of offsetting compensation once harm has occurred, so that it is compensated by new environmental enhancing measures. By contrast, mitigation involves preventive safeguarding measures which eliminate or reduce the harmful effects which a plan or project would have on a protected site. Unlike compensation, mitigation can be taken into account at the Article 6(3) assessment stage.[10]

33. At the time that the Itchen licences were assessed as part of the Review of Consents process, the Conservation (Natural Habitats, &c.) Regulations 1994 were in force. Regulation 50 required the EA to review existing decisions, consents, authorisations and permissions in accordance with Articles 6(3) and 6(4) of the Habitats Directive.

EU Water Framework Directive

34. The Water Framework Directive 2000/60 ('WFD') is European legislation providing protection to bodies of water.

35. The purposes of the WFD include establishing a framework for the protection of transitional waters and groundwater which prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems; promotes sustainable water use based on a long-term protection of available water resources; and contributes to mitigating the effects of floods and droughts.[11]

36. As transposed by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, the WFD imposes a general duty on the Secretary of State

[9] Defra 2012 – Habitats and Wild Birds Directives: guidance on the application of article 6(4), para 33.
[10] See, in particular, Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174 at [66]-[68].
[11] Article 1(1).

and the EA. By regulation 3(1), they must exercise their relevant functions "*so as to secure compliance with the requirements of the WFD*".

37. Article 4(1)(a)(i) imposes an obligation on Member States to implement the necessary measures to prevent deterioration of the status of bodies of surface water. In Bund für Umwelt und Naturschutz Deutschland eV (C-461/13) the CJEU held that this duty is binding on Member States:

> "31 It should be noted that, contrary to the submissions of Bundesrepublik Deutschland and the Netherlands Government, the wording of Article 4(1)(a)(i) of Directive 2000/60, which provides that 'Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water', attests to the binding force of that provision. The words 'shall implement' involve an obligation on the Member States to act to that effect."

38. The WFD Regulations 2017 transpose this obligation into a specific duty with respect to abstraction licences. By regulation 3(2)(a), the Secretary of State and the EA must "*determine an authorisation*" so as to prevent deterioration of the status of a body of surface water. Determining an authorisation includes deciding whether "*to grant, vary or revoke, or impose conditions"* on an abstraction licence.

39. In addition, the Secretary of State and the EA must, in exercising their functions so far as affecting a river basin district, have regard to the River Basin Management Plan for that district and any supplementary plan (regulation 33).

40. Case law has established that deterioration of status in Article 4(1)(a)(i) means that there is deterioration as soon as the status of at least of one of the quality elements in Annex V to the WFD falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned is already in the lowest class, any deterioration of that element constitutes a deterioration of status.[12]

41. The Water Framework Directive (Standards and Classification) Directions (England and Wales) 2015, issued by the Secretary of State to the EA, govern the classification of water bodies. By article 6, the EA "*must, in order to ensure that the classification results [for water bodies] reflect any impact on the ecological quality of the water environment that is of sufficient spatial extent to affect ecological status, ensure, as far as reasonably possible, that*

[12] Bund für Umwelt und Naturschutz Deutschland eV v Germany (C-461/13).

the monitoring data and modelling results it uses in classification are representative of the water body as a whole."

42. Two exemptions are potentially available for the Article 4(1)(a)(i) WFD obligation to prevent deterioration in bodies of surface water: Article 4(6) and Article 4(7). Regulation 3(2) of the WFD Regulations 2017 provides that these provisions – as transposed by regulation 18 and regulation 19 – apply to the determination of abstraction licences.

