

WATER RESOURCES ACT 1991

THE ENVIRONMENT AGENCY'S PROPOSED CHANGES TO FOUR ABSTRACTION LICENCES HELD BY SOUTHERN WATER AUTHORISING ABSTRACTION FROM THE RIVERS ITCHEN AND TEST, AND ONE ABSTRACTION LICENCE HELD BY ENVIRONMENT AGENCY AFFECTING THE CANDOVER STREAM

PLANNING INSPECTORATE REFERENCE: RSA/WR/00016/17/18

ENVIRONMENT AGENCY'S CLOSING SUBMISSIONS¹

I. INTRODUCTION

1. As noted in opening, subject to the new force majeure condition in the Test licence to reflect what is in any event authorised under Article 4(6) WFD, SWS now agrees that the Agency's proposals as originally formulated should be approved. The licences do not authorise a relaxation of restrictions during drought. Instead, any such relaxation would need to be authorised by the separate process of a drought permit or drought order.
2. Since agreement in principle was reached with SWS shortly before the inquiry opened, the Agency has worked extremely hard with SWS on the content of that agreement, and on ensuring that the quasi Rule 6 parties have been kept appropriately informed and involved. The happy consequence of this is that there are no issues of dispute remaining between SWS, the Agency, Natural England and Fish Legal. All these parties are agreed that the Secretary of State should confirm the license proposals in the form advocated by the Agency.
3. The merits of a potential future application for a drought permit or drought order are not a matter for determination in these proceedings. The Agency's

¹ These closing submissions should be read in conjunction with our Opening Statement of the same dates. The abbreviations defined there are used here.

discretion on how to respond to any such application remains unfettered. It is important to understand that, whilst the s.20 agreement and associated documents have been produced to facilitate the speedy and effective determination of any such application, if it subsequently turns out that the Agency or the Secretary of State (as the case may be) have proper grounds for refusing such an application, and do so, the default position will be the environmental protection secured by the current license proposals.

4. This is the context for considering the residual concerns, principally by LRM, as to whether the evidence base (including monitoring and being 'application ready') for a drought permit/order application will be acceptable and/or whether the associated mitigation/compensation proposals are sufficient. The appropriate arena for those concerns is the consultation and determination process for the drought order/permit application. If the concerns are well founded and lead to a refusal on the basis that the case for a drought order/permit has not adequately been made out, then the restrictions in the licence proposals will continue unrelaxed and the environmental protection will remain unaltered.
5. Put simply, the monitoring, mitigation and compensation arrangements, **contemplated by the s.20 Agreement** do not inform the content of the licence proposals and do not affect them. **They inform and affect potential future decisions on abstraction not authorised by the proposed licences. This is fundamental, given that the Secretary of State's jurisdiction in these proceedings is to consider the appropriateness of what is authorised by the proposed licences.**
6. SWS have confirmed that, in their view that the arrangements provide them with sufficient confidence of being able to comply with their public water supply duties. Great weight should be given to this, in accordance with the legal principle that in planning and environmental matters the views expressed by those with statutory responsibilities must be given "*great weight*" in relation to matters falling within those responsibilities: see

Ashdown Forest Economic Development LLP v. Wealden District Council [2016] PTSR 79 per Sales J. at para. 110, following *Shadwell Estates Ltd. v. Breckland D* [2013] EWHC 12 (Admin) per Beatson J. at para. 72. No evidence or convincing analysis has been provided, whether by LRM or others, which compels a conclusion that, notwithstanding the great weight to be given to SWS's view, the proposed arrangements do not adequately secure compliance with SWS's public water supply duties.

7. Despite the substantial agreement between the parties, these closing submissions nonetheless seek to explain on behalf of the Agency why the variations should be made as sought. We address the following issues in turn:

(1) A summary of the legal framework;

(2) A summary of the Agency's case, and its approach to consultations in connection with:

- a. the Testwood abstraction,
- b. the Itchen abstraction,
- c. the Candover abstraction;

(3) The Agency's agreement with SWS;

(4) Any remaining points of contention between the Agency and other parties, and the Agency's position in relation to these.

