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## **The Water Act 2003: withdrawal of compensation on the grounds of Serious Damage**

### **A consultation on the principles to be used in determining whether a water abstraction may cause serious damage**

#### **1. About the Blueprint for Water**

1.1 The Blueprint for Water is a unique coalition of environmental, water efficiency, fishing and angling organisations which call on the Government and its agencies to set out the necessary steps to achieve “sustainable water” by 2015. The Blueprint for Water is a campaign of Wildlife and Countryside Link. More information is available at [www.blueprintforwater.org.uk](http://www.blueprintforwater.org.uk).

1.2 This response is supported by the following organisations:

- Amphibian and Reptile Conservation
- Angling Trust
- Buglife – The Invertebrate Conservation Trust
- National Trust
- Royal Society for the Protection of Birds
- Salmon & Trout Association
- The Rivers Trust
- The Wildlife Trusts
- Waterwise
- Wildfowl and Wetlands Trust
- WWF-UK

#### **2. Summary of our response**

2.1 The Blueprint for Water welcomes the commitment by the Government to start using powers under Section 27 in 2012. The legacy of unsustainable abstraction is a problem that urgently needs addressing and any additional policy tool that can add necessary momentum to the process is greatly appreciated.

2.2 However, we have serious concerns about the proposals set out in the consultation document. We believe that the principles and examples of indicators set out in the consultation will limit the application of Section 27 to very few (if any) water bodies. It is essential that the definition of ‘Serious Damage’ is proportionate to the abstraction problem faced, the legacy issues Section 27 was designed to address and the evidence collected through existing monitoring and investigation programmes.

2.3 We have a number of suggestions to amend the principles and indicators set out in the document, designed to help it make a useful contribution towards addressing the legacy of unsustainable abstraction. These include:

- Embedding the need to “protect from” in the principles, including adequately addressing the risk that serious damage is occurring but it is not scientifically possible to prove a causal link between the abstraction and ecological decline.
- Including water bodies where it is highly likely that abstraction is preventing achievement of good ecological status or potential in the table of candidate sites under Principle 2.
- Acknowledging that substantial loss of flow can be as damaging as complete loss of flow, due to reductions in water quality (which may also cause fish mortalities), reducing in fish passage, spawning habitat and an increase in stress in populations.
- Better reflecting the fact that unsustainable abstraction is a temporal problem in Principle 3. There will be times when relatively short periods (e.g. a dry summer and autumn) can cause long term impacts, such as eradication of an entire life stage of the population. Many affected rivers are in such a chronic state of decline that a drought period could cause irreversible damage. Such examples should not be excluded from the definition of ‘Serious Damage’.

### **3. Introduction**

3.1 In the Water White Paper the Government states “A power in the Water Act 2003 enables licences causing serious damage to our rivers, lakes and ground water to be removed or varied without compensation. We will start using this power from 2012 and will consult shortly on how to do so.”

3.2 The Blueprint for Water greatly welcomed this statement. Our freshwater environment has been seriously degraded, unsustainable abstraction has been a significant contributing factor, and, to date, the existing set of policy tools (including the Restoring Sustainable Abstraction (RSA) programme) has failed to satisfactorily address the problem. Any additional policy tool that can be used to inject much needed momentum into addressing the legacy of unsustainable abstraction is therefore extremely welcome. The compensation requirement has been one of the main reasons why the RSA has not been effective in addressing the legacy to date. Only a handful of licences have ever been reformed on a compulsory basis using compensation and many of the RSA sites are outstanding precisely because the compensation mechanism has stalled or funds are simply not yet available, which suggests how difficult the process is.

3.3 In this context, we consider the ability to use powers under Section 27 extremely important. Blueprint for Water members were involved in the discussions and various consultation processes leading up to the publication of the Water Act 2003. We understand that while Section 27 was not intended to be applied across the board, it was supposed to make a significant contribution towards addressing the legacy of unsustainable abstraction. The Water Act’s Regulatory Impact Assessment said:

“From 15 July 2012, the Environment Agency will be able to revoke without compensation non-limited licences under which abstraction is causing serious environmental damage. This should encourage greater consideration of the environmental impact of abstraction by all abstractors

and may encourage the voluntary conversion of licences to time-limited status. It is anticipated that compensation running to hundreds of millions of pounds will be required to be paid to stop or curtail abstractions that are damaging Natura 2000 sites (under the Habitats Directive) and Sites of Special Scientific Interest before this measure takes effect. The payment of compensation to those who cause damage to the environment is clearly inconsistent with the polluter pays principle, and this measure seeks to remove that inconsistency.”