43. Article 4(6) provides as follows:

> "Temporary deterioration in the status of bodies of water shall not be in breach of the requirements of this Directive if this is the result of circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen, when all of the following conditions have been met:
>
> (a) all practicable steps are taken to prevent further deterioration in status and in order not to compromise the achievement of the objectives of this Directive in other bodies of water not affected by those circumstances;
>
> (b) the conditions under which circumstances that are exceptional or that could not reasonably have been foreseen may be declared, including the adoption of the appropriate indicators, are stated in the river basin management plan;
>
> (c) the measures to be taken under such exceptional circumstances are included in the programme of measures and will not compromise the recovery of the quality of the body of water once the circumstances are over;
>
> (d) the effects of the circumstances that are exceptional or that could not reasonably have been foreseen are reviewed annually and, subject to the reasons set out in paragraph 4(a), all practicable measures are taken with the aim of restoring the body of water to its status prior to the effects of those circumstances as soon as reasonably practicable, and
>
> (e) a summary of the effects of the circumstances and of such measures taken or to be taken in accordance with paragraphs (a) and (d) are included in the next update of the river basin management plan."

44. In applying Article 4(6), the Member State must ensure that its application does not permanently exclude or compromise the achievement of the objectives of this

Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation.[13]

45. Article 4(6) is applicable to SWS's drought planning. Guidance issued by the Environment Agency in September 2017[14] on the environmental assessment of water company drought plans recognises the relevance of Article 4(6) to water company drought planning. The guidance notes that "*Your drought plans may cover circumstances that are exceptional. Hence your drought plan may need to contain actions which would cause temporary deterioration"* (p.10).

46. As to the circumstances covered by Article 4(6), the guidance states (p.11):

> "Exceptional or unforeseen circumstances are likely to be particular to the geography of your supply area. Although the Directive highlights that 'prolonged' droughts are exceptional, it does not prevent the use of Article 4.6 in other circumstances (e.g. acute non-prolonged droughts that are exceptionally severe). The Directive does not define 'exceptional' beyond that it relates to natural cause or force majeure. In relation to drought, exceptional could reasonably relate to shortage of rain, low river flows or levels, low groundwater levels or low reservoir levels where these are due to natural cause or force majeure."

Domestic environmental obligations

SSSIs – Wildlife and Countryside Act 1981

47. Section 28 of the Wildlife and Countryside Act 1981 provides that notification of a SSSI by Natural England is on the basis that an area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features.

48. Section 28G imposes an obligation upon authorities (including the Secretary of State, statutory undertakers,[15] and public bodies of any description) to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest. This duty applies when an authority exercises its functions so far as is likely to affect the flora, fauna or

[13] Article 4(8).
[14] Environment Agency, "Drought plan guideline extra information. Environmental assessment for water company drought plans", September 2017
[15] Including Southern Water

geological or physiographical features by reason of which a site of special scientific interest is of special interest.

49. The obligation under s.28G is not one to give particular weight or have particular regard to the protection of SSSIs, but to take reasonable steps for conservation and enhancement.[16]

50. By section 28I, before permitting the carrying out of operations likely to damage the features by reason of which a site is a SSSI, a section 28G authority must give notice to NE. Unless notified by NE that it need not do so, the authority must wait until 28 days have passed before deciding whether to give its permission. It must take into account NE's advice. If it does not follow that advice, it must notify NE (with a statement of how it has taken the advice into account) and must not allow the operations to start within 21 days from the date of its notice to NE.

51. Section 28H describes a similar duty where the section 28G authority proposes to carry out operations likely to cause damage to the SSSI.

General duties to promote or take into account conservation interests

52. The Environment Act 1995 imposes a number of general environmental duties on the EA. Section 4(1) provides that the EA's principal aim is to protect or enhance the environment so as to contribute towards achieving sustainable development. By section 6(1), the EA is under a duty, to such extent as it considers desirable, generally to promote certain environmental interests concerning water.[17]

53. Section 6(6) provides that "It shall be the duty of the Agency to maintain, improve and develop fisheries of salmon, trout, eels, lampreys, smelt and freshwater fish".

54. Subject to various constraints, s.7(1)(a) imposes a duty upon the Secretary of State and the Environment Agency in formulating or considering any proposals relating to any functions of the Agency other than its pollution control functions so to exercise any powers with respect to the proposals as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest. This duty applies to the Secretary of State

[16] *R (Friends of the Earth England, Wales and Northern Ireland Ltd) v The Welsh Ministers* [2016] 1 Env LR 1, paras 130, 132-133.