II. THE LEGAL FRAMEWORK

8. Much of the legal framework is set out in the Statement of Common Ground on legal matters between the Agency and SWS.² Given that SWS has accepted the Agency's proposed licence changes, the legal issues in dispute (on pp.23-24 of the Legal SoCG) now fall away. These matters related to factual points

² Inquiry Document SOCG1.

which are no longer in dispute before the inquiry, and therefore do not need to be determined.

9. The Secretary of State remains bound by the provisions of the Habitats Directive³ and the Water Framework Directive (“**the WFD**”).⁴ As European legislation, these are at the top of the legal hierarchy.
10. Article 6(3) of the Habitats Directive prevents permission being granted for plans or projects where it cannot be ruled out that they would not adversely affect the integrity of a European Site. This is subject to Article 6(4), which allows the plan or project to proceed where:
 - (1) There are no alternative solutions;
 - (2) Compensation is offered such that the coherence of Natura 2000 is protected;
 - (3) The plan or project must be carried out for imperative reasons of overriding public interest.
11. Article 4 of the WFD provides that, subject to various exceptions, Member States shall ensure that they prevent deterioration of all bodies of surface water. Member States are required - unless a derogation applies- to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the directive. The concept of ‘deterioration of the status’ of a body of surface water in Article 4 must be interpreted as meaning that there is deterioration as soon as the status of at least one of the quality elements 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, within the meaning of that annex, is already in the lowest class, any deterioration of that element constitutes a

³ CD16.

⁴ CD17.

'deterioration of the status' of a body of surface water, within the meaning of Article 4.⁵

12. SWS, as a statutory water undertaker, is under a duty "*to develop and maintain an efficient and economical system of water supply*", and for the making of arrangements for supply and the upkeep of infrastructure.⁶ SWS has been concerned about its ability to comply with this supply duty given the requirements of the Habitats Directive and the WFD. The Agency's concerns have been that the approach taken to drought events must be compliant with environmental law and specifically that the requirements of Art 6(4) of the Habitats Directive and Art 4(6) of the WFD are rigorously applied.

13. The answer to these concerns is the use of the drought regime in Part II, Chapter III of the Water Resources Act 1991. This sets out a scheme by which statutory water undertakers can apply for drought permits or orders to allow them to abstract above the limits set by their licences in times of drought. The Agency and SWS have agreed a mechanism by which it is agreed that the drought regime is sufficient to allow SWS to meet its supply duty in a way which is compliant with environmental law and the domestic legislation concerning water regulation.

III. THE AGENCY'S PROPOSALS

Testwood

14. The Agency's proposed changes to the Testwood Licence are explained in Alison Matthews' Update Statement.⁷ This explains the process of how the changes came about: after discussions between the Agency and SWS, SWS volunteered licence changes. The Agency did not determine that application,

⁵ Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland eV v Germany*, CD28.

⁶ Water Industry Act 1991, s.37(1), CD2.5.

⁷ ID31.

but served notice on SWS to modify the Testwood Licence under s.52 of the WRA 1991.⁸

The Content of and Justification for the Agency's Proposals

15. The Agency's proposal in relation to the Testwood abstraction was set out in its Licence Change Proposal Report ("**the LCPR**").⁹ The Summary to the LCPR includes:

"We are serving notice on Southern Water to ensure that future abstraction meets current SSSI and Water Framework Directive (WFD) legal requirements and to provide clarity to Southern Water for future planning about acceptable levels of abstraction at Testwood.

...

Increased use of the Testwood licence could reduce flows in the lower River Test by around 20 - 50% and, during exceptionally low flow conditions, flows at some points could be reduced by up to 80%.

Although the current licence has a flow condition, it was set historically at an exceptionally low level and our evidence indicates that operating the abstraction under the terms of the current licence could lead to an impact on salmon entry into the Test and migration upriver. These could also be risk of impact on invertebrates and macrophytes which are interest features of the River Test SSSI."

