

**IN THE MATTER OF**

**THE WATER RESOURCES ACT 1991**

**AND**

**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**

**OVERVIEW OF THE ENVIRONMENT AGENCY'S CASE, AND RESPONSE TO SOUTHERN WATER'S GROUNDS OF APPEAL DATED 27 MARCH 2017, AND PROVISIONAL CASE AS AT 23 NOVEMBER 2017**

**INTRODUCTION**

1. This document serves as an overview of the case that Environment Agency ('the Agency') will present at the inquiry in relation to its proposed changes to four abstraction licences held by Southern Water Services Limited ('Southern Water'), which authorise abstraction from the Rivers Test and Itchen, and one abstraction licence held by the Agency which affects the Candover Stream. Southern Water filed its own introduction and summary in the Grounds of Appeal dated 27 March 2017. Those grounds were filed in relation to the Agency's non- determination of Southern Water's Testwood licence application, but served as a useful introduction to all of the matters which will be before the Inspector at the inquiry until they were superseded by Southern Water's Provisional Case as at 23 November 2017 ('Provisional Case'). Given that Southern Water's case is provisional only (and therefore the Agency cannot conclusively respond to the arguments which will be put), the Statement of Common Ground process will be used to clarify the points of agreement and dispute.

2. As much of the factual background is common ground, the Agency does not propose to set out its own full narrative account. Instead the Agency will respond in this document to the key points which Southern Water make in its Grounds of Appeal and Provisional Case, and in so doing it will rely on the general terms and abbreviations used by Southern Water. While many of the arguments in the Grounds of Appeal may have been superseded, the Provisional Case does not withdraw the Grounds of Appeal, and so the Agency proceeds on the basis that that document remains ‘in play’, at least for the time being. This response is therefore divided into two parts, Sections A and B, which respond to the Grounds of Appeal and Provisional Case respectively. The particular justifications for the proposed changes to the five abstraction licences are then set out in separate Case Statements for the Itchen, Testwood and Candover licences, filed and served herewith with a number of Annexes. Again, these Statements may, at least to some extent, have been superseded by Southern Water’s Provisional Case, but as this Inquiry emanates from Southern Water’s objections to the Agency’s proposals to vary the licences, it is necessary for the Agency to explain the background to those proposals and the thinking behind them.
  
3. Since Southern Water lodged its Grounds of Appeal in March, the Agency has served notice under section 52 of the Water Resources Act 1991 of its own proposals to vary the Testwood licence. That Notice was served on 30 June 2017. These proposals, and their implications for Southern Water’s own application to vary that licence, are set out in the Testwood Case Statement and the Licence Change Proposal Report annexed to it.

## **SECTION A**

### **SOUTHERN WATER’S MAIN POINTS IN ITS GROUNDS OF APPEAL**

4. The Agency is proposing to vary the three Itchen licences to include more restrictive conditions; namely monthly abstraction quantities for the months of June – September, an aggregate annual quantity of 42,000MI across all three licences, and a Hands-off Flow condition (‘HoF’) requiring abstraction to cease when flows are at or below 198 MI per day, as measured at Allbrook and Highbridge gauging station on the Itchen. These changes are proposed on Habitats Regulations grounds. The essence of Southern Water’s

case, as put in its Grounds of Appeal, was that it requires ‘special conditions’ to be applied to the three Itchen licences, the Testwood licence and the Candover licence, during the transitional period, pending the implementation of three ‘Water Resource Schemes’ which it is developing to secure alternative supplies in drought conditions to the water presently abstracted under the Itchen licences. For these purposes:

- a) The Three Water Resource Schemes are (i) a bulk water supply from Portsmouth Water to Southern Water’s South Hampshire supply network, which was due to become operational by September 2017; (ii) construction of the pipeline from Testwood to Otterbourne (on the Itchen), using water abstracted from the Test for treatment and distribution at Otterbourne when flows in the Itchen are low; and (iii) supplementing drought flows in the Itchen with groundwater abstracted under the Candover Scheme, when Southern Water acquires the related abstraction licence from the Agency.
  - b) The ‘special conditions’ would, in relation to the Testwood licence, allow abstraction of water to exceed Southern Water’s general proposed restriction of 105MI/ per day, and increase to 136MI/d, when flows on the River Itchen at Allbrook and Highbridge fall below 240MI/d (provided that Southern Water have firstly imposed demand restrictions). As far as the three Itchen licences are concerned, the special conditions would allow abstraction to occur even when flows fall below the proposed HoF of 198MI/d at Allbrook and Highbridge, provided again that demand restrictions on non-essential uses of water are in force. Finally in relation the Candover Scheme, the special conditions would allow abstraction under the Candover licence to be maintained in times of drought at present licenced levels (annual limit of 3,750 MI, daily limit of 20 MI/d in May-August and 27 MI/d during the remaining months) before the commencement of the Agency’s proposed reductions (750MI/year, 5MI/d – not 730MI/year as Southern Water state in paragraph 47 of its Grounds of Appeal).
5. Southern Water justifies the imposition of these special conditions, in both the Itchen and Testwood licences, on the basis that without them there will be a material disruption of essential public water supply, and accordingly there are imperative reasons of overriding public interest (IROPI) under Article 6(4) of the Habitats Directive, there being no

feasible alternatives reasonably available to Southern Water during the transitional period.

6. While Southern Water does not challenge the Agency's conclusion that its proposed changes to the Itchen licences are necessary to avoid their having an adverse effect on the integrity of the River Itchen SAC, it does say that the content and quality of the ecological evidence the Agency examined in order to reach that conclusion is relevant to the application of IROPI; and specifically to the balancing exercise required to determine whether the public interest in maintaining essential water supply in drought conditions overrides the public interest in protecting European sites.
7. With regard to the Testwood licence, Southern Water also says in its Grounds of Appeal that if the special condition (and indeed the other conditions proposed in Southern Water's voluntary application, as set out in paragraph 46 of its Grounds of Appeal) are not imposed there will be an unnecessary increase in the risk of adverse effect on the River Itchen SAC during drought conditions. This is because refusal of Southern Water's voluntary licence application will make the proposed pipeline more difficult to promote to the planning authorities. Abstraction from the River Itchen under the Itchen licences will in turn be more frequent, and longer in duration, during the transitional period. Given the risk of this, the Secretary of State is obliged to include the conditions so as to avoid being in breach of Article 6(2) of the Habitats Directive, which places a general obligation on Member States to take appropriate steps to avoid the deterioration of European protected sites. This is so even though abstraction under the Testwood licence (being from the River Test rather than the River Itchen) will not of itself pose a risk of adverse effect to the River Itchen SAC.

