



# Water Resources Act 1991

## 1991 CHAPTER 57

### PART II

#### WATER RESOURCES MANAGEMENT

### CHAPTER II

#### ABSTRACTION AND IMPOUNDING

##### *Consideration of licence applications*

### **38 General consideration of applications.**

(1) The [<sup>F1</sup>Agency] shall not determine any application for a licence under this Chapter before the end of the period specified for the purposes of the application in accordance with section 37(5) above.

[<sup>F2</sup>(1A) An application shall be determined in two stages in accordance with subsections (1B) and (1C) below if it is an application for a full licence or a transfer licence which, if granted—

- (a) would take effect immediately after the expiry of an existing licence of the same type (the “existing licence”) and be held by the same person as the holder of that licence; but
- (b) would in any other respect be different from the existing licence in a way which, if the existing licence were to continue without expiring, would require an application to be made under section 51(2) below for a variation of the licence.

(1B) So far as the application relates to any such difference as is mentioned in subsection (1A)(b) above, it shall first be treated for determination purposes as if it were an application for a variation under section 51(2) below (but as if the existing licence were to continue without expiring).

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- (1C) If the result of that would have been the grant of the application for variation of the licence, the application referred to in subsection (1) above shall be treated as one for a licence with that variation, and its determination concluded accordingly; and otherwise its determination shall be concluded as if it were an application for a licence with no such variation.]
- (2) Subject to the following provisions of this Chapter, on any application to the [F1Agency] for a licence under this Chapter, the [F1Agency]—
- (a) may grant a licence containing such provisions as the [F1Agency] considers appropriate; or
  - (b) if, having regard to the provisions of this Chapter, the [F1Agency] considers it necessary or expedient to do so, may refuse to grant a licence.
- (3) Without prejudice to section 39(1) below, the [F1Agency], in dealing with any application for a licence under this Chapter, shall have regard to [F3all the relevant circumstances, including any duty imposed by or under any enactment on bodies having functions in relation to inland waters (for example, navigation authorities and internal drainage boards), and shall have regard in particular to] —
- (a) any representations in writing relating to the application which are received by the [F1Agency] before the end of the period mentioned in subsection (1) above; and
  - (b) the requirements of the applicant, in so far as they appear to the [F1Agency] to be reasonable requirements.

#### Textual Amendments

- F1** Words in s. 38 substituted (subject to other provisions of the amending Act) (1.4.1996) by 1995 c. 25, s. 120, **Sch. 22 para. 128** (with ss. 7(6), 115, 117); S.I. 1996/186, **art. 3**
- F2** S. 38(1A)-(1C) inserted (1.4.2004) by **Water Act 2003 (c. 37)**, **ss. 15(2)**, 105(3); S.I. 2004/641, **art. 3(d)** (with **Sch. 3 paras. 2, 7**)
- F3** Words in s. 38(3) inserted (1.4.2004) by **Water Act 2003 (c. 37)**, **ss. 15(3)**, 105(3); S.I. 2004/641, **art. 3(d)** (with **Sch. 3 paras. 2, 7**)

### 39 **Obligation to have regard to existing rights and privileges.**

- (1) [F4Subject to subsection (1A) below,] the [F5Agency] shall not, except with the consent of the person entitled to the rights, grant a licence so authorising—
- (a) the abstraction of water; or
  - (b) the flow of any inland waters to be obstructed or impeded by means of impounding works,
- as to derogate from any rights which, at the time when the application is determined by the [F5Agency], are protected rights for the purposes of this Chapter.
- [F6(1A) Subsection (1) above does not apply when—
- (a) the application to be determined is one which does not fall within subsection (1A) of section 38 above only because paragraph (b) of that subsection is not satisfied; or
  - (b) the determination of an application is being concluded in accordance with subsection (1C) of that section.]