16. The Agency's proposed licence therefore included a number of features in order to protect the environment:¹⁰

- (1) Limiting the duration of the licence to expire on 31st December 2027;
- (2) Reducing the annual limit to 29,200ML;
- (3) Reducing the daily limit from 136ML/d to 80ML/d;
- (4) Imposing Hands-off Flow ("**HoF**"), including a 355ML/d rate until 31st March 2017;
- (5) Imposing a metering and fish screening condition.

⁸ CD2.15

⁹ SC4.16, Bundle p.2392ff.

¹⁰ Bundle p.2394.

All conditions were proposed to become effective on issue of the licence.

17. The reasons for the Agency's proposals were as follows:¹¹

"Our preferred licence change option ensures that the operation of Testwood abstraction in general would not be changed substantially, meets the EFI flow regime which removes the risk of deterioration to the waterbody, and ensures supporting flow for migration of the SSSI salmon to change. The salmon migration protection flow conditions are more restrictive than the EFI and under SSSI, we do have to have regard to the costs and benefits of imposing licence changes and so we have delayed these licence changes until 2027 to allow Southern Water time to develop alternative sources of water."

18. The use of EFI methodology has been explained by Alison Matthews.¹²

Consultation in Relation to the Testwood

19. There were responses from ten individuals and organisations to SWS's volunteered licence changes. The Agency has set out its consideration of these responses.¹³

20. The Agency's proposed changes were advertised, and responses were received from ten individuals and organisations. The main points of concern were similar to those raised by SWS's voluntary application. As Southern Water objected to the proposed changes, the Agency ceased being the decision-maker; the Secretary of State took over that role.

21. In the process of this inquiry, the Agency has considered and provided its view in relation to the responses to its proposals (see Alison Matthews' Update Statement paras 26-37).

The Agency's Case in relation to Testwood

22. There has been no substantial change in relation to the Agency's position concerning Testwood during the course of this inquiry. Subject to the provision for force majeure, which corresponds verbatim with the provision for force majeure in Article 4(6) of the Water Framework Directive, the licence

¹¹ LCPR 12.7, Bundle p.2448.

¹² Update Statement para. 6, also her Testwood Proof EA2, paras 15-19.

¹³ Bundle pp.3394-3407; Alison Matthews Update Statement Annex 1.

currently suggested by SWS and the Agency is materially the same as that proposed by the Agency before the matter was referred to the Secretary of State. Any greater abstraction required by drought would be governed through the drought regime in the Water Resources Act 1991. Outside of drought conditions, the HoF figure of 355MI/d would apply.

23. Alison Matthews has explained the Agency's position in relation to the split between the Great Test and Little Test. Mr Johnson's points relating to the alleged requirement for a two thirds vs. one third division between the two arms of the Test as purportedly set out in the 'Coleridge Award' (about which scant evidence has been provided to substantiate his assertions) are not well founded. In particular:

- a. The history (1996-2015) of flows has not been two thirds / one third over: see the graph at SC4.17h, Appendix H, Figure 6.5.2.1. Mr Johnson accepted that, as a matter of good river management, a one-third to two-third split between flows would not be applied at all times.
- b. As the relevant interests are both within LRM's control, there is no question as things currently stand of one party seeking to enforce the purported right to a two thirds / one thirds split against another. Even on Mr Johnson's analysis, that scenario would only arise if LRM were to sever its interests by disposing of one part. There is no evidence at all of any such transaction being likely to take place in the foreseeable future. The scenario postulated by Mr Johnson is wholly speculative and lacking in reality.
- c. In any event, and fundamentally, even if flows of 236M/d were to go down the Great Test (i.e applying a strict two thirds / one third approach), this would provide sufficient environmental protection.