### **THE AGENCY'S MAIN POINTS IN RESPONSE TO THE GROUNDS OF APPEAL**

8. An overview of the Agency's response to these points, and the case it will present at the inquiry if the Grounds of Appeal are still 'in play', is as follows:

#### **The Itchen Licences**

9. As stated in the Pre-Inquiry Statement for the Itchen licences, special conditions should not be inserted into these licences, because the requirements of Article 6(4) of the Habitats Directive are not satisfied. There are alternative solutions, and the imperative reasons of overriding public interest (IROPI) test is not satisfied as Article 6(4) Habitats Directive makes clear that IROPI only arises once it has been established that there are no alternative solutions:

*“4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.”*

10. Regarding alternative solutions, if drought is anticipated Southern Water can seek drought permits and drought orders under the drought regime contained in Part III of Chapter II of the Water Resources Act 1991 (WRA), sections 73-81. This regime specifically caters for the situation envisaged by Southern Water whereby it is necessary to abstract beyond the restrictions imposed by abstraction licences in order to meet public water supply obligations. The drought regime in sections 73-81 WRA allows water companies to apply to the Secretary of State for either ordinary or emergency drought orders. There must, by reason of an exceptional shortage of rain, be a serious deficiency of supplies of water in any area for ordinary drought orders and for emergency drought orders, in addition, the deficiency of supplies is such as to be likely to impair the economic or social well-being of persons in the area. Drought orders can authorise: the taking of extra water by a water company; prohibiting uses of water for certain activities (as set out in the Drought Direction 2011); 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. Drought permits granted by the Agency under section 79A WRA allow for similar but more restricted provisions in terms of what the permits can authorise water companies to do.
11. The imposition of ‘special conditions’ in abstraction licences would subvert the purpose of this regime which has its own procedural requirements and safeguards, and is a distinct

regulatory process. Defra took this approach when considering Southern Water's draft IROPI case: see its letter of 11 August 2016 and enclosed note at Annex 7 of the Itchen Case Statement.

12. The Agency does not accept that imposing conditions in abstraction licences that subvert the drought regime would be lawful. Any such conditions would not be necessary when no drought situation had yet arisen, and they would thus not meet the requirements for the validity of licence conditions. The whole purpose of the drought regime is to deal with situations that Southern Water envisages, and that regime has a clearly set out regulatory practice and process which is practicable and efficient in dealing with serious deficiency of supplies of water as a result of an exceptional shortage of rain by allowing exceptions to the normal restrictions on taking water. It cannot, as Southern Water contends in paragraph 59 of the Grounds of Appeal, be contrary to good regulatory practice to follow the process specifically set out in legislation to deal with drought situations. An approach concerning special conditions would be assessed on the basis of the evidence at the time of the determination of the licence. The drought order / drought permit regime allows for applications to be made on the basis of the evidence at the time of the application. The evidence base may have changed considerably since the decision is made in relation to the licence.
  
13. As to Southern Water's argument summarised in paragraph 6 above, the outcome of the Agency's appropriate assessment was that it could not be concluded there were no adverse effects on integrity of the River Itchen SAC and the authorised abstraction could only continue unchanged if the requirements of Article 6(4) Habitats Directive were met. As the Agency (and Defra) concluded there were alternative solutions there was no requirement to consider the merits of any IROPI case. It is accepted that the nature of adverse effects could have a bearing on the strength of any IROPI case whereby the greater the damage to European sites, the greater the imperative reasons (of overriding public interest) would have to be. The level of harm which may be caused by a proposal is capable of being relevant to IROPI. However, the Agency does not accept that the level of prospect of harm eventuating is relevant to the consideration of IROPI. The level of prospect of harm is a matter for consideration under Article 6(3). Article 6(4) follows on from Article 6(3) but they answer distinct questions. Article 6(4) is set out above. Article 6(3) states:

*“3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”*

14. Once the level of prospect of harm has been established under Article 6(3), it is not considered again under Article 6(4). Article 6(3) sets a threshold question. The European Court of Justice in case C-258/11 (*Sweetman v An Bord Pleanála* [2014] PTSR 1092) holds in paragraph 35:

*“As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (see *Solvay and Others*, paragraphs 73 and 74).”*

### **The Testwood licence**

15. The Testwood licence presently authorises Southern Water to abstract up to 136 Ml per day. As stated in paragraph 46 of its Grounds of Appeal, by application to vary the licence made in August 2016 Southern Water volunteered to reduce that daily limit to 105Ml/d, provided that it can increase it back to 136Ml/d when its ability to abstract from the River Itchen is constrained, subject to the safeguards proposed in the special condition. Southern Water intends to pump the water abstracted from Testwood to Otterbourne, for treatment and distribution, via its proposed pipeline.
16. As stated in the Testwood Pre-Inquiry Statement, the Agency could not determine that voluntary application within the statutory timescale, as extended, because it needed to assess whether Southern Water's proposed licence conditions contravened the Water

Framework Directive (WFD), specifically whether they posed a risk of deterioration in the (presently Good) status of the Test (Lower) water body, in which the Testwood abstraction point is located. The Agency notified Southern Water that it was carrying out an assessment of the deterioration risk, and that it was formulating its own proposals to vary the licence based on that assessment.

