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CC:
Lord Smith of Finsbury,
Richard Benyon MP,
Greg Barker MP,
John Aldrick,
Mat Crocker,
Pam Gilder

Wednesday, 02 February 2011

Dear Paul,

Hydropower

Fish Legal is the legal wing of the Angling Trust in England, but its lawyers also act for its members in Wales, Scotland and Northern Ireland. It has recently been involved in a number of instances of hydropower developments, and has received a number of files arising from a Freedom of Information request to the Environment Agency. This experience of particular cases and the new information has added to the concerns we detailed in our previous letter.

The AT, FL and other partner organisations involved are due to meet with you on 11th February following our letter of 10th December, but we think it would be helpful to you to have the benefit of this experience ahead of our discussion next week.

For several years now, and with the rise in the number of these schemes which are appearing on rivers throughout England and Wales, the members of Fish Legal have been extremely concerned at the effects on specific fisheries in which they have a direct interest. There is also growing concern at the cumulative negative impact of serial schemes on the migration of fish – not just salmonids but also coarse fish and eels which are dependent on free migration

We are aware that our European neighbours are increasingly sceptical about the benefits of hydropower on small rivers. In complete contrast the Environment Agency, Defra and DECC are promoting the installation and rehabilitation of these projects on inland waterways which we believe threatens fisheries and jeopardises the UK's ability to implement the Water Framework Directive and to ensure that watercourses are able to achieve good ecological status/ potential by 2015.

It appears that there is an Agency 'default position' which is *not* to oppose planning applications and to *approve* licence applications. Furthermore, angling clubs and riparian owners are excluded from consultation or are included for form's sake only. It further appears that developers' interests are raised not only above those of

angling and fisheries, but also of delicate and complex river environments, in order to achieve what amounts to a very small increase in the production of "green" energy. Indeed, the latest report commissioned by DECC suggests that the viable total might be as little as 0.2% of UK electricity supply.

The following outlines the results of recent experience and information from examination of Agency files on specific cases.

i) Process of Consultation

On most of the rivers where such schemes are located, the bed and banks of the river as well as the rights to fish will be privately-owned by fishing clubs, syndicates or riparian owners. Sometimes, the freehold to the fishing is integrated into land ownership. In other circumstances, it is separated off, so that there may be landlords who own the corporeal rights to the bed and banks, but where the fishing rights are held by others, such as angling clubs. Some hold rights up to and including the weirs and banks whilst others may have fishing above or below such structures. Any changes to the regime of flow, hydrology, habitats and fish migration will affect their rights, even at some distance from the development.

However, despite their interests in the land and the fishing rights, it is often the case that they are not consulted directly by the Environment Agency when applications for licences to impound or abstract are considered. The Agency position is that the commercial interests of the developers have to be protected but appears to have no equal regard to the interests of others. Even where they have objected to particular schemes or to particular issues with regard to, for instance, depleted reaches or poor fish passage, their objections have usually been ignored or have been considered and then rejected implicitly through the agreement or grant of the licence. This outcome is exacerbated by the lack of right of appeal against the grant of a licence by an affected party, whereas the applicant can appeal against a licence refusal. This asymmetrical risk should be overcome by the Agency taking more trouble to liaise with affected interests, not less.

Although we see this as a recurring pattern in England and Wales, we cite by way of example, Settle Weir on the Ribble (Settle Anglers), Gunthorpe Weir (Nottingham Anglers) and Sawley Weir (Pride of Derby Angling Club).

In the last two examples, the Nottingham Anglers and the Pride of Derby Angling Association have not been invited to be fully engaged in consultations where they believe their interests have been sidelined and de-prioritised below the interests of those applicants who do not own the land but who are planning to develop it for financial gain.

By way of clarification, the Pride of Derby Angling Club (the Sawley Weir case), own the fishing rights outright up to and on both sides of the Weir. A screen of 35 metres in length will be built on the upstream site and the turbines and the flume downstream of the weir will prevent fishing for another 25–30 metres or so. These create direct and obvious impediments to their fishing rights – damage which was never considered by the Agency. The indirect effects on flow, spawning areas below the weir and habitat were also not fully considered by the Agency, which appeared to agree a compromise with the developers despite the concerns expressed by its own local fisheries staff.

