

23<sup>rd</sup> March 2018

Mr Mike O'Neill  
Environment Agency

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Dear Mike

### **Itchen Inquiry**

I continue to act for WWF and S&TC UK.

As you may know, WWF and S&TC UK are very pleased that the proposed agreement between the EA and SWS records SWS's acceptance that the proper mechanism for dealing with drought circumstances is not through the abstraction licences, but through the drought regime under the Water Resources Act 1991, that the abstraction licences do not need to make special provision for drought circumstances and that SWS now withdraws its objections to the Agency's proposals for the various licences.

It is clear that your staff has worked tirelessly and they deserve considerable thanks for their efforts.

Before the Agreement is finalised, there are a few points WWF and S&TC UK wish to raise.

### **SWS' Long-Term Water Resources Scheme**

WWF and S&TC UK made it clear in their Statement of Case, and agree with Natural England per its Position Statement of 13<sup>th</sup> March 2018, that we would prefer an even more precautionary approach based upon the needs of conservation, to return the rivers, as far as possible, to their natural state.

On SWS's Long-Term Water Resources Scheme, it is vital that a satisfactory Long Term Water Resources Scheme is finalised and put in place as quickly as possible by SWS. WWF and S&TC UK will measure the overall success of the agreement between the EA and SWS, not by whether it avoids a long and protracted Inquiry, but by whether, in fact, it requires SWS to put into place its Long-Term Water Resources Scheme as soon as possible.

To that end, WWF and S&TC UK are concerned that, per clause 4 of the draft Agreement, it remains possible that the Long-Term Water Resources Scheme, based on Scenario A of the draft WRMP, may not be delivered as soon as possible, despite SWS' all best endeavours.

It is important that the final Agreement cannot, in any way, allow SWS later to avoid or delay the urgent and necessary investment.

To add greater certainty, WWF and S&TC UK would suggest that the following underlined wording could be added to the Agreement, such that clause 4 now reads:

*"4) SWS agrees to use all best endeavours to implement the long-term scheme for alternative water resources ("the Long-term Water Resources Scheme") set out in its Final*

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*Water Resources Management Plan (“WRMP”) 2019, as may be revised by future plans, and to implement the said Scheme as soon as possible, and in any event no later than by the start of [add date], unless it is actively prevented from so doing by the effect of any relevant statute. For the avoidance of doubt the long-term scheme will be based on Scenario A in the draft WRMP 2019, subject to any changes required by the consultation process in which SWS is statutorily required to engage.”*

### **Sequencing during drought**

WWF and S&TC UK also have some concerns over sequencing and the use of the Candover abstraction during drought.

Under Annex 1, the Candover augmentation scheme can be brought online before Level 3, Phase 2 restrictions and can be used at the same time as steps 5 and 6 of the sequence outlined in Annex 1, rather than after them.

You know that WWF and S&TC UK’s position is that the Candover boreholes should be decommissioned completely, but it seems that, as there are no other sources of water that can currently be deployed in times of drought, until SWS starts to deliver its Long-Term Water Resources Scheme, the EA cannot yet decommission Candover completely.

However, noting that the Candover is subject to designation under the Habitats Directive, which the European Court of Justice has identified has a strict precautionary basis, and which has to be interpreted by reference to Article 174(2) of the Treaty, which itself establishes the precautionary principle as one of the foundations of the high level of protection pursued by Community policy on the environment, WWF and S&TC UK believe that, in this interim period, use of the Candover scheme should come in much later in the drought sequence.

WWF and S&TC UK would ask the EA and SWS to look again to consider how best this can be achieved.

### **Review of drought permit conditions**

Clause 15(3) of the draft Agreement states that there will be a “*six monthly review of drought permit document; any material changes in relevant legislation and stakeholder liaison*”.

WWF and S&TC UK would suggest that ‘further environmental information’ should be added to this list, so that, as new environmental information becomes available, that may show harm is being caused, such information must be fed into the review process and changes to terms made to address any new concerns. This would include the results of any monitoring which may show that the ecology of the rivers is being adversely affected.

### **Force majeure**

Finally, WWF and S&TC UK have some concerns over clause 25(e) - force majeure events - which includes “*an exceptional inability on the part of SWS to discharge its supply duty due to flows in the River Test falling to 355 Ml/d due to natural causes but the Agency has refused an application for a Test Surface Water Drought Permit due to a failure to meet the ESOR test under the WRA 1991, or the Agency has indicated that it is not possible to meet the ESOR test under the WRA 1991*”.

WWF and S&TC UK would welcome some clarity on the type of circumstances in which the parties believe this sub-clause may be engaged. If, in such circumstances, the ESOR test cannot be met, it is not clear what ‘exceptional inability on the part of SWS’ is sufficient. If

there is no exceptional shortage of rainfall, what natural causes could lead to such exceptional inability?

The Agreement should make it clear that the effect of any SWS failure to invest and deliver sufficient infrastructure and alternative resources in the 10 years running up to this Inquiry, and the subsequent years to 2027, does not allow this sub-clause to be engaged.

WWF and S&TC UK look forward to hearing from you on the above and to working with the EA over the next years to ensure the Itchen, Test and Candover reach the levels of protection they need.

Yours sincerely

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Solicitor

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