17. As stated above, that investigation is now complete and the Agency published its variation proposals on 30 June 2017. Full details of the Agency's proposals are given in the Testwood Case Statement, and the documents annexed to it, which include the Agency's Licence Change Proposal Report and draft determination report setting out how it would have determined Southern Water's voluntary application to vary the licence, had Southern Water not lodged its appeal for non-determination. It is apparent from these documents that the special condition should not be granted, the reasons in summary being:

- (a) Applying its Environmental Flow Indicator ('EFI'), and data in the Test and Itchen Resource Assessment and Management ('RAM') ledger, the Agency has determined that abstraction at the fully licenced rate of 136 Ml/d poses a risk of deterioration in status of the Test (Lower) water body. As respectively specified in paragraphs 33-34 and 40 of the Testwood and Itchen Case Statements, when exercising its relevant functions so as to determine licence variation applications, the Agency must ensure that there is no deterioration in the status of WFD water bodies. (And as stated in paragraph 42 of the latter, the duty applies equally to the Secretary of State at the inquiry). This duty overrides the other legal provisions that the Agency is obliged to have regard to, when granting and varying abstraction licences, specified in paragraph 65(a)-(e) of the Grounds of Appeal.
- (b) When the retention of water by water companies on abstraction licences represents a deterioration risk, the Agency will seek to recover that water for the reasons given in paragraphs 10 -12 above, namely the water company should instead avail itself of the drought regime contained in sections 73 -81 of the WRA 1991, and apply for drought orders or drought permits. The need for this approach is apparent here, given that the use of the proposed pipeline would enable longer periods of abstraction, at higher rates.

18. After considering a range of options, against specified environmental outcomes that a varied licence would have to meet (including ensuring there is no deterioration in the present Good status of the water body, and that flows in the lower River Test maintain or improve passage for migrating salmon), the Agency's published proposals specifying a daily abstraction limit of 80 MI/d. Other proposed changes include:

(a) An annual abstraction limit of 29,200 MI.

(b) The imposition of a HoF of 355MI/d at The Test Total Assessment Point (which represents all freshwater flow in the River Test system entering the tidal waters of Southampton Water), again to meet the EFI and address the risk of deterioration; replacing the present HoF of 91MI/d (measured on the Great Test), which is so low that it has never been engaged.

(c) The imposition of more stringent HOFs from 2027, justified on the basis of the need to protect the features of the River Test SSSI, principally to facilitate salmon migration. Namely a HoF of 390MI/d at The Test Total Assessment Point between March and December, in place of the HoF of 355 MI/d referred to above (with the 355MI/d limit remaining in place for January and February); and a new HoF of 233 MI/d in January and February, and 265MI/d for the remainder of the year, at a point approximately 300 metres downstream of the Testwood abstraction point.

Southern Water has objected to these proposals, and so the Agency has referred them to the Secretary of State for determination, as required by section 53 of the WRA 1991. The Agency will be urging the Inspector to uphold these proposals at the inquiry.

19. Had Southern Water's variation application still been pending on 30 June, when the Agency's variation proposals were published, it follows that the Agency would have refused all of Southern Water's volunteered reductions described in paragraph 46 of the Grounds of Appeal, save for a licence expiry date in 2027. The draft determination report which the Agency has drawn up in relation to that application, and which is annexed to the Testwood Case Statement, amplifies on the reasons why.

20. As to the argument summarised in paragraph 7 above, that Article 6(2) of the Habitats Directive obliges the Secretary of State to grant Southern Water's voluntary licence application:

(a) The Agency does not accept that any increase in abstraction under the Itchen licences, resulting from the inability to use the pipeline in times of drought, will result in an unnecessary increase in the risk of adverse effect to the River Itchen SAC. As stated in the Itchen Pre-Inquiry Statement, if the Itchen licences are varied in the manner the Agency proposes, the abstraction they authorise will not adversely affect the integrity of the River Itchen SAC. The Agency has satisfied itself of this by applying the Article 6(3) Habitats Directive test. There will only be a risk to the integrity of the Itchen SAC if the three Itchen licences are varied to include the special condition which Southern Water proposes.

(b) The Agency does not therefore consider that it is necessary for the Inspector to consider how Article 6(2) of the Habitats Directive applies to the Testwood licence, authorising abstraction from the River Test, which is not a SAC. Without prejudice to that contention:

(i) The Agency accepts that Article 6(2) is accurately summarised in the Grounds of Appeal. For completeness, Article 6(2) says:

*'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.'*

(ii) The Agency also accepts (as contended in paragraph 28 of the Grounds of Appeal) that regulation 9(1) of the Habitats Regulations requires the Secretary of State to exercise his functions at the inquiry so as to secure compliance with the requirements of (amongst others) Article 6(2).

(iii) As stated in paragraph 17(a) above the Agency could not have granted Southern Water's volunteered reductions on the Testwood licence,

since that would have contravened the duty imposed in Article 4 of the WFD to ensure no deterioration in status of the Test (Lower) water body.

- (iv) The duty upon Member States<sup>1</sup> to ensure no deterioration in status of water bodies, as expressed in Article 4, is absolute, save for the following two exceptions/defences, neither of which Southern Water contend to apply:
- Article 4(6), which provides that a temporary deterioration in status is not to be regarded as a breach of the WFD if it results from natural causes which are exceptional or cannot reasonably be foreseen, including extreme floods or prolonged droughts and is subject to stringent conditions including that 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.
  - Article 4(7), which provides that failure to prevent deterioration will not amount to Member States being in breach of the WFD if it is the result of either '*new modifications to the physical characteristics of a surface water body, or alterations to the level of bodies of groundwater*', and which again is subject to stringent conditions.
- (v) It follows that Article 6(2) of the Habitats Directive cannot override the requirement to ensure no deterioration in water body status imposed by Article 4 of the WFD. If the Inspector were to accept Southern Water's point, the result would be a risk in deterioration in status of Test (Lower) water body, in order to protect the River Itchen SAC.

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<sup>1</sup> Imposed upon the Secretary of State and the Agency by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, Regulation 3.