[17] Namely: (a) the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and associated land; (b) the conservation of flora and fauna which are dependent on an aquatic environment; and (c) the use of such waters and land for recreational purposes.

only so far as may be consistent with his duties under section 2 of the Water Industry Act 1991.

55. By sections 7(1)(c) and 7(3), the EA is under a duty to take into account environmental effects[18] when considering proposals relating to its functions, as well those relating to the functions of a water undertaker. Section 8 imposes duties similar to those arising in relation to SSSIs under ss. 28H and 28I of the Wildlife and Countryside Act 1981.

56. The WIA 1991 imposes environmental and recreational duties on the Secretary of State, Ofwat and water undertakers in formulating or considering any proposals relating to the functions of water undertakers (section 3(1)). By section 3(2), these include a requirement to exercise any power conferred with respect to the proposals so as to further certain environmental interests[19], though only so far as may be consistent with: the purposes of any legislation relating to the functions of the water undertaker; the Secretary of State's and Ofwat's water supply duties. They also include a requirement to take into account any effect which the proposals would have on certain environmental interests.[20]

57. By section 40(1) of the Natural Environment and Rural Communities Act 2006, a public authority must, in exercising its functions, have regard to the purpose of conserving biodiversity so far as is consistent with the proper exercise of those functions. Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat (section 40(3)). This duty applies to the Secretary of State, the EA and SWS.

58. Under s.41 of the Natural Environment and Rural Communities Act 2006, the Secretary of State must publish a list of living organisms and types of habitat which, in the Secretary of State's opinion, are of principal importance for the purpose of conserving biodiversity. The Secretary of State must take such steps as appear to him to be reasonably practicable to further the conservation of the living organisms and

[18] The duty is, inter alia, to: take into account any effect which the proposals would have on the beauty or amenity of any rural area or on any such flora, fauna, features, buildings, sites or objects; have regard to any effect which the proposals would have on the economic or social well-being of local communities in rural areas.

[19] Namely: the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest, and (in the case of a water undertaker) water conservation.

[20] Namely: any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects.

types of habitat included at any list published under s.41, or promote the taking by others of such steps.

The supply duty and related obligations

59. By virtue of section 37(1) Water Industry Act 1991 ("WIA 1991"), SWS is under a duty:

> "to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—(a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and (b) for maintaining, improving and extending the water undertaker's water mains and other pipes, as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part."

60. Other obligations imposed on a water undertaker under the WIA 1991 are in addition to, and in no way qualify, the supply duty (section 37(3) WIA 1991).

61. The supply duty is enforceable by the Secretary of State or Ofwat by way of enforcement order (sections 37(2) and section 18 WIA 1991). Where a water company has breached an enforcement order, the Secretary of State of Ofwat may impose a penalty of such amount as is reasonable in all the circumstances of the case, subject to a maximum of 10% of the company's turnover (section 22A).

Other aspects of the supply duty

62. Water companies are subject to specific regulatory standards. These include the obligation, supplemented by regulations and enforced by the Drinking Water Inspectorate, to ensure that water supplied to any premises for domestic or food production is wholesome at the time of supply (section 68 WIA 1991). Other requirements include those relating to the constancy and pressure of the water an undertaker supplies (section 65 WIA 1991).

63. The supply duty is linked to a number of procedural requirements. These can briefly be summarised as follows.

64. Water undertakers are under a duty, in accordance with 37A(1) WIA 1991, to *"prepare, publish and maintain*" a water resources management plan ("WRMP"). By section 37A(2), a WRMP "*is a plan for how the water undertaker will manage and develop water*

resources so as to be able, and continue to be able, to meet its obligations under" Part III of the WIA 1991: i.e. a plan for how it will meet its supply duty.

