

FAO

Your ref: AK

Andrew Kelton
Fish Legal

Our ref: MG

By email Andrew.Kelton@fishlegal.net

Date: 23 March 2018

Contact:
Meyrick Gough

Dear Andrew

Response to Agency on sequencing

I am writing to set out in more detail an explanation of the legal, operational and ecological considerations that underpin the proposed sequence in which SWS proposes to abstract from the Test, Candover boreholes and Itchen in drought, and particularly the order in which abstraction from the Candover boreholes takes place. This letter responds to the proposals put forward in your email of 21 March 2018 at 16.41. This letter is sent following discussions between our respective Counsel, at which our Counsel responded to the direct questions raised in that email, so this letter does not deal with these but only the headline points for the benefit of the inspector and other parties with an interest in the Inquiry.

Discharging SWS's supply duty in the Hampshire South West and South East water supply zones

SWS is under a duty to provide a secure and reliable public water supply pursuant to its statutory duty under section 37 Water Industry Act. Discharging its duty requires a complex operational process whereby SWS must maintain the supplies to meet customer demand in normal and drought conditions. Below I summarise the arrangements by which SWS discharges its supply duty in the area of interest to the inquiry. The water sources under consideration at the inquiry are considered to be essential infrastructure and Defra has imposed restrictions on the level of operational detail that SWS can put into the public domain. Accordingly, the analysis below is in summary

form. As agreed between our Counsel, I am available to discuss matters with FishLegal representatives to explain the position in more detail.

In the Western Area there are seven water resources zones (see section 3.2 of the draft 2019 WRMP Technical Overview), of which the following three are of most relevance to this Inquiry:

- Hampshire Southampton West
- Hampshire Southampton East; and
- Isle of Wight

Abstraction from the River Itchen (and related groundwater sources) supplies water to customers in the Hampshire Southampton East zone.

Abstraction from the River Test supplies water to customers in Hampshire Southampton West zone, provides a transfer to the Isle of Wight, and is used to supply water to Hampshire Southampton East in circumstances when available abstraction from the River Itchen cannot meet prevailing customer demands e.g. in the event of an outage in supply, or River Itchen seasonal licence limits. Abstraction from the River Test is also necessary to support nationally significant infrastructure. Abstraction from the River Test is the only source supplying Southampton West within the zone. Outside of the zone the only transfer capacity is a very small (approx. 3 Ml/d) from Hampshire Rural Zone

SWS is finalising the contractual arrangement with Portsmouth Water whereby Portsmouth Water can provide an additional 15 megalitres/per day to Hampshire Southampton East. SWS has constructed a new transfer pipeline and pumps to enable this transfer to take place. The transfer from Portsmouth Water will help SWS to meet customer demands in the Hampshire Southampton East zone during times when water availability on SWS's own River Itchen sources cannot meet customer demand.

The source of the water under the bulk supply agreement comes from Gaters Mill, an abstraction from the lower reaches of the River Itchen. It is not an instant or immediately available SWS resource. Under the terms of the agreement, SWS is required to serve a notice to request water from Portsmouth Water. To respond to the notice and transfer the water to SWS, the water has to be available to Portsmouth Water. This means that Portsmouth Water has to first consider if it has sufficient sources to meet its own demands. In circumstances where Portsmouth Water does not, the water is not deemed available under the supply agreement and the notice requesting the transfer of water to SWS cannot be met.

SWS has existing distribution infrastructure in place to facilitate transfers from Hampshire Southampton West to Hampshire Southampton East, and this infrastructure is already used when required. Conversely, there is no/limited provision for transfer of water from the Hampshire South East to Hampshire South West zone. The existing distribution infrastructure does not support the transfer of flows in that direction.

Daily abstraction limit

Fish Legal has expressed a particular concern about the daily abstraction limit of 80MI/d proposed for the Testwood licence. This is a reduction in the current limit on the licence which is 136MI/d. The Environment Agency have assessed the new licences to be sustainable and the conditions are much tighter than previous licences. SWS is therefore agreeing to operate within these increased constraints to ensure that the environment is protected during normal conditions.

However, in its position statement to the inquiry on 13th March, Fish Legal portrayed the licence change as effectively a rise in actual abstraction – on the basis that SWS currently abstracts (and consistently has abstracted) below the limits of its licence but will now seek to routinely increase abstraction at higher levels up to 80MI/d .

Fish Legal's concern in this regard is misplaced.