(vi) Article 4(1)(c) of the WFD imposes a requirement for Member States to ensure that the standards and objectives for ‘protected areas’ (defined to include sites designated under the Habitats Directive) were met by December 2015, which was necessary given that the Habitats Directive specified no time limits of its own. As stated in paragraph 41 of the Agency’s Itchen Pre-Inquiry Statement, the standards and objectives for the Habitats Directive are ‘to *maintain or restore, at favourable conservation status, the natural habitats and species of wild fauna and flora of Community interest*’. As these objectives had to be met by December 2015, the Agency required the changes to the Itchen licences to be implemented immediately, rather than by December 2018 as Southern Water requested. The Agency included the requirement for the varied conditions to take effect immediately in its section 52 WRA proposals, to which Southern Water has objected (see paragraphs 26 and 45 of the Agency’s Itchen Pre-Inquiry Statement).

21. Southern Water is also wrong to say the IROPI provisions contained in Article 6(4) of the Habitats Directive can be used to justify the special condition in the Testwood licence. Abstraction under the Testwood licence (being from the River Test rather than the River Itchen) will not of itself pose a risk of adverse effect to the River Itchen SAC, or indeed any other SAC or SPA. When making its voluntary application in August 2016 Southern Water did not seek to justify the inclusion of the special condition in the Testwood licence on IROPI grounds, or seek to argue that the Habitats Directive applied to that application. Moreover, as stated in the preceding paragraph, in determining that application the Agency (and the Secretary of State upon appeal) have a legal duty under the WFD to ensure no deterioration in water body status. Southern Water does not contend that either Article 4(6) or 4(7) of the WFD apply, and so the duty to avoid deterioration is absolute.

### **The transitional period**

22. Southern Water seeks to abstract water under the special conditions during the transitional period, namely until the Otterbourne-Testwood pipeline has been constructed and it can transfer water under the Candover Scheme. The Agency's position, however, is that there is no transitional period, and the reductions it proposes in relation to all five licences (namely the Itchen, Testwood and Candover licences) should apply immediately, for the reasons specified in each Case Statement.
23. Regarding the Candover Scheme, as paragraph 13 of the Grounds of Appeal acknowledges, the abstraction licence is held by the Agency. Southern Water says in paragraph 13 that it will acquire that licence '*pursuant to [its] 2014 Water Resources Management Plan*'. In discussions relating to that draft plan, it is true that Southern Water approached the Agency to discuss acquiring the Scheme, but the Agency took the view that the Scheme could not be valued until restrictions on the licence were imposed in 2015, and until the outcome of the renewal application in 2016. Since those developments, Southern Water have made no further request to discuss ownership of the Scheme. A transfer of the licence to Southern Water cannot be assumed. There are no detailed proposals from Southern Water as to what changes it would seek to its licence if there was a transfer, and such hypothetical scenarios are beyond the scope of this inquiry.
24. The Candover licence has expired, and the Secretary of State is to determine whether the licence should be renewed on the more restrictive terms proposed by the Agency, which are justified:
- (a) On the basis that the Agency's environmental assessment concluded that the expiring licence would risk adversely affecting the Itchen SAC and SSSI. The abstraction would reduce groundwater levels and delay groundwater recovery, impacting flows and dependent chalkstream habitat and characteristic species in the Candover Stream, with adverse effect to the SAC and SSSI, contrary to Conservation Objectives. The discharge of water under the existing licence risks adversely changing the ecological balance and natural processes, and could lower day-time water temperatures in the summer months, with adverse implications for the protected White-clawed crayfish;

- (b) On account of the potentially harmful impact caused by a reduction in groundwater levels, and the fact that groundwater recovery will be delayed, with risks (i) to the ecology in the Candover floodplain, where the River Itchen SSSI wetlands are located; (ii) to the Candover winterbourne; and (iii) the headwaters of neighbouring Chalk streams, namely the Rivers Wey, Alre and Dever.

Under the renewed licence the Agency proposes that substantially reduced quantities of water could be discharged, in the short term, to support ecology (particularly crayfish) in the Candover Stream in times of low flows, to mitigate the risks from other abstractions in the upper Itchen area. The Scheme should no longer be used to provide abstraction support. The Agency's proposed new licence has been subject to environmental assessment and Appropriate Assessment and meets the tests to ensure it will not adversely affect the River Itchen SAC or SSSI, or habitats and species protected under the Natural Environment and Rural Communities Act 2006. The longer term future of the Scheme depends upon further assessment of these other abstractions and the determination of new flow targets for the River Itchen SSSI and SAC.

25. Regarding the Candover licence, it would appear from paragraph 47 of the Grounds of Appeal that Southern Water is only challenging the reduction in quantities, and the restriction in use to environmental support, in the transitional period, not beyond that.
26. Turning to the Testwood licence, Southern Water proposes to use its special condition until the end of the transitional period. After that time, under the terms of its application it proposes to abstract up to 105Ml/day from the Testwood source, transferring up to 45Ml/day to Otterbourne via the pipeline, when flows in the River Itchen are low, for treatment and distribution. As stated in paragraph 18 above, the Agency proposes maximum daily abstraction of 80Ml/day. Up to that quantity, the Agency accepts that Southern Water can use the pipeline as it wishes.

### **Alternatives**

27. Southern Water says that there are no reasonable alternatives, if it is to maintain essential water supply during the transitional period, if the special conditions are not allowed. It says it would have to identify alternative sources of water other than those set out in its

2014 Water Resources Management Plan, with the only two alternatives which have been identified to date (desalination plant or effluent re-use scheme) unlikely to be operational for ten to fifteen years.

