



Response to the Department for Environment Food & Rural Affairs ("Defra") Consultation on Reforming the Water Abstraction Management System "Making the Most of Every Drop" dated December 2013 (the "Consultation")

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the water working party.

UKELA makes the following comments on the proposals.

Preliminary Observations

In general there is a lack of detail in the consultation document. This gives rise to concern that a similar lack of detail will follow in the legislative changes that will be made and subsequent policy guidance will be left to fill in the gaps. There are too many references to future work being completed which should in fact be incorporated into the current proposals for reform. An example is the work to be completed to better model future water demand: the government cannot prudently design a new market for water without reference to a comprehensive overview of future demand, infrastructure needs (both private and public), and supply.

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Constitutional clarity, the rule of law and legal certainty require that a clear position which aims to direct the conduct of citizens and companies is set out in legislation – preferably through primary legislation - and further guidance and policy documents only serve to direct how that position is to be achieved.

Further, there is no mention (other than through a reference to the Consultation Impact Assessment) of the potential impact to customers' bills. Striving to reach a balance between protecting the environment, ensuring business certainty, and avoiding large impacts on customers' bills should be the key focus of any policy changes. A positive step to move towards this goal would be to more comprehensively join up proposals for reform with the River Basin Management Planning ("**RBMP**") process.

UKELA is also concerned on the timings of abstraction reform i.e. that reform will not take place until 2020 and that the Government intends to delay legislation on abstraction reform until the next Parliament. This makes the timescales for reforms extremely uncertain. UKELA is supportive of the view set out by the Blueprint for Water Coalition's response to the Consultation that provides "...Despite assurances from the Government and the Opposition that they would bring in abstraction reform, postponing any legislation until after the election makes the likelihood and timescales for reforms extremely uncertain. This is even more worrying given the proposals in the current Water Bill to introduce upstream competition and water trading - provisions that will incentivise the use of potentially damaging unused portions of existing abstraction licences....".

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Following on from UKELA's aim of making the law work for a better environment, UKELA's overriding concerns are as follows.

(i) Reforms in this area should protect the environment and ensure compliance with relevant legal standards and objectives.

These include environmental objectives for water bodies and protected areas under the Water Framework Directive (including the non-deterioration objective). The timeframes for complying with those standards should drive the implementation of reforms in this area.

(ii) Reforms in this area should make the legislation more coherent and transparent, and better integrated.

UKELA's research into the state of environmental law 2011-2012 highlighted why these things matter in making the law more effective and workable. It also identified a general need for more coherent, transparent and better integrated environmental legislation. The research reports are available at <http://www.ukela.org/aim5>.

Although not the main focus of that report, UKELA considers that the current regime for regulating water abstraction suffers from a serious lack of coherence and transparency. Provisions concerning the licence requirement, such as:-

- applications procedure,
- enforcement; and
- appeals

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are spread across a range of instruments including Part 2 of the Water Resources Act 1991 as amended by the Water Act 2003; the Water Resources (Abstraction and Impounding) Regulations 2006; the Anti-Pollution Works Regulations 1999 (as applied by the Abstraction and Impounding Regs); Environmental Civil Sanctions (England) Order 2010; Environmental Damage (Prevention and Remediation) Regulations 2009.

This fragmentation makes it hard to gain a picture of the regime as a whole. The use of cross-referencing, amendment and modification make the individual pieces of legislation hard to follow. The Water Resources Act 1991 provisions (as amended by the Water Act 2003) – especially those concerning protected rights - are particularly impenetrable.

UKELA notes the government's intention of bringing water abstraction within the Environmental Permitting Regulations. UKELA welcomes this move so far as it has the potential to simplify the law in this area, by replacing the present confusing array of legislation with one well-drafted instrument supported by easy-to-follow guidance. However, there is a risk that this move could make the Environmental Permitting Regulations themselves significantly more complex (and less coherent, integrated and transparent). Care should be taken to avoid this, for example when integrating the array of enforcement powers that apply to abstraction licensing with the more bespoke provisions for environmental permits; when designing bespoke provisions regulating water rights trading (which would not apply to other kinds of environmental permit); or if a two-tier system of controls were introduced, depending on whether the licence is for abstraction from a basic or an enhanced catchment.

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The two-tier system presents particular challenges in terms of complexity. UKELA notes the approach taken in the Consultation is that both the "Current System Plus" and "Water Shares" options would only be implemented in "enhanced catchments" and that Defra expects only a third of catchments to be classified as enhanced in the 2020s, rising to 50% in the 2050s. This could leave water firms in the position of having to understand and comply with two different water abstraction regimes for decades to come. This could be quite challenging going forward and does not provide a very streamlined approach and has the potential to be complex and costly from an administrative point of view. (See further the response to Question 16).