- 3.4 We therefore have serious concerns about the proposals outlined in the consultation document, which will limit the application of Section 27 to very few (if any) water bodies. We feel that the definition of ‘Serious Damage’ must be proportionate to the abstraction problem we face and the evidence that we are collecting through existing monitoring and investigation programmes. We do not believe, based on our understanding of the problem sites, that any site will pass the criteria set out in the consultation document. We request that Defra publish figures on how many RSA sites or Water Framework Directive (WFD) water bodies currently under investigation for abstraction issues could meet the principles and example criteria proposed. If none - or very few sites - meet them, then the principles and criteria must be adjusted so that they are proportional; otherwise these powers are effectively useless.
- 3.5 We also have concerns that the principals and criteria are not commensurate with the problem the legislation was designed to address. Section 27 was introduced primarily to help deal with the legacy of unsustainable abstraction that has arisen since the introduction of abstraction licences in the Water Resources Act 1963 (many of which bear no or little relation to water availability or environmental limits). Unsustainable abstraction has resulted in a significant decline in freshwater ecosystem functioning over the last 50 years. This means that with the pre-abstraction baseline dating back decades in many cases, it is difficult to measure the impact of abstraction with high levels of certainty (unless of course, abstraction ceases and the recovery can be measured). We are concerned that the principles set out in the consultation do not reflect this context. Instead, they draw heavily on the Common Incident Classification Scheme (CICS), treating abstraction impacts as though they manifest as acute events (e.g. being able to measure number of fish killed), when in fact abstraction impacts are much more likely to have chronic effects manifesting over a period of time. It is also worth noting that many of our monitoring systems are not designed to measure the impacts of chronic damage (this has also been raised by the Environment Agency, Natural England and the Blueprint for Water in reference to failure of monitoring systems to identify the chronic impacts of drought).
- 3.6 In terms of process, we would like to see a definition of ‘Serious Damage’ that is derived from the conclusions of the scientific investigations into the impact of abstraction on ecology. Sites should be identified as ‘seriously damaged’ immediately after this point in the process (not after the options assessment as proposed in the consultation). This is because the current definition of serious damage (i.e. the problem) is completely independent of the remedial options available (i.e. the proposed solution(s)). We are concerned that to define ‘Serious Damage’ after the options assessment will only lead to further delays in delivering solutions, and undermine the credibility of the scientific basis on which the decision was made.
- 3.7 We are aware that, despite the guidance from the principles and the example criteria, decisions will more than likely be subjective – based on expert judgement on a case by case basis. We think this is right, but as a result it is essential that the process is transparent and involves stakeholders (i.e. not just the Environment Agency and the abstractor). Where protected areas are involved we recommend that consultation of the relevant statutory agencies is required, to

determine whether site integrity has been adversely impacted (or if there is a risk of adverse impacts on site integrity). There is a precedent for the involvement of the statutory authorities in such processes in ss.63 and 61(c) of the Habitats Regulations 2010, which concern the review of existing decisions and consents affecting Natura 2000 sites. It cannot be correct that the Environment Agency advises itself as to whether there will an adverse effect on site integrity and/or serious harm will result (and thus whether compensation is payable or not). The views of stakeholders should also be taken into account. In addition, we believe that, given the potentially subjective nature of decision making, the precautionary principle should be an integral part of the process.

#### 4. Risk of Serious Damage, weight of evidence and the precautionary principle

4.1 Section 27 enables the Secretary of State to amend licences without compensation in order to protect from serious damage on the following ground (subsection d):

*“the ground for revoking or varying the licence is that the Secretary of State is **satisfied** that the revocation or variation is **necessary** in order to **protect from serious damage**”* (our emphases)

4.2 We are concerned that the ordering of the consultation means it could be interpreted as saying that we need to wait until we can prove that serious damage had occurred before acting. Using the examples given in the document, internationally important habitats would be destroyed and species made extinct under this scenario. We think that this approach is incredibly dangerous and goes against the precautionary principle that is the basis of the WFD<sup>1</sup> and advocated in Articles 6(2) and 6(3) of the Habitats Directive.