28. The drought regime and process referred to in paragraphs 10-12 above do provide reasonable alternatives to maintaining public water supplies and that regime was devised for that purpose in mind. Drought orders can be applied for and granted by Secretary of State within reasonable timescales and - as stated in section 6 of the Agency's Itchen case statement - the procedure is not cumbersome or inefficient as long as a water company provides sufficient information and justification to the Secretary of State in relation to its application. The procedure is outlined in Schedule 7 to the WRA 1991 and allows for "fast-tracking" of applications (see paragraph 2(2) of Schedule 7).
29. Southern Water has been aware of the need to develop alternative sources of water since as long ago as 2007. The Agency is of the view that Southern Water has failed to address this issue in a timely manner, despite Agency prompting:
- (a) The restrictions on abstraction under the Itchen licences became clear in 2007, when Itchen SAC Review of Consents concluded by the publication of the Site Action Plan. In its 2009 Water Resources Management Plan, Southern Water therefore committed to implement a funded solution for the provision of alternatives by 2015. The Testwood and Candover licences were identified as possible alternative sources, but Southern Water did not investigate their suitability or the associated environmental risks.
  - (b) The 2014 Water Resources Management Plan extended the commitment to implement a funded solution until 2018. That Plan continued to identify the Testwood and Candover licences as possible solutions (along with the bulk supply from Portsmouth Water), but it acknowledged the associated environmental risks and so committed to investigating other sources. By letter dated 17 September 2014, Defra gave Southern Water permission to publish the Plan provided that it developed contingency options.

- (c) The Agency therefore anticipated that Southern Water would proceed to develop other, more sustainable, long-term solutions, but Southern Water failed to do so. In order to protect the environment, the Agency has had to resort to serving notice of its proposals to vary the Itchen licences, under section 52 of WRA 1991, and now also in relation to the Testwood licence too.

### **Relevant law**

30. In paragraphs 7 and 21-37 of its Grounds of Appeal Southern Water sets out the relevant law. The Agency has set out its own summaries of relevant law which apply to the Itchen, Testwood and Candover matters in each of its Case Statements. The Agency largely agrees with Southern Water's assessment of the relevant legal provisions, save for the following comments:

- (a) In summarising the environmental objectives of Article 4 of the WFD in paragraph 34 of the Grounds of Appeal, Southern Water mentions the duty to aim to achieve Good status by December 2015 (subject to any extensions permitted by Article 4(4)), but makes no mention of the other core environmental objective, namely the duty to prevent deterioration in status, referred to in paragraph 17(a) above and in the Case Statements for the Testwood, Itchen and Candover matters.
- (b) The Water Environment (WFD) Regulations 2003 referred to in paragraphs 35-37, which transpose the WFD, have now been superseded by the 2017 Regulations referred to in paragraphs 39 and 42 of the Itchen Pre-Inquiry Statement and paragraph 34 of the Testwood Statement.
- (c) Paragraph 7(iii) refers to the Agency's duty under section 39(1) of the Environment Act 1995 to have regard to the likely costs and benefits when exercising its powers, but not section 39(2), which says that this requirement does not affect the Agency's obligation to discharge any duties given to it under any other legislative provisions (such as its duties under WFD and the Habitats Directive).

- (d) The reference to section 20 of the WRA (considered further below) in paragraph 29 is not relevant as the Agency has not entered into any relevant arrangements with Southern Water under that provision.
- (e) In paragraph 7(v) Southern Water says that the Secretary of State must take proper account of its obligations under section 37A-D of the Water Industry Act 1991 to produce and maintain a water resources management plan, and paragraph 24 refers to the duty upon Southern Water in section 39B of that Act to produce and maintain a drought plan. The Agency accepts that it must have ‘particular regard’ to these duties, when exercising its functions, by virtue of section 15 WRA. However, this domestic duty is subject to the primacy of European Union law. It must therefore be applied consistently with the stringent requirements set out in the WFD and Habitats Directive, as incorporated via the Water Framework Directive Regulations 2017 and the Habitats Regulations.
- (f) With regard to the Water Industry Act 1991 Southern Water neglect to mention the duty imposed on water undertakers under section 3(2)(a), when formulating proposals in relation to their functions, ‘*so far as my may be consistent with the purposes of any enactment relating to the functions of the water undertaker*’ to exercise its powers so as to further the conservation and enhancement of flora, fauna and geological or physiographical features of special interest, and to further water conservation.
- (g) The Habitats Regulations referred to in paragraph 28 are now, with effect from 30 November 2017, the Conservation of Habitats and Species Regulations 2017. The 2010 Regulations which these revoked, by regulation 7(1)(a) defined the ‘competent authorities’ charged with the duty to ensure that plans or projects do not adversely affect the integrity of European sites to include Southern Water as a ‘statutory undertaker’. The 2017 Regulations are in the same terms (the no adverse effect duty now appearing in regulation 63 of the 2017 Regulations rather than regulation 61).
- (h) Similarly, the Agency’s obligations under the Wildlife and Countryside Act 1981 (to take reasonable steps to further the conservation and enhancement of SSSIs), and under the Natural Environment and Rural Communities Act 2006 (to have regard to the purpose of conserving biodiversity) referred to in section 4 of the Testwood and Candover Case Statements apply equally to Southern Water. Sections 28G(3)(e) of

and 40(4)(e) of these Acts respectively define ‘section 28G authorities’ and ‘public authorities’ to include statutory undertakers.

## **SECTION B: RESPONSE TO SOUTHERN WATER’S PROVISIONAL CASE**

31. Southern Water’s revised case, as set out in this document, can be divided into the following issues, the first two and the final one applying to all three sites:

- Reliance on drought orders
- Special conditions (revised from those set out in its Grounds of Appeal)
- Section 20 agreements
- Specific Testwood arguments
- Specific Candover arguments
- Conflicting legal demands

The Agency summarises and responds to these new arguments in turn.

### **Drought orders**

32. In paragraphs 1-6 of its Provisional Case Southern Water sets out why it needs to undertake its proposed actions in drought conditions. Southern Water asserts in paragraph 3 that strategic water resource options will take 10 years to develop as set out in its draft WRMP but this has not yet been published for consultation so a full assessment of these options has not yet been undertaken. . In paragraph 5 Southern Water refers to its forthcoming Drought Plan. This plan was submitted to the Secretary of State on 1 December 2017 and Defra is currently assessing its plan for sensitive information before it can be published for public consultation. Section 39B(6) of the WIA 1991 requires water companies to revise, consult and publish a drought plan within 5 years from the date of its previous final drought plan. Southern Water published its drought plan on 1 February 2013. The late submission of its drought plan will cause Southern Water to miss the five years deadline for the drought plan to be published.