It may be the case that, once the detailed design of the reformed system for abstraction licensing has been settled, it differs so much from that applying to other kinds of environmental permit (enforcement powers, provisions for trading, timeframes for reviews/appeals etc.) that it makes more sense not to bring it within the environmental permitting regime (and EP Regulations). Instead, the water abstraction licensing regime could be set out in a single, freestanding piece of legislation, preferably primary legislation.

Response to consultation questions

Q1. What are your views on the proposal to convert seasonal licences into abstraction permissions based on water availability?

Due to greater climate variability, this is a welcome development. We are already seeing infrastructure investment being diverted to increasing storage capacity (in anticipation of a change in abstraction legislation), rather than the ultimate goal of increasing water efficiency. Regulatory regimes shape incentives and so the final

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policy direction should be drafted so as to provide an incentive to reduce water consumption overall.

UKELA supports the view that the current system lacks flexibility and is not responsive enough to balance the challenges of climate change and predicted increases in water demand with the pressures already on the environment. It is hoped that the move away from seasonal licences will introduce greater flexibility into the system based on water availability. UKELA also notes the need for there to be changes in the charges for abstraction to tie in with the end of seasonal licences. The charging regime will need to be addressed further e.g. will abstractors who can only abstract at higher flows pay less and those who can abstract at low flows pay more?

Q2. What do you think about the different proposed approaches to linking abstraction to water availability for surface water and groundwater abstractions?

The "Current System Plus" proposal seeks to improve the regulatory tools used in the current system and sets out a less complex change from the existing abstraction regime compared to the "Water Share" proposal. As such, UKELA's view is that the "Current System Plus" option should allow greater regulatory certainty and should be easier for the regulator to implement and police in practice. There should also be reduced costs to business i.e. the changes will not be so time-consuming to understand and to plan for.

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The "Water Shares" option, on the other hand, is much more complex and sets out a much more radical reform of the existing system. UKELA understands that the aim of the "Water Shares" proposal is to provide greater flexibility and for a regime that reacts better to changing patterns of availability e.g. compared to a regime where the abstraction licences are based on fixed volumes. However, there is very little detail in the Consultation as to how this option would work in practice and how it would provide industry with the long term certainty it requires on abstraction volumes/availability of water.

The "Water Shares" option may promote greater cooperation amongst catchment stakeholders. The Consultation seems to assume this as a consequence of the proposal, but it is far from clear how this is an inevitable outcome. Cooperative working amongst stakeholders should be built into the revised regime: without it there is a risk that weaker/smaller stakeholders will lose out to those with greater financial clout.

The Consultation indicates that an additional benefit of the Water Shares proposal is the additional flexibility and opportunity it offers in terms of water trading. Page 39 of the Consultation provides that *"the key difference between the Water Shares and the Current System Plus option is that the more sophisticated water management framework of Water Shares allows for pre-approval of a much greater range of trades, including shorter-term trades over the allocation period and upstream trades....this should deliver greater economic benefits....an added benefit of this option is that abstractors have an asset similar to land that they can mortgage and effectively plan investments around..."*. However, there is a lack of detail in the Consultation as to exactly how the Water Shares option would allow a

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much greater range of trades and how this will deliver greater economic benefits. We welcome further clarification in this regard.

UKELA is of the view that water trading may require a cap on the costs that a licence holder may charge for reselling water. Otherwise, there is the risk that holders of licences may be able to hold others to ransom over water trades, for example neighbours without access to boreholes or with licences permitting abstraction of an insufficient quantity for their needs. In essence regulation must ensure there is no collusion in the market, or any anti-competitive practices. Page 40 of the Consultation provides that "*...we consider that the current competition law is sufficiently robust to prevent distortions occurring as a result of market dominance*". However, UKELA is of the view that any abstraction reform should carefully address the risk of market distortion and build in measures to prevent this occurring rather than simply rely on the application of the Competition Act 1998.

Q3. Would it be helpful if abstraction conditions required abstractors to gradually reduce their abstraction at low flows before stopping, rather than being just on or off?

Yes, UKELA welcomes this proposal and agrees that this approach should provide greater flexibility for abstractors, with the overall objective of reducing the likelihood that abstractors would have to stop abstracting entirely. It is not clear why this is only included as part of the Current System Plus option and why it is not also a component of the Water Shares proposal (other than the potential for even greater complexity). However, the goal should be to ensure both flexibility and certainty. An on/off condition promotes neither.

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The abstraction reform regulations will need to ensure that conditions in abstraction licences are sufficiently clear to provide legal certainty, whilst avoiding the risk of environmental damage (e.g. if reductions in abstraction were too gradual). Achieving the correct balance is key.