24. In conclusion, the Agency's position is that abstraction from the Test up to the full limit permitted by the licence, would be sustainable and would not jeopardise compliance with the WFD.¹⁴

Candover

The Content of and Justification for the Agency's Proposals

25. The Agency's proposed changes to the Candover Licence are explained in Tim Sykes' Candover Update Statement.¹⁵

26. The Agency has been clear since 2005 that adverse effect upon habitats and species from the operation of the Candover scheme could not be ruled out.¹⁶ The Agency therefore modified its own licence in December 2015, reducing the maximum daily rate and annual limit.¹⁷ In 2016, there was further investigation of the impact of the operation of the scheme on the environment. This investigation resulted in the following proposed licence changes to protect the environment:¹⁸

- (1) Maximum daily rate of abstraction of 5MI/d to be used over a 5-month period;
- (2) Maximum annual volume of 750MI/d;
- (3) Limitation upon use until flows have recovered to "normal" for at least 22 months in any consecutive 24-month period, and following that period, the scheme not to be used for a fixed 4-year period, irrespective of flow variability and conditions;
- (4) Addition of a further ecological sampling point at Abbotstone;
- (5) A time limit of 31 December 2022.

¹⁴ Alison Matthew, Update Statement para. 28.

¹⁵ ID29.

¹⁶ Tim Sykes, Update Statement on Candover, ID29, para. 3.

¹⁷ Tim Sykes, Update Statement for the Candover Scheme, para. 6.

¹⁸ Tim Sykes, Update Statement for the Candover Scheme, para. 11. See also the detail of the proposals in the Agency's Candover Statement of Case, SC2.1, bundle pp.58-60.

27. The reason for the abstraction limits is set out at para. 66 of the Agency's Candover Statement of Case:¹⁹

"...To work out how much the licence should be reduced by, the Agency ensured that the new daily rate would not cause flows to rise above the median (normal) flow expected for the time of year. With this restriction in place, the White-clawed crayfish would not be exposed to risks that would be greater than they experience as a result of natural flow variations. But maintaining the Scheme, in reduced form, will provide support to the White-clawed crayfish if their habitat becomes significantly restricted, or degraded, due to extreme low flows. The Agency's assessment resulted in a proposed daily rate of 5Ml/d which could be used over a 5 month period to give an annual volume of 750Ml/yr (reduced from 3,750 Ml/yr).

Consultation in Relation to the Candover Scheme

28. There was extensive involvement of third parties prior to the Agency making an application for amendment of the Candover scheme.²⁰ The Agency's application was then publicised by newspaper. 19 representations were received. A summary of the representations are set out in Annex 1 to Tim Sykes' Update Statement for the Candover Scheme.

29. Other than from SWS, which no longer maintains its objections, the representations were largely supportive of the Agency's proposals. Regarding the possibility of decommissioning the Candover Scheme, Tim Sykes has said:²¹

"Most of the third-party representations were very supportive of the Agency's approach to reduce the licence but most would have preferred the scheme to have been decommissioned and the licence revoked. The Agency considered that approach, but decided to retain the scheme whilst the impact of other licences which can potentially adversely affect the Candover Scheme are investigated. This gives the Agency scope to offset the impact of those other abstraction impacts if there is a drought in the period whilst they are being investigated. The licence proposal included only renewing the licence until 2022 at which time the long-term future of it will be decided in the light of an updated target flow regime for the River Itchen."

The Agency's Position in Relation to Candover

¹⁹ Bundle p.58.

²⁰ Tim Sykes, Update Statement for the Candover Scheme, paras 16-21.

²¹ Tim Sykes, Update Statement for the Candover Scheme, para. 26.

30. The Agency seeks that the licence is granted to it in the form provided. The justification for the duration of the licence up to 2022 was explained by Tim Sykes in evidence at the Inquiry. Up to 2022, it is justifiable to keep the Candover scheme in case it is needed. However, its use is not something which the Agency would do lightly. Natural England's consent would be required prior to use of the Candover Scheme for augmentation. Natural England is sceptical of augmentation schemes and should be used as a matter of last resource, and imposed a number of caveats to their support for its use. Abstraction under the licence will be extremely limited. SWS accept that, for abstraction over the licence limits in drought conditions, it is not possible to rule out adverse effects for the purposes of the Habitats Directive. SW has therefore accepted the need to provide habitat compensation.²²

Itchen

The Content of and Justification for the Agency's Proposals

31. The Agency's proposed changes to the Itchen Licence are explained in Tim Sykes' Itchen Update Statement.²³

32. As with the Candover Scheme, the Agency has been clear since 2005 that it could not be shown that the Itchen licence caused no adverse effect under the Habitats Directive.²⁴ The proposed licence includes the following changes:

- (1) The imposition of a HoF of 198 MI/d at Allbrook and Highbridge;
- (2) The imposition of monthly restrictions in June (4110 MI/d), July (3940 MI/d), August (3445 MI/d) and September (2280 MI/d).