Of course, the Agency will argue that these are simply private rights issues. However, the Agency has specific duties under s6(6) of the Environment Act 1995 - "it shall be the duty of the Agency to maintain, improve and develop salmon fisheries, trout fisheries, freshwater fisheries and eel fisheries" – which we do not believe are being met in these cases.

ii) Involvement of fisheries staff at the Environment Agency

In the case of Gunthorpe Weir and Sawley Weir, as in other cases around England and Wales, we have found that, increasingly, the fisheries officers at the Environment Agency, including those with both general and local expertise, and those who have a full understanding of the implications of these hydro-schemes, are being sidelined in favour of Head Office policy with its determination to promote hydropower rather than take a balanced view on protecting the local as well as the global environment. That means that concerns expressed by local Agency staff from an early stage – including on fish passage, hands-off flows, the effects on weir pools and on angling amenity and habitat are sidelined in the name of compromise. The developer – unable to attain its required ends via local or area Environment Agency offices, has written directly to the Head Office at the

Agency; Head Office has pushed for a rapid resolution and the development is then pressed forwards with the exclusion of the concerns raised by local staff.

iii) Regulation v Negotiation

Now that the Fish Legal lawyers have had the opportunity to study the files on the Gunthorpe and Sawley cases, we have seen that much of the communication between the different departments of the Environment Agency and with the developer consist of a process of negotiation on the detail and not on the question of whether the development can go ahead.

In short, there appears to be a presumption that impoundment or abstraction for such schemes *will* take place but that the Agency should negotiate with developers over the relevant details. The avoidance of appeals seems to be paramount. Instead of the Agency maintaining baseline thresholds and minimum requirements designed to protect the ecology and the local aquatic environment, as should be expected of the regulatory body, the Agency falls into a situation where figures are offered and agreements made by way of compromise reminiscent of a second hand car sale. In the cases of Gunthorpe and Sawley Weir, it is apparent that the developer, when dissatisfied with Agency criticism of the proposed scheme, complained to Head Office and also to DECC from where it appears pressure has then been exerted on staff lower down to make decisions with the information available, mostly provided by the developer himself. It is also apparent that even the instructions to CEFAS for an independent report in the case of Gunthorpe had to be agreed with the developer. The final report was criticised by the developer and was then re-drafted to suit.

The end result is that a licence is produced which satisfies the developer, compromises on environmental protection, alienates the fisheries staff and those anglers and angling clubs who/which hold rights on the rivers and gives the general impression that the Agency is concerned more for *facilitating* development, rather than *regulating and protecting* the environment and, specifically, fisheries.

v) The licence

Over the period of negotiation with the developers, and by internal consultation with different departments, licences have been produced for Gunthorpe and Sawley Weir which are very similar. We believe that both licences contain terms which are unacceptable both to the environment and to our members and that crucial clauses are in fact utterly and completely unenforceable. We have listed below a few examples:

We generally believe that the hands-off flow figures at paragraph 4 (further conditions) of both licences have been reached through compromise and they are inadequate. They in effect allow the water levels of flow to drop to half of the Q95 (the flow which is exceeded for 95% of the time and generally accepted as representing the low summer flow) before the turbine will shut down – which would permit a flow lower than the lowest ever recorded in the river. In other words, at times when there will be no flow over the weir and little in the fish pass, the turbines will still be turning. The figures for the relationship between efficiency and flow are also misleading in that they assume consistency when, in fact, the efficiency rates drop at times of low river flow. Therefore, more water will actually be taken by the turbines than calculated when flows are low, leaving even less in the river.

At paragraph 4.8, the 20mm screen-spacing exceeds the recommendations made in the Good Practice Guidelines, by the EIFAC Eel Working Group and also in the report produced by CEFAS on behalf of the Environment Agency on the Gunthorpe Weir case.

There is a term at paragraph 4.32 in the Schedule A of Conditions which reads "the licence holder shall suspend hydro-electric power generation immediately if mortality, which is directly attributable to operation of the turbine, of more than 10 adult salmon/sea trout or 100 fish (including coarse fish, lamprey, non-migratory trout, eels or elvers) occurs in any 24 hour period."

There are several things which need to be said about this. Firstly, although the Environment Agency is keen to stress that it does not believe that the system will fail and that fish will be killed, it in effect allows for situations where fewer than the stated number of fish *can be* killed every day without any action being required. Therefore, as long as no more than 10 salmon and sea trout or 100 fish of other species are killed in the stated period, the turbines will continue to operate. The licence therefore allows fish to be killed without the possibility of enforcement.

This determining condition appears to have been provided in consultation with the legal department of the Agency. However, it has been borrowed from the guidelines for the categorisation of pollution events for the purposes of prosecution and is therefore not relevant in this situation.

We would point out that pollution events which are so categorised are treated on a one-off basis. Given that the turbine is designed to function continuously, it is unlikely that if a fish kill were to occur, that it would be an *anomalous event*: either the turbines will kill fish or they will not. If there is a problem, then it will relate to the nature of the turbines and the effectiveness of the screen on an ongoing basis.

Furthermore, who will then perform the investigation and measurement to determine how many fish have been/ are being killed? How will it be clear whether the dead fish which were observed were killed within the 24 hour period? Who will decide when the 24 hour period begins? Will some fish-deaths fall within the next 24 hour period? What evidence will count towards the numbers killed? Who will be doing the monitoring?