33. Applying for a drought permit or order (and not being granted it, or not implementing it even if it is granted it) does not of itself affect Southern Water's level of service to its customers, but implementing customer restrictions through either temporary use restrictions and/or non-essential use bans over and above its stated level of service (i.e. at a higher frequency) would impact levels of service. The Agency has not seen any evidence to support Southern Water's statement in paragraph 12 of its Provisional Case that *TUBs would need to be in place throughout the ten year period*". The Agency's position is that this is very unlikely. The company's level of service is an agreement between itself and its customers and it is for Southern Water to manage any changes to its level of service. Additionally, the Provisional Case does not demonstrate that the frequency and risk of drought permits and drought orders is static throughout the ten year period needed to implement longer term strategic options. The gradual implementation of smaller schemes before larger strategic options can be delivered in ten years should progressively improve the supply-demand balance, and therefore decrease the risk of drought permits and orders across this period. So, the risk at the end of the ten year period should be lower than at the start. This does not seem to have been reflected in the Provisional Case to date. Southern Water is also able to implement further improvements or schemes across the resource zone to improve its supply demand balance and decrease the statistical risk of requiring drought orders across the 10 years. The Agency has not had sufficient time to fully assess Southern Water's draft WRMP or draft drought plan yet so it is not yet possible to comment on or validate specifics that Southern Water has referred to.

34. In paragraph 9 of its Provisional Case Southern Water asserts that reliance on drought order and permits is insufficiently reliable to enable it to meet its public water supply duties. The Agency has dealt with this point in paragraphs 9 to 12 of this Overview Statement of Case as well as in paragraphs 51 to 73 of the Itchen Case Statement; the central point being that the drought order and permit regime set out in sections 73 to 81 WRA is precisely there to deal with such situations that Southern Water envisages, responding to the specific circumstances at the time of the application. Where the criteria for applying for droughts orders or permits are met then Southern Water can apply for such orders or permits and there is no limit on the number of applications. If the lawful decision is that a drought plan or drought order should not be granted due to obligations

under WFD or the Habitats Directive, then the aims sought by Southern Water should not be achieved via the back door by means of generic special conditions.

35. Despite its general objection, in paragraph 10 of its Provisional Case Southern Water accepts that it will have to apply for drought orders or permits. By doing so it negates the requirement for special conditions (discussed below) as drought orders or permits can authorise temporary variations to the abstraction licences overriding the conditions of those licences. So long as Southern Water is ‘application-ready’ as referred to in paragraphs 59 to 73 of the Itchen Case Statement there would be no justification for special conditions which duplicate the effect of drought orders or permit and the risk Southern Water identifies in paragraph 13 of its Provisional Case would not arise.

### **Special Conditions**

36. Paragraph 13 seeks a special condition allowing abstraction at all three sites authorising temporary relief from Southern Water’s proposed limits in the three licences, until such time as the drought orders/permits proposed in its Drought Plan are obtained. As such Southern Water’s case in relation to special conditions has evolved from that set out in its Grounds of Appeal, which involved the special conditions applying pending the implementation of its three ‘Water Resource Schemes’. Beyond that, the revised Itchen special condition is similar, relying as it does on Southern Water having imposed demand restrictions; the revised Testwood special condition no longer seeks abstraction above 105M1/d, but at times when flows are below Southern Water’s proposed HoF of 265M1/d; and the Candover special condition now requires Southern Water to impose demand restrictions.

37. Particulars of the three conditions are given in paragraphs 20, 22 and 26 regarding Testwood, Candover and Itchen respectively. The proposed conditions are expressed to apply when (a) the flows fall beneath Southern Water’s proposed Testwood HoF of 265M1/d, and the proposed Itchen HoF of 198M1/d, and (b) to allow abstraction above Southern Water’s proposed Candover limits of 20M1/d (June- August), and 27M1/d for the remainder of the year. There are four fundamental problems with these conditions:

(i) Southern Water do not suggest any restraints on the amount of water that can be abstracted below/above these levels. On their face these conditions therefore allow Southern Water to take all the water out of the Test and the Itchen, and the Candover groundwater body. This is obviously unacceptable.

(ii) As far as the Itchen is concerned, abstracting below 198M1/d would contravene Article 6(3) of the Habitats Directive, and so the only way that the condition is permissible is if the IROPI test in Article 6(4) is satisfied. The Agency's case is that alternatives are available, in the form of drought orders and permits, and so IROPI does not apply. And as far as Testwood is concerned, for the reasons explained in paragraph 52 below abstracting below 265M1/d would pose an unacceptable risk in the deterioration in status of the Test (Lower) water body, and so would contravene the WFD. Southern Water has made no case that the Article 4(6) and 4(7) exceptions/defences referred to in paragraph 19(b)(iv) above apply here.

(iii) They are unlawful because they do not meet the test for the validity of licence conditions, applying the applicable rules set out in the Planning Practice Guidance 2014, which amongst other things require that the proposed condition is 'necessary'. This is not the case as it subverts the drought regime: it cannot be necessary to include conditions in abstraction licences which duplicate the purpose and role of the drought order and permit regime, and which frustrate the drought order/permit making power. Water companies should apply for drought orders or permits to deal with drought events.

(iv) They do not specify what happens in a case where the drought order or drought permit application is unsuccessful. It would be unlawful for special conditions to permit abstraction in circumstances where there has been a specific decision that a drought order or permit should be denied (for instance, on the basis of the Habitats Directive or WFD).

38. These fundamental problems do not apply to the new Candover proposals because paragraph 21 of the Provisional Case states that Southern Water are proposing that to apply the special condition in relation to its own proposed use of the Scheme; at a new

discharge point on the River Itchen, downstream of the existing discharge point on the Candover Stream, and (the Agency presumes) downstream of the White-clawed crayfish population protected under the Habitats Directive. If that is correct, the question of the revised Scheme contravening the Habitats Directive will no longer arise. But two fundamental problems with the special condition remain:

(i) As stated in paragraphs 28 and 80 of the Agency's Candover Case Statement, the Agency cannot assess the environmental impacts of any changes that Southern Water proposes to make to the Scheme until such time as the Agency has consented to a transfer of the abstraction licence to Southern Water, and until such time as Southern Water have then applied to vary that licence. It is by no means certain that the Agency would consent to transfer the licence to Southern Water; the Agency may decide to decommission the Scheme, or sell it to a third party. Likewise, it is by no means certain that any amendments to the scheme proposed by Southern Water would be acceptable.