65. By section 37A(3), a WRMP must address a number of matters. These include the water undertaker's estimate of the quantities of water required to meet its supply obligation; the measures it intends to take or continue for the purpose of meeting the supply obligation; and the likely sequence and timing for implementing those measures. A WRMP must also address any other matters specified by the Secretary of State in directions.[21] It must cover a planning period of at least 25 years.

66. The process of preparing, maintaining and revising WRMPs is closely regulated. Of the various requirements,[22] the following are of particular note:
    a. A WRMP must be reviewed annually. A revised WRMP must be published at least every 5 years, though more frequent revisions may be required (section 37A(6) WIA 1991).
    b. Draft WRMPs are subject to a mandatory process of review by Secretary of State, informal and formal consultation with key stakeholders (such as the EA, NE and Ofwat), and public consultation (sections 37A and 37B WIA 1991, regulation 2 WRMP Regulations 2007).
    c. The Secretary of State may direct a hearing or inquiry to be held in connection with a draft WRMP (regulation 4 WRMP Regulations 2007).
    d. The Secretary of State may direct a water undertaker to modify its draft WRMP, in which case the latter must comply with the direction (section 37B(7) WIA 1991).

67. The effect of these provisions is that a water undertaker cannot publish a revised WRMP unless authorised to do by the Secretary of State. This is reflected in the WRMP Guideline 2016, non-statutory guidance published by Defra, the EA and Ofwat:

> "The Secretary of State or Welsh Ministers will review your draft plan, the representations made and statement of response, along with technical advice from the regulators [the Environment Agency or Natural Resources Wales] and decide whether your plan can be published. They may ask you to complete further work before being published. If so, the Secretary of State or Welsh Ministers will send you the necessary instructions.
>
> […]

[21] Currently the Water Resources Management Plan (England) Direction 2017

[22] See ss.37A, 37AA, 37B, 37C, 37D Water Industry Act 1991; Water Resources Management Plan Regulations 2007/727; Water Resources Management Plan (England) Direction 2017.

You cannot publish your final plan until you have received permission from the Secretary of State or the Welsh Ministers." (p.7)

68. In addition to a WRMP, water undertakers are under a duty *"to prepare, publish and maintain a drought plan*" (section 39B(1)). A drought plan is a "*plan for how the water undertaker will continue, during a period of drought, to discharge its duties to supply adequate quantities of wholesome water, with as little recourse as reasonably possible to drought orders or drought permits*" under the WRA 1991 (section 39B(2) WIA 1991).

69. Under section 39B(4) WIA 1991, a drought plan must address a number of matters. These include the measures the water undertaker might need to take to restrain the demand for water within its area; the measures it might need to take to obtain extra water from other sources; and how the water undertaker will monitor the effects of the drought and of the measures taken under the drought plan. It must also address any other matters specified by the Secretary of State in directions.[23]

70. A revised drought plan must be prepared at least every 5 years, though more frequent revisions may be required (section 39B(6)). Before preparing its plan, a water company must consult the EA, Ofwat and the Secretary of State (section 39B(7)). The Secretary of State may give directions specifying the form which a drought plan must take and water companies must comply with such directions (sections 39B(8) and (10)).

71. The preparation and publication of a drought plan follows the same procedure as for a WRMP under section 37B (section 39B(5)), as supplemented by the Drought Plan (England) Directions 2016. In particular, a water company must send its draft drought plan to the Secretary of State and publish it for public consultation (sections 37B(1) and (3)). The Secretary of State may direct a water company to modify its draft drought plan, in which case the latter must comply with the direction (section 37B(7)).

72. Preparation of a drought plan is subject to the requirement of the Habitats Directive.

Obligations on the Secretary of State and Environment Agency

73. While SWS has primary responsibility for ensuring that adequate water is supplied in South Hampshire, the statutory framework imposes express obligations on the EA and the Secretary of State in respect of that duty.