4.3 We urge that the final guidance embeds the need to “protect from” in the principles (and does not represent this need in a separate section, as in the current proposal).

4.4 In terms of risk of serious damage, there are two types of risk:

- risk of serious damage from a future abstraction (as identified in the consultation document, which we feel is particularly important for those environments which are over-licensed);
- risk that serious damage is occurring but we have not been able to prove a causal link between the abstraction and ecological decline.

4.5 We feel that this latter risk is not yet adequately reflected in the proposals. It is incredibly important that the proposals reflect the limitations posed by the science and the monitoring regimes. We believe that in order for the Secretary of State to be “satisfied”, it is reasonable to say either that we are sure that abstraction is causing serious damage, or – importantly – that it is more likely than not that abstraction is causing serious damage. Legally, the application of Section 27 does not need to be limited to those very few cases where there is very high certainty that abstraction is causing damage (i.e. rivers with surface water intakes) and these are just a fraction of the problem. We think it is reasonable to also include groundwater and

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<sup>1</sup> The Water Framework Directive states that it is “based on the precautionary principle and on the principles that preventive action should be taken, environmental damage should, as a priority, be rectified at source and that the polluter should pay”.

other abstractions where the evidence suggests that it is more likely than not that abstraction is causing the damage.

4.6 In terms of the risk of future damage, we believe that this is a question of evaluation and judgment, and thus that it is necessary to take into account the probability that damage could occur as well as the significance of that potential damage. Beyond this, it is not at all clear how the proposal to use the same test for future damage as proposed for actual damage is to be applied in practice; some clarification and examples are needed.

4.7 It is important that the monitoring regime is 'fit for purpose'. We would like reassurance that the evidence collected through the RSA and WFD investigations is sufficient to support the indicators used as examples in the consultation document. It would be a travesty if we set out such indicators only to find that we cannot meet the tests because we have not collected sufficient monitoring data. Instead, we think the indicators/criteria should be designed to reflect the significant amount of information the Environment Agency has already collected about the abstraction problem.

## **5. Principle 1 - magnitude and extent of the damage**

5.1 Principle 1 aims to establish the extent and magnitude of the damage by describing an area of damage in terms of km, acres, proportion of sites or numbers of individuals affected. However, the table of examples attributes values such as 'small', 'substantial' or 'low level', which we feel implies the significance of the damage (which is to be established in principle 2). Principle 1 can be used to assess size, but it is essential that it does not make inferences about the importance of the damage linked to size and numbers alone. Scale needs to be considered in the local context and as such we do not support indicators such as classifying serious damage over 1km of stream.

5.2 The abstraction problem cannot be defined just in terms of a dry river (as implied in the table). There can be serious impacts related to low flows at critical times (e.g. during the Atlantic salmon, sea trout, sea lamprey and elver migrations) and the effect of chronic low flows over time (which can change the nature of the ecosystem, through increased sedimentation, change in aquatic flora and increased concentration of pollutants). Relatively small losses of flow can result in large loss of natural habitat (e.g. lowering of water levels in riparian zones and terrestrial habitat). Therefore, the example of 'small loss' is very difficult to interpret as it is not just measured in terms of river flow.

5.3 We question why the indicator of 60% Environmental Flow Indicator (EFI) is used to quantify serious damage, particularly as the Environment Agency currently classify highest risk in terms of 50% EFI.

5.4 We foresee problems with indicators that assess magnitude in terms of a proportion of a site. This suggests that only protected areas can be included and ignores the problems RSA has encountered working on a site level and the general acceptance of the need to take a catchment approach.

5.5 The indicator related to a substantial loss of individuals is difficult to quantify in terms of a chronic decline. It is difficult to see how this will be measured in terms of licences that have been in operation for 40 years or more. Will historic catch records, historic existence of now-defunct wild fisheries or other anecdotal evidence be taken into account?

## 6. Principle 2 – qualitative nature of the damage

6.1 We feel Principle 2 is essential. However, we disagree with a number of the examples set out in the table.

6.2 Firstly, we believe that water bodies should be included as candidate sites for application of Section 27 where it is highly likely that abstraction is preventing achievement of good ecological status or potential (and not dismissed, as in the current table). We are concerned that the proposals appear to give greater weight and consideration to the “no deterioration” aim of the WFD and less emphasis to the “good ecological status” aim. We believe that there is no legal justification for any such distinction. While we understand that the “no deterioration” objective is a current obligation, and the “good status” objective does not come into effect until 2015 at the earliest, amending abstraction licences is essential to meet the primary objectives of WFD in the longer term.