At paragraph 4.33, it is indicated that, "the licence holder shall not recommence hydro-electric power generation [following a fish kill as above] until the licence holder has taken appropriate remedial action and has confirmed in writing to the Agency that such action has been taken." In other words, if over 100 fish are killed, the sanction is to cease operating until the appropriate remedial action has taken place. There is therefore no provision for enforcement against the licence holder unless generation continues without permission.

The eel monitoring and protection provisions are equally flawed. "Each year when eels have been detected to be migrating between 1st September and 30th December, licence holders shall suspend turbine operation for a 12 hour period each day commencing at the civic lighting up time." Firstly, it is unclear who would be doing the monitoring here and who would order the shutdown of the operation. Secondly, it is unlikely that this would protect migrating eel populations. This is because eels do not necessarily migrate by the clock. Again, we feel that this term is completely impractical and unenforceable.

In the examples which we have given, the licences are for impoundments, although we would also refer you to a case Fish Legal is pursuing on the Ribble – Settle Weir – where the licence covers abstraction and is as problematic as in the two cases on the Trent which we are using here (hands off flow, the measurement of the amount abstracted, etc).

vi) <u>Policy, plan and project – the role of DECC and Defra</u>

Pursuant to Agency policy and its new streamlined system for licensing, and following the pressure exerted by DECC and Defra, not only are hydro-electric schemes on rivers encouraged, they are also falling into a general pattern of country-wide development which includes the listing by the Environment Agency of suitable rivers for projects to take place and even providing a map for this purpose. This quite clearly constitutes a strategic programme or plan.

DECC, Defra and the Environment Agency are overseeing the way in which such a plan is put into effect. However, it is quite apparent that the Environment Agency, Defra and DECC have not taken into account the *cumulative* effects of hydro-schemes on rivers – including the Trent – and where there have been multiple applications for hydro-schemes to be put in place – even where the Agency is actively facilitating developments on its own weirs on the Thames. The Trent has a recovering salmon stock and it is very likely that the heightening of the weirs and the consequential lack of provision for fish passage does little more than provide extra obstacles to the recovery of the stock, the ability of fish to migrate and the likelihood of the Environment Agency meeting its obligations under the Water Framework Directive and under section 6(6) of the Environment Act 1995.

Often, we see poor quality Environmental Impact Assessments submitted with applications. These deal, of course, with specific schemes which the Agency seeks to treat on a "case-by-case" basis. However, we are unaware of a Strategic Environmental Assessment having been drafted which would consider the wider issues of the cumulative effects on rivers in England and Wales We believe that this may be in contravention of the Strategic Environmental Assessment Directive which requires such an assessment to be produced – in the words of the preamble at paragraph 14, "identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme". Article 3 requires that an "

environmental assessment. . .shall be carried out for plans and programmes. . . which are likely to have significant environmental effects." ANNEX II Gives the criteria for determining the likely significance of effects, including " the cumulative nature of the effects".

vii) No objection to Planning Applications

At the end of the long period of negotiation for the licences on Sawley and Gunthorpe Weirs, the Agency drew up a review on the process itself. It was concluded that a policy should be adopted which appears to exclude objections from the Agency at the planning stage – and that the Agency's involvement should be limited to the licence-permitting stage only.

In other words, the Agency's default position *appears* to be that it will not object to planning applications but simply "advise" LPAs. Such a policy would limit the Agency in its regulatory function by *fettering its discretion* as a statutory consultee and suppressing the criticism of projects and developments by local/ area fisheries teams.

When we meet on 11 February it would be helpful if you or your team were able to address the following questions:

1. Can the Agency confirm that it will no longer object to hydro *planning* applications? If so, what are the grounds for such a policy?

2. How does the Agency propose to address the inadequate level of consultation of fisheries interests in licence applications?

3. Does the Environment Agency intend to carry out a full SEA for the national programme of hydroelectric developments? If not what are its criteria for a full SEA?

4. What weighting does the Agency intend to place on damage to fisheries in relation to economic benefits and the low energy output of small hydro schemes? How will this be measured? What is the basis for such a policy?

5. In over two years of dealing with the Agency on hydropower it is clear that the Climate Change and Water Resources functions have primacy over Fisheries and Bio-diversity. Now that you are aware of our concerns, do you find this acceptable, and if not will you address it?

We look forward to seeing you on the 11th.

With kind regards,

Mark Lloyd

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also on behalf of:
Huw Evans, Chairman, Afonydd Cymru
Arlin Rickard, Executive Director, Association of Rivers Trusts;
Ivor Llewelyn, Director (England and Wales), Atlantic Salmon Trust;
Paul Knight, Chief Executive, Salmon and Trout Association;
Shaun Leonard, Director, Wild Trout Trust