SWS works to a general principle that it will only abstract what it needs to meet demand. However demand fluctuates and varies. This often results in periods of abstraction below the authorised abstraction level contained within its licence, but it also requires the licence to have sufficient headroom to enable the company to meet increased demand as and when required.

Given the concerns expressed by Fish Legal and its clients during the inquiry process it is important to make clear that in accepting the licence conditions proposed by the Environment Agency (and in entering into the Section 20 Agreement), SWS does not envisage any substantive change to the overall operation of SWS' sources in "normal conditions". SWS will still only abstract what it needs in order to meet demand. It is anticipated that the typical abstractions from the River Test will remain within the existing range of 50-65 MI/day.

For SWS' purpose "normal" is intended to mean non-drought conditions, where all water sources are fully available and where SWS is experiencing average customer demand, with no unusual or exceptional circumstances to have regard to (e.g. outages due to maintenance or force majeure events or increased demand events whether in these zones or elsewhere in the western area).

However, despite this expectation, even in non-drought conditions SWS still need the flexibility to abstract above this average of actual abstraction (but within the limits of its licence conditions) to ensure it can meet demand, e.g. when seasonal licence conditions apply on the Itchen licences, in response to demand fluctuations, or to accommodate planned maintenance etc.

To reassure Fish Legal and its clients that its concerns are misplaced, SWS proposes to include the following general principle in the Section 20

agreement. SWS is thereby recording its commitment in a publicly available document produced pursuant to a statutory process under the Water Resources Act.

General Principle 1

SWS currently abstracts typically in the range of 50 – 65 MI/day from the River Test in normal conditions. The company expects this typical pattern of abstraction to continue. The revised abstraction licence stipulates maximum daily abstraction at 80MI/day, which provides the company with the necessary operational flexibility to abstract above 50 - 65 MI/day, to a maximum of 80MI/d, where necessary to provide a secure reliable public water supply pursuant to the company's duty under section 37 Water Industry Act. Outside of drought conditions, recourse to abstraction from the River Test above the typical daily range is expected to be infrequent including, but not limited to, the need to meet the requirements of nationally significant infrastructure, planned maintenance, seasonal restrictions on the River Itchen sources, and the failure of a water source.

Abstraction during drought

It is only under drought conditions that SWS would need to revert to the provisions detailed in annex 1 to the section 20 agreement. Annex 1 sets out how SWS in agreement of the Environment Agency propose to deal with drought conditions until the new sources of water from the implementation of SWS' long term strategies (as detailed in the draft Water Resources Management Plan currently in consultation) are available. SWS's proposed sequence has raised legal, ecological and logistical considerations, which are dealt with separately below.

Legal considerations

The Agency has raised a legal question around the proposed sequence for the Drought Orders identified in Annex 1. The Agency's concern is that, now that it is accepted that on the basis of current information an adverse effect on the integrity of the Candover site cannot be ruled out by operation of the scheme, Article 6(4) of the Habitats Directive requires there to be an assessment of alternatives prior to the use of the Candover scheme. Abstraction from the Test under a Drought Order, below 265 MI/d (TTF), may be such an alternative.

SWS agrees that in the above circumstances, in order to use the Candover scheme it must be demonstrated that there are no other alternatives and that further abstraction from the Test may be an alternative.

Following discussion between our SWS and EA Counsel at the meeting this morning, at which your Counsel were present, it has been agreed that any

future decision about the sequence of abstraction must be driven by ecological considerations and legal compliance. Accordingly, the general principle set out below must be viewed as subject to legal compliance at the time of any drought order application and, more immediately, to EA approval before the close of the inquiry.

Logistical considerations

As explained above, the Testwood abstraction principally supplies customers in the Hampshire Southampton West zone, with provision for transfers to the Isle of Wight, a nationally important industrial customer (the identity of which cannot be disclosed for security reasons) and Hampshire Southampton East.

Conversely, there is no/limited provision for transfer of water from sources in the Hampshire Southampton East to Hampshire Southampton West zone.

It follows that the sequence of abstraction from the various sources *may* depend on where there is a shortfall of water supply to meet demand. If that shortfall principally arises in Hampshire Southampton East, then it will be open to SWS to consider using the Candover and Itchen sources under Drought Orders in advance of abstracting water under a Drought Order from the Test below 265Ml/d. However, if the shortfall of water occurs in Hampshire Southampton West then it *may* not be possible to prioritise abstraction from the Candover and Itchen sources as it will not be possible to transfer this supply from East to West.