6.3 When Section 27 was introduced in 2003, it was envisaged as a mechanism to address all the abstraction-related WFD failures for water bodies not currently included in the RSA programme. We are concerned that these water bodies will ‘fall through the gap’, because protected areas, Sites of Special Scientific Interest (SSSIs) and other important sites are already included under RSA and are eligible to access compensation raised through the Environmental Improvement Unit Charge (EIUC); there currently is no clear mechanism for other water bodies.

6.4 Legal justification aside, the problem with elevating ‘no deterioration’ as the only WFD driver for Section 27 is the fact that the Environment Agency has interpreted ‘no deterioration’ against a 2009 baseline. As previously stated, Section 27 was introduced to help address the legacy of the 1963 abstraction licence allocation, and so in the majority of affected water bodies the deterioration would have occurred long before 2009 (and by then are probably already in such a degraded state that further deterioration is unlikely under current licence conditions).

6.5 Principle 2 also makes large inferences about the effects of abstraction on ecosystems. As stated in our response for Principle 1, it must be acknowledged that ‘substantial loss of flow’ can be as damaging as ‘complete’ loss of flow, due to reductions in water quality (which may also cause fish mortalities), reducing fish passage at the critical time of year for migratory species to reach spawning grounds, a reduction in spawning habitat and increased stress in populations resulting in increased vulnerability to disease and parasites and generally lowering fitness.

6.6 Measures must go further than protecting species designated under the Habitats Directive, or Schedule 5 of the Wildlife and Countryside Act (WCA) 1981:

6.6.1 the key species that are mortally affected by over-abstraction are fish, and many fish species are afforded little protection under the WCA 1981;

6.6.2 clear reference must be made to Section 41 of the Natural Environment and Rural Communities Act 2006, which lists species of principal importance;

6.6.3 the relevance of the proposed outcomes of *Biodiversity 2020* must be acknowledged. For example, one of the 2020 outcomes is to secure better wildlife habitats with 90% of priority habitats in favourable or recovering condition. Priority habitats include rivers and aquifer-fed naturally-fluctuating waterbodies. In assessing damage therefore, consideration must be

given to impacts on priority habitats and species and the extent to which low flows may hinder achievement of *Biodiversity 2020* outcomes;

- 6.6.4 the impact on chalk streams, a globally important habitat overly affected by unsustainable abstraction in England, must be specifically assessed; and
- 6.6.5 water bodies failing to meet good ecological status under the WFD are not precluded from being defined as suffering 'Serious Damage'. A case should be made on a local basis about the qualitative extent of damage to a water body.

## **7. Principle 3 – whether damage is reversible**

- 7.1 The table states that damage may not be serious if there is 'Substantial, but temporary, loss of flow where any effects are reversed after a short period of time' and if there is 'short-term loss of habitat but outside of key life stages of fauna dependant on that habitat'. Flow is a key factor which creates specific habitat conditions for a range of key species. Loss of flow fundamentally alters habitat and has the potential to impact on the viability of species in the short, medium and long term.
- 7.2 It must be recognised that flow is a type of habitat.
- 7.3 We are concerned that the indicators listed in the table do not reflect the fact that unsustainable abstraction is a temporal problem. There will be times (in very wet years for example) when there is sufficient water to support the abstraction as well as the ecosystem functioning. And there will be relatively short periods (e.g. a dry summer and autumn) that can cause long term impacts, such as eradication of an entire life stage of the population. Also, many affected rivers are in such a chronic state of decline that a drought period could cause irreversible damage.
- 7.4 We feel that the definition of drought used in the table needs to be clarified. At present, drought is defined on a regional basis and in many places individual catchments suffer localised effects of drought long before official drought status is declared.
- 7.5 We feel that defining the temporal nature of the problem would be better defined using Q or the proportion of time that the river fails to meet its EFI.

## **8. Examples in the proposal**

- 8.1 We would appreciate inclusion of real (anonymous) examples using WFD investigations and RSA sites, including examples where unsustainable abstraction is a long term problem and examples of abstractions from ground water.



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