33. A time-limit of 31 March 2025 was also added to the licences.²⁵

34. Tim Sykes has explained the reasoning behind the HoF figure:²⁶

²² See the Candover Drought Order Habitats Regulation Compensation Package, Draft 20 March 2018, ID27.

²³ ID30.

²⁴ Tim Sykes, Update Statement for the Itchen Abstraction, ID30, para. 3.

²⁵ Agency's Itchen Statement of Case, SC3, para. 44(iii), bundle p.1345.

“The HOF condition was derived from thorough and detailed analysis of macroinvertebrate data from the River Itchen, which showed that at times of very low flows, the characteristics of the macroinvertebrate assemblage changed from what might be expected for a chalk stream. A technical report was prepared to use this macroinvertebrate analysis to define a target flow regime for the River Itchen, which included maintaining summer Q95 flows above a certain level as well as ensuring flows do not drop below the HOF. Monthly conditions were also defined to give additional protection in drier months – notably in June and July to protect salmon migration.

The technical work to understand the relationship between the macroinvertebrate community and river flows was considered at the time to be statistically robust and the science sound, mostly because the data was based upon observed biological and river flow data. Translating that into licence conditions was more of a judgement, and for that we employed Atkins to help by offering its professional expert advice and to consult a range of experts from Agency, Natural England... and elsewhere. Hence the target flow regime was subject to peer review and widely held to be justifiable and sound.”

35. Further explanation can be found in the Agency’s Itchen Statement of Case.

Paragraph 17 makes it clear that Option 2 of was selected at the Stage 4 Site Action Plan.²⁷ The nature of Option 2 was as follows:²⁸

“Option 2 – Modify Licences to meet Environment Agency target flow regime

Using the water resource model (as set out in SAP Appendix C), different seasonal abstraction patterns were tested to assess compliance with the flow regime. This showed that in order to meet the invertebrate flow regime, reductions in monthly abstraction were required for all Lower Itchen licences for August and September and abstraction should not cause flows to fall below a certain threshold. It also proved necessary to introduce an additional constraint on monthly abstraction in order to protect flows in June and July for salmon migration. It was proposed that the peak daily licence limit should not be modified; this maintains operational flexibility in the licences, provided that the monthly total abstraction is not exceeded.”

Consultation in Relation to the Itchen Scheme

36. The EA served notice on SWS under s.52 of the WRA 1991 on 7 November 2016, and this was publicised by newspaper. The Agency’s response to the representations received is set out in detail in Tim Sykes’ Update Statement for the Itchen Abstraction.²⁹ Most of the representations supported the

²⁶ Tim Sykes, Update Statement for the Itchen Abstraction, paras 6-7.

²⁷ Bundle p.1337.

²⁸ Agency’s Itchen Statement of Case, para. 16, bundle pp. 1335-1336.

²⁹ Paras 11-15.

scheme. The matter was referred to the Secretary of State on 15 December 2016.³⁰

The Agency's Position in Relation to the Itchen

37. Tim Sykes has considered the WWF's proposals that an even higher HoF figure of 224 Ml/d should be adopted.³¹ Mr Sykes has explained orally the derivation of the 198 Ml/d figure.