74. By section 15(1) Water Resources Act 1991 ("WRA 1991"), the EA is under a duty, in exercising any of its powers under any enactment, *"to have particular regard to the duties*

[23] Currently the Drought Plan (England) Directions 2016

imposed" on any water undertaker by Parts II to IV of the WIA 1991 and which appear to the EA likely to be affected by the exercise of its powers. These include the section 37 WIA 1991 supply duty.

75. This obligation also applies to the Secretary of State. By section 15(2), he must take into account the duty imposed on the EA by section 15(1) in exercising:
    a. any power conferred, inter alia, by the Environment Act 1995, the WRA 1991, the WIA 1991 or the Water Act 1989 in relation to, or to decisions of, the EA; or
    b. any power which, but for any direction given by the Secretary of State, would fall to be exercised by the EA.

76. The Environment Act 1995 contains further provisions of relevance to the supply duty. By section 6(2), the EA must take such action as it considers[24] to be necessary or expedient for the purpose: (a) of conserving, redistributing or otherwise augmenting water resources; and (b) of securing the proper use of water resources (including their efficient use).

77. By section 20(1) of the Water Resources Act 1991, the EA is under a duty:

> "so far as reasonably practicable to enter into and maintain such arrangements with water undertakers for securing the proper management or operation of—
>
> (a) the waters which are available to be used by water undertakers for the purposes of, or in connection with, the carrying out of their functions; and
>
> (b) any reservoirs, apparatus or other works which belong to, are operated by or are otherwise under the control of water undertakers for the purposes of, or in connection with, the carrying out of their functions,
>
> as the [EA] from time to time considers appropriate for the purpose of carrying out its functions under section 6(2) or, as the case may be, section 6(2A) of the [Environment Act 1995]"

78. The EA is to send to the Secretary of State copies of arrangements entered into by it under section 20.

79. The EA has a number of powers of compulsory entry onto premises (sections 169-173 WRA 1991). By section 172, any person designated in writing by either of the

[24] In accordance with any directions given by the Secretary of State under section 40 of the Environment Act 1995

Ministers[25] or the EA may enter premises for certain purposes. These include deciding whether, and if so in what manner, any power or duty imposed on the EA should be exercised, as well exercising that power or duty. The designated person's activities may include carrying out inspections, measurements and tests.

80. The exercise of a section 172 power of entry is subject to provisions set out in Schedule 20 WRA 1991. These include:
    a. The entry may only take place at a reasonable time and after notice has been given, unless in an emergency (para 1).
    b. In certain circumstances, the EA may obtain a warrant to exercise the power of entry by force (para 2).
    c. There is provision for compensation to be paid to anyone who has sustained loss or damage by reason of the entry onto the premises (para 6).

81. By section 39(1) Environment Act 1995, the EA is under a duty to have regard to the likely costs and benefits of exercising its powers. This duty does not affect the EA's obligation to discharge any duties, comply with any requirements, or pursue any objectives imposed upon it otherwise than under section 39 (section 39(2)).

82. Additional duties are imposed on the Secretary of State (and Ofwat) under the WIA 1991 in respect of the supply duty.

83. Section 2(2A) imposes duties on the Secretary of State and Ofwat as to when and how they should exercise and perform the powers and duties conferred or imposed on them by virtue of certain provisions (section 2(1)). These include their powers and duties in respect of the preparation and review of WRMPs and drought plans (section 2(6)).

84. Section 2(2A) provides as follows:

    "(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated–
        (a) to further the consumer objective;
        (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

[25] I.e. the Secretary of State or the relevant Defra Minister: section 221 WRA 1991

(c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;
(d) to secure that the activities authorised by the licence of a water supply licensee or sewerage licensee and any statutory functions imposed on it in consequence of the licence are properly carried out; and
(e) to further the resilience objective."

85. Section 2(2B) defines the consumer objective as:

> "to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services."

86. Section 2(2DA) defines the "resilience objective" as:

> "(a) to secure the long-term resilience of water undertakers' supply systems […] as regards environmental pressures, population growth and changes in consumer behaviour, and
> (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water […] to consumers, including by promoting—
> (i) appropriate long-term planning and investment by relevant undertakers, and
> (ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources."