The proposals set out in section 4.2.2 of the Consultation linking total groundwater abstraction to long-term groundwater availability only apply to "enhanced catchments" i.e. catchments with environmental stress or where there is demand for water trading. In "basic catchments" we understand that the intention is that groundwater abstraction limits would not be linked to water availability and would remain fixed between years. However, given unsustainable groundwater abstraction and the fact that groundwater levels in aquifers generally react to changing weather patterns more slowly than surface water, UKELA is of the view that groundwater abstraction reform should apply to all catchments (both basic and enhanced) at the earliest opportunity.

Q4. Do you think the proposal to protect the environment using a regulatory minimum level at very low flows is reasonable? If not, how do you think we should protect the environment at very low flows?

Yes, provided this is calculated in a way that really will protect the environment. The process and calculations used to set the "regulatory minimum level" need to be fully justified and transparent and kept under review. Any proposed changes to the minimum level should be subject to prior consultation with stakeholders i.e. stakeholders should be provided with sufficient notice to any changes (also see the response to question 13 below on notice periods).

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Ensuring the reliable supply of high quality water is imperative for both the protection of the environment and for the promotion of business certainty and flexibility. The larger the quantity of high quality water available, the more uses to which it can be put by a wider range of business.

Q5. What do you think of the proposal to require abstractors who discharge water close to where they take it from to continue to discharge a proportion in line with their current pattern?

The elements of the water balance calculation are river flows, groundwater recharge, abstractions, discharges, and a resource allocation for the environment and any other water uses or features that require protection. All point source discharges, irrespective of where they occur in relation to the source, should be taken into account.

Q6. How best do you think water company discharges should be regulated to provide reliable water for downstream abstraction without impacting on water quality objectives or constraining flexibility in water management?

No comment.

Q7. If you are an abstractor, how would these charging proposals affect your business?

N/A.

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Q8. To what extent would a system that charges abstractors partly on permitted volumes and partly on actual usage (ie a two part tariff) encourage abstractors to use less water?

UKELA supports the view that existing tariffs where the majority of abstractors pay for taking water based on the size (permitted volume) of the licence rather than water usage provide no incentive for abstractors to use water efficiently or to reward those who have invested in water efficient technology/taken innovative approaches to reducing water use. The current use of the two part tariff with a greater focus on actual water usage is only used by a minority of abstractors and its increased uptake should be welcomed i.e. a combination of licensed volume and actual water use. However, the cost implications/fairness of introducing an expanded "two part tariff" need to be explored further with a particular emphasis on the need to make sure there is no market distortion and that a "level playing field" is maintained. For example, large businesses with significant financial reserves can invest more in water efficient technology and reduce their abstraction costs more easily than smaller abstractors with limited financial resources.

Q9. Would quicker and easier water trading benefit abstractors now? How beneficial do you think it would be to abstractors in the future?

As noted above, an additional benefit of the Water Shares proposal is the additional flexibility and opportunity it offers in terms of water trading. However this may require a cap on the costs that a licence holder may charge for reselling water. It runs the risk that holders of licences permitting them to abstract in excess of their own requirements may be able to hold others to ransom over water trades, for example, neighbours without access to boreholes or who hold licences

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permitting abstraction of an insufficient quantity for their needs. In essence regulation must ensure there is no collusion in the market, or any anti-competitive practices.

Q10. To what extent do you see additional benefits in the wider range of trades that can happen under the Water Shares option, compared to the Current System Plus option?

See answer to question 9 above.

Q11. Do you agree that participation in abstraction trading should initially be limited to those with a direct interest in abstracting water?

See answer to question 9 above. The effects of the reform should be carefully monitored for any market distortions which should be rectified prior to widening the market. Limiting the market participants to those with a direct interest in abstracting water is the easiest way of facilitating monitoring, and by excluding those with no interest in water abstraction other than trading it as a commodity, would ensure a fair and sensible approach.

Q12. Do you support our proposals for a more consistent approach to making changes to abstraction conditions? If not how would you improve the proposals?

UKELA welcomes the proposals for a more consistent approach to making changes to abstraction conditions. It supports the proposal that the process for changing abstraction conditions should apply equally to abstractors regardless of when the

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abstraction licences were granted i.e. whether or not the licences are time limited. It is important that the impacts of changes to abstraction licence conditions (e.g. reductions in the amounts of water abstracted) are spread across all abstractors (rather than just impacting those abstractors with time limited licences). UKELA supports the view that the regulation needs to be designed carefully so as to strike the correct balance between providing regulatory certainty for abstractors and ensuring the right level of environmental protection. Consistency and transparency is absolutely fundamental at all stages of the review process for abstraction permissions.

