

WATER RESOURCES ACT 1991

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

Joint statement from the Environment Agency and Southern Water Services Ltd

1. This joint statement has been prepared in response to the Inspector's request for information about the development of the section 20 agreement and associated documents.
2. It sets out key features of the agreement and documents, the process by which they have been agreed and the status that the documents will have following the conclusion of the inquiry process.

Key features of the agreement

3. As explained on the first day of the inquiry, Southern Water and the Agency have come to an agreement about the approach that should be taken to enable Southern Water to abstract greater quantities of water from the River Test, the Candover boreholes and the River Itchen than would be authorised under the Agency's proposed licence changes during drought conditions and force majeure scenarios (the "Interim Test, Candover and Itchen Interim Abstraction scheme").
4. In the lead-up to the inquiry, the Agency's position was that during drought, such abstraction should be authorised by a drought order or permit and that the Agency would respond to water shortages resulting from non-drought force majeure on an ad hoc basis. Southern Water's concern was that reliance on drought permits or orders - or in the case of force majeure events, ad hoc discussion with the Agency - to secure water supply would put Southern Water in breach of its supply duty due to the lack of certainty and the risk that SWS would not obtain the requisite authorisation in sufficient time.
5. Following exchange of rebuttal evidence, Southern Water approached the Agency to discuss the prospect of coming to an agreed solution that would address both parties' concerns. This took as its starting point the information provided by the Agency in its rebuttal proofs about the approach it would take to abstraction from these sources during drought conditions. The Agency and Southern Water representatives met on Friday 9 March 2018 and reached agreement on heads of terms. That agreement was recorded in the draft dated 12 March 2018 submitted to the Inspector [ID 1].

6. Since the inquiry adjourned, that document has been recorded in an agreement between Southern Water and the Agency under section 20 of the Water Resources Act 1991 (“WRA”), referred to as a “section 20 agreement”. A draft of this agreement was submitted to the Inspector on 20 March 2018 [ID 8]. A section 20 agreement is an agreement which the Agency may enter into with a water company for the purposes of securing the proper management of water resources. The advantage of this form of agreement is that section 20 WRA provides that any questions arising under the agreement may be referred to the Secretary of State for determination and the obligations of a water undertaker under agreement are enforceable by the Secretary of State under section 18 WIA 1991.
7. There are four key features of the agreement between Southern Water and the Agency, now contained in the section 20 agreement:
 - (i) Abstraction during drought conditions will be authorised by a drought permit or drought order;
 - (ii) The Agency will work with Southern Water and Natural England to agree the ecological monitoring, mitigation and compensation measures that need to be in place in order to authorise a Test Surface Water Drought Permit/Order, Candover Drought Order or Itchen Drought Order;
 - (iii) The Agency will agree with Southern Water the process by which to determine the appropriate sequence of drought actions to minimise the risks of environmental impact during drought from implementation of the Interim Test, Candover and Itchen Interim Abstraction scheme;
 - (iv) Abstraction from the Test during a non-drought force majeure event should be authorised by a force majeure condition in the Test Surface Water licence.

(i) Abstraction during drought conditions

8. The first feature of the agreement is that all abstraction beyond the scope of the Agency’s proposed licences during drought conditions should be authorised by way of a drought permit or drought order. This provides the Agency and the Secretary of State with ongoing regulatory oversight of abstraction in drought conditions and the impact of such abstraction on the environment.
9. In return, the Agency has set out in writing the process that it will follow in the event that Southern Water applies for a Test Surface Water Drought Permit. This process does not depart from the statutory framework or the Agency guidance on drought permit applications. Rather, it sets out pragmatic arrangements for the administrative process by which the drought permit application will be prepared, reviewed by the Agency and, in the event an application is made, how it will be processed so as to ensure that a decision is reached swiftly whilst also ensuring the statutory consultation process is followed.

10. The agreed process and timeline is now recorded in clauses 22 to 25 of the draft section 20 agreement and Annex 2.

(ii) **Ecological monitoring, mitigation and compensation**

11. The second feature of the agreement is that Southern Water and the Agency agreed to carry out further work to develop the environmental monitoring, mitigation and compensation that need to be in place prior to the Secretary of State or the Agency granting a drought order or drought permit to authorise increased abstraction.