87. Finally, the EA and the Secretary of State must have regard to the wider economic consequences of any regulatory action impacting on the availability of water supplies. By section 108(1) of the Deregulation Act 2015, a person exercising a regulatory function must, in the exercise of that function, have regard to the desirability of promoting economic growth (section 108(1)). In performing this duty, the person must, in particular, consider the importance for the promotion of economic growth of exercising the regulatory function in a way which ensures that regulatory action is taken only when it is needed, and any action taken is appropriate (section 108(2)).

88. Defra has issued statutory guidance on the section 108 growth duty, emphasising the importance of regulators understanding the business environment. This includes "*knowledge of how a regulator's approach to delivering regulation, and the individual actions that a regulator takes, impact on businesses generally, and on business growth; including both direct economic impacts and indirect impacts"* (p.8).

Drought orders authorising abstraction and discharge

89. The drought order regime is contained primarily in sections 73-81 WRA 1991. The available provisions in a drought order depend on whether it is of ordinary or emergency type (sections 74 and 75 WRA 1991). The remainder of this section summarises the legal features of ordinary drought orders which authorise the taking or discharge of water, where the applicant is a water company.

90. In order for a water undertaker to obtain an ordinary[26] drought order, it must satisfy the Secretary of State that, by reason of an exceptional shortage of rain, there exists or is threatened a serious deficiency of supplies of water in the relevant area.[27] There is no statutory definition of "exceptional shortage of rain" or "serious deficiency of supplies of water".

91. Ordinary drought orders can, in particular, authorise: the taking of extra water by a water company; prohibiting uses of water for certain activities; the discharge of water by water company; restriction or prohibition on the taking of water by other persons, and suspending or modifying restrictions to which water company or other person is subject as respects taking of water (section 74). [28]

92. Schedule 8 WRA 1991 sets out the procedure for making drought order applications. These include the following requirements in particular:
    a. Notice of a drought order application must be advertised and served on specified persons, which include the EA and relevant local authorities (para 1(1)).

[26] The test for an emergency drought order is slightly different. By section 73(2), the Secretary of State may make one where he satisfied: (a) that by reason of an exceptional shortage of rain, a serious deficiency of supplies of water in any area exists or is threatened; and (b) that the deficiency is such as to be likely to impair the economic or social well-being of persons in the area.

[27] By section 73(1) WRA 1991, the Secretary of State may make an ordinary drought where he is satisfied that, by reason of an exceptional shortage of rain, there exists or is threatened: a) a serious deficiency of supplies of water in any area; or b) such a deficiency in the flow or level of water in any inland water as to pose a serious threat to any of the flora or fauna which are dependent on those waters.

[28] By contrast, drought permits cannot be used to impose restrictions on water use (section 79A(2) Water Resources Act 1991).

b. The notice must state, inter alia, that objections to the application may be made to the Secretary of State within seven days from the day on which it was served or published (para 1(3)).
c. If any objection is duly made to an application for a drought order and is not withdrawn, the Secretary of State must hold an inquiry or hearing (para 2(1)). The Secretary of State may hold a local inquiry notwithstanding that he is not required to do so (para 2(6)).
d. Where it appears to the Secretary of State that a drought order *"is required to be made urgently if it is to enable the deficiency of supplies of water to be effectively met*" he may dispense with the hearing or inquiry (para 2(2)). Nonetheless, he must still have regard to any objection to a proposed drought order which was duly made and not withdrawn (para 2(3)).

93. Ordinary drought orders expire 6 months after they come into force, unless extended by the Secretary of State for up to a further 6 months (sections 74(3)-(4) WRA 1991).

94. Section 79 and Schedule 9 provide for the payment of compensation and charges where a drought order has been made.

Restrictions on water use

95. Alongside the duty on water undertakers to supply enough water to meet demand, the statutory framework enables them to impose use restrictions in certain scenarios.