(ii) In particular, in addition to considering the ecological impacts of the revised scheme generally, the Agency would need to assess the potential impact of the revised proposals on the SSSI wetlands, priority habitats features under section 41 of the Natural Environment and Rural Communities Act 2006, and upon local wildlife sites. As is apparent from the Agency's Candover Case Statement, its proposed changes to the abstraction licence are made on account of the need to protect these features as well as the White-clawed crayfish.

39. Each of the special conditions is expressed to apply on a temporary basis, pending – the Agency assumes – the obtaining of a drought order or permit. Southern Water proposes that the conditions will apply provided that it takes the following measures: (a) implementation of water efficiency measures (such as media campaigns to influence water use), and TUBs as specified in its forthcoming Drought Plan; (b) application for a drought permit authorising abstraction at the three sites beneath/above the proposed limits specified in paragraph 37 above; (c) application for a second drought order authorising non-essential use restrictions set out in the forthcoming Drought Plan; and (d) implementation of the applicable measures specified in the forthcoming Drought Plan once that drought order has been obtained.

40. Southern Water submitted its drought plan on 1 December to Defra and the Agency has seen a draft of the drought plan, but has not had sufficient time to fully assess it and so the Agency cannot comment on the detail of proposals. What is apparent at this stage is that the special condition will be very detailed. Wherever possible the Agency includes short conditions in abstraction licences so that they do not fall foul of the principles for the validity of planning and other conditions specified in the Planning Practice Guidance 2014. In addition to the ‘necessity’ requirement referred to in paragraph 37(iii) above, these are that conditions must be relevant to the planning/abstraction regime and to the activity authorised; enforceable and precise; and reasonable in all other respects. The Agency harbours significant concerns that it will be possible to formulate a condition with sufficient clarity and precision; and requires Southern Water to provide its proposed condition as soon as the drought plan is published, so that this can be evaluated.
41. With particular regard to the Itchen special condition, paragraph 26(g) adds that the condition will only apply when ‘*appropriate compensatory measures have been secured*’. As such the conditions are premised on there being an IROPI case, but there has been no thorough consideration of IROPI or nature and extent of any compensatory measures since Defra concluded that there were alternative solutions, namely drought orders and permits. The issue would form part of the drought order application made to the Secretary of State, and that – in the Agency’s respectful submission – would be the appropriate time for it. Paragraph 26(f) adds that the special condition will only apply when the only available alternative is the imposition of more severe water use restrictions, such as rota cuts and standby supplies. The Agency, as regulator of the abstraction licence, would need to make that determination but it is not clear how it would do so.

### **Section 20 agreements**

42. In paragraphs 16 and 24 of its Provisional Case Southern Water request the Agency to enter into section 20 agreements, regarding the Testwood and Candover abstractions, to enable Southern Water to gain access to land to collect data on the environmental impacts of the abstractions. SW propose that the Agency effectively delegates its compulsory access powers, with Southern Water funding and operating the monitoring. Southern Water say that this data is necessary to obtain more data about the impact of abstraction

above 80M1/d on the Test, and regarding Candover to monitor the impact of Southern Water's revised proposals involving its proposed new discharge point.

43. In summary, the Agency's position is that the Secretary of State cannot require the Agency to enter into such an agreement through the decisions subject to this inquiry, and that the Agency would be unlikely to enter into the agreements.
44. Southern Water's request for these agreements to be entered into is beyond the scope of the issues before the Secretary of State: section 20 of the WRA does not allow the Secretary of State to impose these agreements upon the Agency. It is beyond the jurisdiction of this appeal.
45. Section 20 of the WRA provides that it is the duty of the Agency, so far as reasonably practicable, to enter into arrangements with water companies for securing the proper management and operation of the water from which the water companies abstract, which it considers necessary to enable the Agency to discharge its general water resources management duties under section 6(2) of the Environment Act 1995 (which is summarised in section 4 of the Candover Statement of Case). Section 172 of the WRA, in turn, allows '*any person designated in writing for the purpose*' by the Agency (or Ministers) to enter premises for the purpose of determining in what manner the Agency's powers and duties should be exercised, and these powers can include the carrying out of tests and measurements on the premises. By virtue of section 173 of, and Schedule 20 to, the Act applies, and this in turn says that the powers are only exercisable at a reasonable time; and that compensation is payable to landowners for any resulting loss. If the right of access is refused the Agency can apply to Magistrates for a warrant authorising the Agency to designate a person who can exercise the power, if need be by force. The riparian landowners on the Test and Candover Stream have indicated to the Agency that they would resist access being gained, and so in all likelihood it would be necessary for the Agency to obtain warrants.
46. The Agency has never entered into any of the arrangements before. Its position is that the agreements are both impracticable and unnecessary, and that if Southern Water truly believes that this data collection is necessary it should negotiate the appropriate private agreements with the landowners and their tenants.

47. It is unlikely that the Agency would decide to enter into such an agreement, because the Agency's Investigation Manual makes it clear that the powers of entry are only granted to field staff, and that Home Office or Police and Criminal Evidence Act Codes of Practice must be applied. It would be inappropriate for these to be applied by a third party, especially where the landowner objects to access being given. An Agency officer would in all likelihood need to be present throughout, especially if a warrant had to be obtained, and this would not be attractive on resource grounds.
48. The agreements would not seem necessary. Regarding Testwood, in paragraph 14 Southern Water says that it will accept the Agency's proposed daily limit of 80M1/d, and so the only time that it could monitor the impacts of abstraction in excess of 80M1/d would be in the rare cases when any force majeure conditions allow abstraction up to 96 M1/d. Further, Southern Water says that it is committed to securing new sources of supply which will be operational in around ten years. The Agency questions why monitoring is needed to justify potential relaxation in the conditions of the Testwood licence at that time. Similarly, regarding Candover, it will not be necessary to monitor the impact of SW's revised proposals involving new discharge point until such time as the Candover licence has been transferred and varied.