Ecological and logistical considerations

For the legal reasons set out above, SWS plans to proceed on the basis that the correct approach, both as a matter of law and ecological principle, is that the decision as to the sequence in which SWS will abstract from the Test, Candover and Itchen in drought will be taken on the basis of logistical considerations and legal compliance (with EU law), with the aim of minimising the ecological impact of abstraction from each of these water sources.

As regards ecological considerations, SWS will have regard to existing data sources, and the monitoring network and relevant data established under the provisions of the Environmental Monitoring Plan which the EA and SWS have been working on over the course of the last week. In particular SWS will have regard to the potential greater vulnerability of fish seasonally because of their migration patterns, and the invertebrate and macrophyte data. The data will be assessed before SWS decides which Drought Order to apply for and SWS analysis will be provided to the Agency as part of pre-application consultations of any such Drought Application.

Accordingly, SWS proposes to include the following general principle into Annex 1 of the section 20 agreement

General Principle 2

The company will take account of ecological considerations in deciding the order of applications for Drought Orders for abstraction from the Test (at flows below 265ml/d), the Candover boreholes and the River Itchen. In particular the company will take into account the potential greater vulnerability of fish seasonally because of their migration patterns. To assess the potential ecological implications of abstraction, the company 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 appropriate Drought Order. The information will be included in an environmental report submitted as part of any Drought Order application.

Fish Legal's Proposals

In your email of 21 March, you set out the three outstanding issues of concern to Fish Legal's clients, namely

- 1) Within day abstraction
- 2) The prioritisation of abstraction during normal summer flows
- 3) The prioritisation of abstraction during drought

I address the issues in turn:

Within day abstraction

Fish Legal's concern relates to abstraction at night, which is said by the organisation to harm the fish. Fish Legal have proposed a condition that SWS use best endeavours to abstract at a uniform rate, and to avoid unnatural within day variation in river flow downstream of the Testwood abstraction.

SWS understands the principle behind the diurnal variation concerns raised by your client. Accordingly, as part of a package of measures discussed with the EA, SWS will include a proposal for a diurnal investigation at the Test to identify any potential impacts on fish migration. It has also been proposed that an application be made to add the investigation to the Water Industry National Environment Programme (WINEP) which if successful will mean it will become a regulatory obligation on SWS to perform the investigation and to report the findings to the EA. This will provide an evidential basis for SWS to assess the issue and consider the extent of any investment required to address any issues found to have arisen.

The infrastructure and operational investment that may be required to address any potential impacts could be considerable and SWS cannot commit to spending customer money without a proper evidential basis for the need for any such action. This emphasises the need for investigation first.

Unless you can provide compelling evidence of such impacts on the River Test for SWS to consider (and SWS is open to receiving such information and is willing to consider any studies or information relating to impacts on the Test that Fish Legal may have or be aware of), the condition proposed by Fish Legal in SWS' opinion is over-precautionary at this stage and too constraining on SWS' existing operations.

Its implementation would also not be as simple as setting a uniform abstraction limit - changes to operational practices and to equipment/infrastructure would also need to be made if such a condition were imposed to ensure that variations and fluctuations in daily demand could still be met. The abstraction at Testwood does not currently abstract at a uniform rate, and never has, because customer demand is not by its nature uniform. SWS has to ensure that there is enough capacity in the network to meet this varying demand.

The prioritisation of abstraction during normal summer flows

Fish Legal's proposal is for a condition to limit abstractions from the Test to a monthly average.

SWS understands that the rationale for the stipulation proposed by Fish Legal is to protect salmon and trout during the summer months and the migration period. SWS cannot agree to any restriction by way of a monthly abstraction average because of the need for operational flexibility (as explained above). However SWS hope that its commitment set out in General Principle 1 above will reassure FishLegal in this regard.

The prioritisation of abstraction during droughts

We are pleased to see that Fish Legal has acknowledged the merits of our amendments to the proposed sequence of abstraction during drought, to provide that ecological considerations are taken into account. This is explained in more detail above.

We hope this letter sets out SWS's position clearly and comprehensively.

Please do not hesitate to contact me in the event of any queries. As you know, Mr Andy Blaxland and I are due to meet with Mr John Lawson this afternoon to discuss further. In the meantime I will forward a copy of this letter to the Inquiry Programme Officer to assist other parties to the inquiry and the Inspector with an explanation of the matters set out in this letter.

Yours sincerely

Meyrick Gough
Water Strategy Manager

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