96. Section 76 WIA 1991 provides water companies with the power to impose temporary use bans ("TUBs"). By section 76(1), a water undertaker "*may prohibit one or more specified uses of water supplied by means of its supply system if it thinks that it is experiencing, or may experience, a serious shortage of water for distribution*".

97. TUBs are generally known as hosepipe bans (though they extend beyond hosepipes). By way of example, they include: using a hosepipe to water a garden, clean a private motor-vehicle, or clean a patio; and filling or maintaining a domestic swimming or paddling pool (section 76(2) WIA 1991 and Water Use (Temporary Bans) Order 2010/2231).

98. Further use restrictions are available through drought orders. In order to obtain a drought order enabling restrictions on water use, a water company must meet the same statutory test as for a drought order authorising the taking of water.

99. An ordinary drought order may restrict the water uses specified in a direction given by the Secretary of State (section 74(2) WRA 1991), currently the Drought Direction 2011. By way of example, these include: watering outdoor plants on commercial premises; filling or maintaining a non-domestic swimming or paddling pool; operating a mechanical vehicle-washer; cleaning any vehicle, boat, aircraft or railway rolling stock; cleaning any non-domestic premises; cleaning a window of a non-domestic building; and cleaning industrial plant.

100. Emergency drought orders enable the most serious use restrictions. Applications for emergency rather than ordinary drought orders must satisfy an additional statutory requirement. By section 73(2) WRA 1991, the Secretary of State may make an emergency drought order where he is satisfied: (a) that by reason of an exceptional shortage of rain, a serious deficiency of supplies of water in any area exists or is threatened; and (b) that the deficiency is such as to be likely to impair the economic or social well-being of persons in the area.

101. In addition to the restrictions available under an ordinary drought order, they may authorise a water undertaker "*to prohibit or limit the use of water for such purposes as the water undertaker thinks fit*" – thus enabling rota cuts – as well as the supply of water through stand-pipes or water tanks (section 75(2) WRA 1991).

Key legal issues between the parties SWS and the EA as at 24 January 2018

Note: The parties will seek to narrow this list of issues prior to the start of the inquiry and will inform the Inspector if they do so.

WFD

1) Relevance of Art 4(1)(a)(ii) WFD: whether the objective of aiming to achieve good status by December 2015 applies to the proposals to be considered at the inquiry.
2) The legal test for the WFD obligation to prevent deterioration, including the interpretation and application of the decision of the CJEU in Bund für Umwelt und Naturschutz Deutschland eV v Germany (C-461/13).
3) The application of the precautionary principle to the WFD and the relevance of its mention in Recital 11 of the Directive, and the generality of the application of the precautionary principle in EU environmental law.

Habitats Directive

4) The relevance of the WFD December 2015 deadline for protected areas to the inquiry and its application to Habitats Directive requirements.
5) The principles applying to the consideration of alternatives in Article 6(4) of the Habitats Directive.
6) The relevance of the likelihood of harm, as well as the extent of harm, to the Article 6(4) IROPI balancing exercise.

Abstraction licence conditions and drought orders

7) The legal test for the validity of conditions imposed on abstraction licences, and whether the inclusion of special conditions regulating drought scenarios into SWS's abstraction licences would be unlawful.

8) The significance of the availability of Drought Orders in the legislative scheme dealing with drought.

The supply duty and its relationship with domestic environmental obligations

9) The nature, content and requirements/obligations associated with the supply duty imposed on SWS by section 37(1) WIA.

10) The nature of any conflict between the supply duty and domestic environmental obligations, including whether the former takes an 'in principle' priority over the latter, or whether this is to be resolved on a case-by-case basis.

Monitoring

11) The nature of provision for agreements in section 20 of the Water Resources Act 1991, including the Environment Agency being compelled to enter into such agreements.

Other legislative provisions

12) The relevance of the powers of the Secretary of State under s.207 of the Water Resources Act 1991 in relation to national security or mitigating the effects of civil emergency.