12. Southern Water's objective is to ensure that it has implemented the necessary monitoring and mitigation measures – and for the purposes of a Candover or Itchen Drought Order application - secured an IROPI compensation package – to ensure that it is “application ready” within the meaning of the Agency's Drought Plan Guidance and the Drought Plan (England) Direction 2016. This was particularly important in respect of the Test Surface Water Drought Permit and Drought Order given the potential impediments to undertaking monitoring and mitigation on the Test downstream of the Test Surface Water abstraction due to potential objection from landowners.

13. The Agency's objective was to:

- a. secure a monitoring package that would provide adequate baseline environmental data against which to assess the impact of abstraction during drought; and,
- b. to implement upfront mitigation measures in advance of drought conditions to improve the ecological resilience of the water bodies to drought impacts and thereby significantly reduce the ecological risks from the Test, Candover and Itchen Abstraction scheme.

14. Since the inquiry adjourned the parties have produced a suite of ecological packages aimed at achieving these objectives. Drafts of the following documents were submitted to the Inspector on 21 March 2018 [**ID 10-18**]:

- a. A Test Surface Water Drought Order and Drought Permit Monitoring Plan
- b. A Candover Drought Order Monitoring Plan
- c. A Lower Itchen Drought Order Monitoring Plan
- d. A Test Surface Water Drought Order and Drought Permit Mitigation Package
- e. A Candover Drought Order Mitigation Package
- f. A Lower Itchen Drought Order Mitigation Package
- g. A Candover Drought Order IROPI Compensation Package
- h. A Lower Itchen Drought Order IROPI Compensation Package

15. The documents were prepared following intensive discussions between Southern Water, the Agency, Natural England and the Hampshire & Isle of Wight Wildlife Trust (“the Trust”). As a result of the availability of key individuals within the Agency, Natural

England and Southern Water during the time afforded by the adjournment of the inquiry, the parties have been able to make significant progress on these issues over the course of the last fortnight, that might otherwise have taken many months.

16. At the time of submitting first drafts of the documents to the Inspector, there was further agreement to be reached on some points of principle as well as the funding arrangements required to underpin the 8 packages of monitoring, mitigation and compensation.
17. On Friday 23 March 2018, comments were received from interested parties, some of which concern mitigation and monitoring packages. This included detailed suggestions from Little River Management on monitoring and mitigation measures for the stretch of lower Test managed by Little River Management.
18. Further work has since taken place and the position is now as follows. The contents of all three mitigation packages and all three monitoring packages are now agreed by Southern Water, the Agency, the Trust and Natural England, subject to review to consider new material and representations made by interested parties to this inquiry and during the course of the public consultation on the draft Drought Plan. A cost schedule setting out the funding that Southern Water will provide for all mitigation and monitoring measures has also been agreed. Although this has been devised on the basis of the current mitigation and monitoring packages agreed by Southern Water, the Agency, the Trust and Natural England, it contains some contingencies and flexibility so that any subsequent adjustments required in response to input from interested parties and public consultation can be accommodated within the overall costs that have been agreed.
19. The Agency agrees that, save for amendments required in order to accommodate new material and representations made by interested parties to this inquiry and during the course of the public consultation on the draft Drought Plan:
 - a. The programme of mitigation measures will significantly contribute to the objective of building ecological resilience to abstraction-related drought impacts and is likely to significantly reduce the ecological risks from the Interim Test, Candover and Itchen Abstraction scheme.
 - b. By securing the mitigation measures set out in the various mitigation packages, Southern Water is application ready for the purposes of an application by Southern Water for a drought permit or drought order required to implement the Interim Test, Candover and Itchen Abstraction scheme.
 - c. The mitigation measures contained in the various mitigation packages represent the maximum extent of currently foreseeable mitigation that is required in advance of an application from Southern Water for a drought permit or drought order.
 - d. The monitoring measures set out in the various monitoring plans constitute the maximum extent of currently foreseeable monitoring that is required in respect of an application from Southern Water for a drought permit or drought order.