The Consultation provides that "...abstraction conditions should be reviewable when there is evidence of unacceptable environmental risk being caused by abstraction or risks are less than previously judged". How would this public review process take place? What would be the triggers for the review? How will the "review thresholds" be set? The publicly available catchment abstraction rule documents will need to set out full details of the review process and would need to be published well in advance of any reviews taking place to provide businesses with the required certainty. How regularly will risk assessments be carried out? Who will carry out the risk assessments and how much will this cost? The detail of the risk assessments and what these will cover should be agreed in advance with the relevant stakeholders i.e. to make sure that the risk assessments meet their intended objective of allowing abstractors and prospective abstractors to assess and manage the likely risk of changes to abstraction permissions in a catchment.

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Q13. What notice periods do you think would best balance the needs of abstractors and the environment?

UKELA supports the view that it is very important that abstractors are provided with sufficient notice of any required changes to abstraction permissions. Administratively, it would seem that the notice periods are best tied in with the River Basin Management Plan cycles (i.e. 6 yearly cycles); however, climate change will increase the sensitivity and vulnerability of ecosystems. Six years of accumulated harm may lead to irreparable harm. A mechanism for implementing changes on a shorter time frame should be incorporated into the proposals to allow sufficient flexibility.

UKELA supports the view that the regulators should retain their ability to take immediate action to change/vary conditions of abstraction licences (i.e. without providing a notice period) where there is "serious damage" to the environment. Again, transparency will be required on what is meant by "serious damage".

Q14. Do you support the proposal to remove the payment of compensation for changes to abstraction conditions and to phase out the collection of the Environmental Improvement Unit Charge through abstraction charges?

ECHR Article 1 Protocol 1 provides that:-

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

We consider that there is a reasonable case based on public interest and environmental protection for removing the right to compensation. However to ensure that abstractors who have had their licence changed are treated fairly, an appeal system should be implemented. At present the only guarantee that this will be instituted is the phrase on page 47 that it is assumed that the legislation will include an appeal mechanism. This statement also includes only a reference to appeals based on factual errors. This is far too narrow: abstractors must be able to put forth arguments in relation to their own need and other any proposed changes (variation/modification/revocation) themselves.

Although the existing compensation system is rather cumbersome and delays the process of changing licences, the change will mean that abstractors will have to deal with the impact of any future changes to abstraction permissions on their business themselves. What are the likely costs implications for businesses on the removal of compensation? Transparency is required as to how the changes will ensure that there is a "level playing field" for all abstractors (regardless of size and financial strength).

We have no comment on the proposal to phase out the collection of the Environmental Improvement Unit Charge through abstraction charges; provided that funding for Environmental Improvement can be sustained from other sources.

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Q15. Do you agree it is important to take measures when moving licences into the new system that would protect the environment from risks of deterioration?

Yes. But it is far from certain and unduly optimistic (given the scale of the challenge) that the measures currently being taken will ensure that unsustainable abstraction will be eliminated prior to a new abstraction regime being implemented. The government should plan for the two reform processes to be merged in the eventuality that unsustainable abstraction remains a problem when the abstraction regime reform process commences. The need to continue to tackle unsustainable abstraction now is important given the fact that the full abstraction reforms are not due to come in until the 2020s.

Q16. Would you prefer us to consider the risks in each catchment when designing the rules for moving licences into a new system, or should we treat all abstractors in the same way regardless of water availability?

There should not be a top-down approach taken to catchment management (as opposed to the setting of standards). Local businesses and the communities in which they operate are best placed to determine challenges and how to prioritise remedial action so as to balance meeting the requisite environmental standards and the needs of the community.

The system must ensure compliance with legally binding environmental standards, such as the non-deterioration obligation under the Water Framework Directive. It appears that the proposed 'universal approach' may not deliver compliance: Table

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1 states that it 'may not reduce fully licensed abstraction enough in some catchments to ensure the environment will not deteriorate'.

If the only way of ensuring compliance with environmental standards is to go for a two-tier system, the system should be designed so as to minimise regulatory complexity (see introductory comments about ensuring coherence, transparency and integration). A poorly designed, complex system would likely lead to increased costs to business due to resources needed to make sense of and comply with the system; and to regulators due to additional costs of operating a two tier system (compared to a more streamlined unified system).

Q17. What would be the most effective method to calculate the new annual limits to be transferred into the new system (for example average annual, average peak or a combination of actual and licensed volumes)? And what assessment period should be used to calculate them?

No comment

18) Do you support the establishment of a water reserve to support economic growth?

No comment

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