### **Specific Testwood arguments**

#### **Revised HoF of 265 M1d**

49. In paragraphs 12 and 19 of its Provisional Case Southern Water seek a revised HoF of 265 M1/d on the basis that modelling shows that the Agency's proposed HoF of 355 M1/d would preclude abstraction of the proposed daily limit of 80MI/d in low severity droughts.
50. As explained in paragraph 17 above, and in section 6 of the Testwood Case Statement, the Agency has proposed the HoF of 355 M1/d at the Test Total Assessment Point to meet the EFI and address WFD deterioration risk. By contrast, Southern Water does not justify a HoF of 265M1/d on the ground that it is sufficient to protect the environment.

There is no explanation as to how the figure has been derived; Southern Water simply put it forward for reasons of expediency (to avoid it having to apply for multiple drought orders and impose continuous TUBs).

51. Also, Southern Water does not say where its proposed HoF is to be measured. It is explained in paragraph 17 above that the Agency's proposed HoF of 355M1/d is to be measured at the Test Total Assessment Point, and that its proposed HoF to apply from 2027, of 265 M1/d to protect the SSSI features, is to be measured up-river, at a point approximately 300 metres downstream from the abstraction intake. As Southern Water proposes the figure of 265M1/d in place of 355M1/d, the Agency assumes that it is to be monitored at the Test Total Assessment Point, but clarification from Southern Water on this fundamental aspect is required.
52. If this assumption is correct, the Agency cannot agree to a HoF of 265M1/d. Applying the EFI explained in paragraph 16 above, the Agency's proposed HoF of 355M1/d is the 'Minimum Residual Flow' for the Test Total Assessment Point, and a HoF of 265M1/d would present a risk of deterioration in the presently Good status of the Test (Lower) water body, specifically in that it may cause a lowering of the fish element of that classification.

#### Force majeure

53. In paragraph 17 of its Provisional Case Southern Water seeks a condition allowing it to abstract at the rate of 96M1/d day in 'a non-drought force majeure scenario', the examples it gives being major pollution incidents or terrorist events. This figure is not explained, but the Agency understands that it is the maximum daily amount that the infrastructure at the Testwood intake will permit Southern Water to abstract.
54. It is very unusual for the Agency to include such conditions, and they do not appear in the Agency's standard library of conditions for use in abstraction licences. Southern Water's proposed condition does not specify the duration that the condition would apply for, and it would not therefore be possible for the Agency to assess the ecological risks associated with it. The Agency's preferred approach, in the event of the occurrence of unforeseen events beyond the control of the licence holder causing a breach its licence conditions, is therefore to adopt 'enforcement positions': in the exercise of its discretion the Agency

decides not to prosecute, perhaps subject to steps which it requires the licence holder to take to mitigate environmental damage. That is the approach which the Agency believes to be appropriate here.

55. In any event, the Agency cannot include a condition in the licence authorising abstraction at above 80M1/d. Applying the EFI, abstraction at 96 MI1d would poses a risk of deterioration at times of low flows.

#### April 2027 expiry date

56. In paragraph 18 of its Provisional Case Southern Water requests that the revised licence expires on 1 April 2027, so that a review of licence conditions can take place at that time once data is available to better assess the impact of abstraction on the Test.

57. As stated in paragraph 55 of the Testwood Case Statement, the Agency's proposed licence variation specifies an expiry date of 31 December 2027, with the more stringent HoFs to protect the SSSI features applying from April 2027, thus ensuring that they are on the licence and so 'carried forward' into any renewal. The justifications for these HoFs are explained in paragraph 58 of the Testwood Case Statement. The requirement to meet the HoF should not be avoided by an artificially early end to the licence.

58. Southern Water presumably wants to assess the data that it collects in result of its proposed monitoring before these HoFs are imposed, but as stated in the 'Section 20 agreements' section above it is most unlikely that data will be obtained that way. The Agency therefore sees no reason to depart from its proposed justifications for the more stringent HoFs taking effect in April 2027.

#### Specific Candover arguments

59. In paragraph 25 of its Provisional Case Southern Water seeks confirmation that the renewed licence will be extended from 31 December 2022 (the Agency's proposed expiry date) to 2027, although it does not say why.

60. The Agency does not consider that this is appropriate for the reasons explained in paragraphs 66 and 82-87 of the Candover Case Statement. In short, it is unsuitable for the licence to be 'locked in' for this period.
61. In paragraph 23 of its Statement of Case Southern Water also seeks the inclusion of a condition in the Candover licence requiring the Agency to maintain the infrastructure to enable it to operate up to 27Ml/d per year, so that it remains a viable augmentation scheme. In response, the Agency says that it would maintain the Scheme only in relation to its own need, and it will only maintain the Scheme so that it can be operated in an environmentally sustainable way.

### **Conflicting legal demands**

62. In the final paragraph of its Provisional Case Southern Water say that the myriad of EU and domestic legislation has imposed conflicting demands on it in this case, which the drought actions and force majeure provisions seek to reconcile. And in paragraph 5 Southern Water say that there are 'conflicting obligations imposed upon it'.
63. This reflects a basic misunderstanding of the law. As European Union law, the provisions found in the WFD and Habitats Directive take priority over the supply obligations upon Southern Water imposed in the WIA 1991. Whether the supply obligations should override the environmental obligations is a matter to be determined through the prism of the WFD and Habitats Directive. The legal provisions are not balanced against each other: the provisions of the WFD and Habitats Directive are applied. To the extent that there is conflict between the domestic and European Union law, the latter takes priority. Whilst there may be conflicting pressures upon Southern Water, the legal mechanism for resolving those pressures is clear, as outlined above.
64. In view of the matters stated above, and in the individual Case Statements, the Agency respectfully requests the Inspector to vary/renew the licences on the terms that it has proposed.