38. The Agency does not rule out the application of a higher HoF figure in the future. There is substantial future work tabled for environmental assessment on the Itchen. However, in a context of ever-changing and ever-improving evidence, continually returning to the drawing-board to re-evaluate the evidence from the start is not necessarily protective of the environment. The Agency would have to undergo a considerable amount of work if the 198 Ml/d HoF figure were abandoned in favour of a higher figure. This would inevitably delay the introduction of a higher HoF figure. In the meantime, the environment would be at risk as the current licence would remain in force. The Agency is satisfied that 198 Ml/d is a figure which can be justified, and constitutes an opportunity to make an improvement now. It may be that, in years to come, there is robust evidence that the licence for abstraction on the Itchen should be more restrictive than that currently proposed by the Agency. However, the Agency wishes to 'bank' environmental protection at that level before considering whether newer evidence justifies an even higher figure. As Mr Sykes states:³²

"Our position is that we want to draw a line in the sand now, based upon our RoC work. The Agency is committed to revising the target flow regime in 2021, and SWS will conduct further investigations in AMP7, all of which may justify further licence changes, but at this time we want to secure better protection now using our existing evidence base, rather than

³⁰ Not 7 November 2016, as the Update Statement for the Itchen Abstraction states in error at para. 15. 7 November 2016 was the date of service on SWS.

³¹ Update Statement for the Itchen Abstraction, paras 16-20.

³² Update Statement for the Itchen Abstraction, para. 16.

leave existing risk whilst not changing licences and carrying out further work.”IV.

THE AGREEMENT WITH SWS

39. The nature, purpose and history of the Agency’s agreement with SWS is set out in an Agreed Note between SWS and the Agency, on which the Agency relies.³³ In short, the Agreement achieves the following aims:

- (1) Compliance with EU environmental law and corresponding domestic law;
- (2) SWS has a lawful means for abstracting beyond the rate permitted by licences in circumstance of drought, when required;
- (3) The drought mechanisms in the Water Resources Act 1991 were used to permit SWS to apply for further abstraction;
- (4) Provision be made for non-drought force majeure;
- (5) SWS is in a position where it can be “application ready” for a drought permit or drought order application as and when required;
- (6) The Agency would not breach public law principles by fettering its discretion as to its decision-making by an agreement prior to determining any application.

V. OUTSTANDING MATTERS OF DISPUTE

40. The level of dispute at this inquiry is now extremely small. SWS agrees with the Agency’s proposals. The main parties have worked extremely hard to achieve agreement. The Agency’s proposals have a high level of popularity, including support from Natural England and third parties including Fish Legal. This is unsurprising: the proposals represent an opportunity to secure a substantial improvement in an important aspect of the environment.

41. The Section 20 agreement remains in draft, but the Agency hopes that it may be signed before the end of the week.

³³ Forwarded to the Programme Officer on 26 March 2018.

42. Little River Management Ltd (LRM, a riparian leaseholder of a stretch of the Test) contend that the proposed draft monitoring and mitigation plans are not fit for purpose.³⁴ Essentially, LRM state that the monitoring plan requires its consent (and that of its freeholder, Barker Mill), and the plan should take into account the impact upon the angling business. The mitigation is said to be insufficient because it is excluded from the reach where the abstraction takes place.
43. Whilst the mitigation and monitoring proposals form part of the context of this inquiry, they are not a matter which needs to be resolved within it. The draft monitoring package remains a working draft for comment.³⁵ With respect, this is not a matter which the Secretary of State (or the Inspector) can compel the parties to agree. The mitigation and monitoring proposals relate to a future application for a drought permit or drought order, which will be considered by the relevant decision maker (the Agency or the Secretary of State) once it is made. The Agency has long proposed that this is the correct means to deal with a shortage of water due to drought. SWS accepts that the drought regime is a workable means of securing supply during a drought. LRM and Barker Mill are entitled to raise their concerns as part of the drought plan process (or indeed on an application for a drought permit or drought order), but they do not relate to the question of the variation of the licences, current before this Inquiry.
44. LRM's lease (and the grant of it by the Barker Mill Estate) was against the backdrop of the current licence on the Test, with a daily abstraction limit of 136Ml/d, and no HoF limitation. Any concerns or complaints LRM may have in business terms must be seen against that backdrop: the proposed Testwood licence will have a much greater protection of salmon than the *status quo*.

³⁴ ID27.

³⁵ Tim Sykes, Update Statement for the Itchen Abstraction, para. 35.

VI. CONCLUSION

45. It is widely accepted that the Agency's proposals are suitable. The Secretary of State is respectfully requested to approve the Agency's proposed licence changes. They provide a workable means of providing water to the public whilst preserving the environment.

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