20. The mitigation and monitoring packages are being updated to record the final agreement and will be provided to the Inspector as soon as possible. In due course, the contents of these mitigation and monitoring measures will be included in a revised version of the Environmental Monitoring Plan, that forms part of Southern Water's Drought Plan. This will be undertaken as part of the finalisation of the draft Drought Plan currently in consultation and in accordance with the statutory timetable for that process. As recorded in the draft Section 20 Agreement, Southern Water also acknowledges that the Agency may provide further comments on the company's draft Drought Plan during the statutory consultation process.

21. As anticipated by Natural England on the first day of the Inquiry, it has not been possible to finalise agreement about the two IROPI compensation packages. This is principally because of the requirement that there is reasonable certainty that compensation measures can be secured before a package can be agreed. Given the need for scoping exercises and landowner consent issues, this degree of certainty is not attainable in the short timescales that have been available. The packages must be agreed before Southern Water's draft Drought Plan 2018 can be finalised and the Agency and Natural England have committed to working closely with Southern Water following the close of the inquiry to agree the two IROPI compensation packages within this timeframe.

(iii) **The process by which to determine the appropriate sequence of drought actions to minimise the risks of environmental impact**

22. Southern Water and the Agency have taken into account concerns raised that, so far as operational constraints permit, ecological considerations should form part of the process for deciding the sequence of applications for drought orders for abstraction from the Test (at flows below 265ml/d), the Candover boreholes and the River Itchen. It is agreed that Southern Water will take account of ecological considerations in deciding how to proceed. In particular the company will take into account the potential greater vulnerability of fish seasonally because of their migration patterns.

23. To assess the potential ecological implications of abstraction, Southern Water will review and assess the most up to date data from the monitoring installed pursuant to the Environmental Monitoring Plan, and the latest up to date information on macrophytes and invertebrates, before deciding on the sequence of drought actions that will minimise the risks of environmental impact during drought from implementation of the Interim Test, Candover and Itchen Interim Abstraction scheme. The information will be included in an environmental report submitted as part of any drought order application to ensure regulatory involvement in Southern Water's decisions about the sequence of drought orders. The Agency will then take account of the environmental report and the

aforementioned ecological considerations in determining its position on the application. Annex 1 to the Section 20 Agreement has been amended to reflect these changes.

(iv) **Abstraction during non-drought force majeure event**

24. The fourth feature of the agreement is that abstraction from the Test Surface Water licence in non-drought during a force majeure event will be authorised by a force majeure licence condition. The reason why it is necessary for such abstraction to be authorised by a force majeure licence condition is that neither the Agency nor the Secretary of State has the power to authorise abstraction that would otherwise be in breach of normal licence conditions when it is required as a result of a non-drought force majeure event. The force majeure condition that is now jointly proposed by the Agency and Southern Water is set out in the draft Test Surface Water licence submitted to the Inspector: [ID 8]. The draft licence condition provides that the Agency has to be satisfied of the existence of a force majeure event before Southern Water is able to continue abstraction. This means that there is a lawful basis for abstraction in non-drought force majeure whilst ensuring that the Agency retains regulatory oversight of water abstraction during force majeure events.

Engagement with Fish Legal (Rule 6 party) and other interested parties

25. First drafts of the section 20 agreement and accompanying ecological documents were shared with Fish Legal and other interested parties on 20 March 2018 on the basis that they were works in progress and that the input and advice of interested parties would be welcome. As stated above, the Agency and Southern Water have received some comments on these drafts from interested parties, as well as indications from others that comments will follow in due course. The Agency and Southern Water are committed to engaging with interested parties following the close of this inquiry and will take into account such comments as are received when finalising the mitigation, monitoring and compensation plans as part of the ongoing draft Drought Plan process.

26. There has been ongoing engagement with Fish Legal, Little River Management and the Barker Mill Trust since the inquiry adjourned. The details of this engagement can be set out in a separate note from Southern Water's representatives if it would assist the Inspector.

26 March 2018