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- (2) In a case where an application for a licence under this Chapter relates to abstraction from underground strata, the [<sup>F5</sup>Agency], in dealing with the application, shall have regard to the requirements of existing lawful uses of water abstracted from those strata, whether for agriculture, industry, water supply or other purposes.
- (3) For the purposes of this Chapter a right is a protected right if it is such a right as a person is taken to have by virtue of section 27(6) above or section 48(1) below; and any reference in this Chapter to the person entitled to such a right shall be construed accordingly.
- (4) Any reference in this Chapter, in relation to the abstraction of water or obstructing or impeding the flow of any inland waters by means of impounding works, to derogating from a right which is a protected right for the purposes of this Chapter is a reference to, as the case may be—
  - (a) abstracting water; or
  - (b) so obstructing or impeding the flow of any such waters,in such a way, or to such an extent, as to prevent the person entitled to that right from abstracting water to the extent mentioned in section 27(6) above or, as the case may be, section 48(1) below.
- (5) For the purposes of subsection (2) above the [<sup>F5</sup>Agency] shall be entitled (but shall not be bound) to treat as lawful any existing use of water from underground strata unless—
  - (a) by a decision given in any legal proceedings, it has been held to be unlawful; and
  - (b) that decision has not been quashed or reversed.

#### Textual Amendments

- F4** Words in s. 39(1) inserted (1.4.2004) by [Water Act 2003 \(c. 37\)](#), **ss. 16(2)**, 105(3); S.I. 2004/641, art. 3(e) (with [Sch. 3 para. 7](#))
- F5** Words in s. 39 substituted (subject to other provisions of the amending Act) (1.4.1996) by [1995 c. 25](#), s. 120, **Sch. 22 para. 128** (with [ss. 7\(6\)](#), 115, 117); S.I. 1996/186, **art. 3**
- F6** S. 39(1A) inserted (1.4.2004) by [Water Act 2003 \(c. 37\)](#), **ss. 16(3)**, 105(3); S.I. 2004/641, art. 3(e) (with [Sch. 3 para. 7](#))

#### [<sup>F7</sup>39B Register of certain protected rights

- (1) The Secretary of State may by regulations make provision for and in connection with the establishment, and for the keeping and maintenance by the Agency, of one or more registers of protected rights which arise otherwise than by virtue of a licence under this Chapter to abstract water.
- (2) The regulations may, in particular, provide for—
  - (a) a register to relate to a prescribed geographical area, or for different sections of a register to relate to different geographical areas (whether prescribed or not);
  - (b) the inclusion of protected rights which arise other than by virtue of any provision of this Act;
  - (c) the form and contents of the register, and its inspection by members of the public;
  - (d) the procedure for applying for a protected right to be included in the register, including any information which is to accompany the application;

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- (e) cases in which it is the duty of the Agency to include a protected right in the register without an application for inclusion having been made.
- (3) The Secretary of State may by order designate any geographical area in respect of which a register, or a section of a register, relates as an area of compulsory registration.
- (4) If he does so, a protected right in that area which is not registered shall not have effect as a protected right for any purpose of this Act (other than that of registering it) for so long as it is not registered.
- (5) Subsection (4) above does not apply in relation to any protected right until after the expiry of the period of two years beginning with the date on which the order under subsection (3) above was made, or such longer period as may be specified in the order.
- (6) An order under subsection (3) above may be made only on the application of the Agency; but the Secretary of State may direct the Agency to make such an application.
- (7) Schedule 6 to this Act shall have effect with respect to applications for orders under subsection (3) above and with respect to the making of such orders.
- (8) The power to make orders under this section shall be exercisable by statutory instrument; and a statutory instrument containing an order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (9) Paragraphs (d) to (f) of section 219(2) below apply in relation to orders under this section as they apply to regulations made under this Act.]

#### Textual Amendments

**F7** S. 39B inserted (1.4.2004) by [Water Act 2003 \(c. 37\)](#), **ss. 18, 105(3)**; S.I. 2004/641, art. 3(f) (with [Sch. 3 paras. 3, 7](#))

#### 40 **Obligation to take river flow etc. into account.**

- (1) Without prejudice to sections 38(3) and 39(1) above, subsection (2) or, as the case may be, subsection (3) below shall apply where any application for a licence under this Chapter relates to abstraction from any inland waters or to obstructing or impeding the flow of any inland waters by means of impounding works.
- (2) If, in the case of such an application as is mentioned in subsection (1) above, the application is made at a time when no minimum acceptable flow for the inland waters in question has been determined under Chapter I of this Part, the [<sup>F8</sup>Agency], in dealing with the application, shall have regard to the considerations by reference to which, in accordance with section 21(4) and (5) above, a minimum acceptable flow for those waters would fall to be determined.
- (3) If, in the case of such an application as is mentioned in subsection (1) above, the application is made at a time after a minimum acceptable flow for the waters in question has been determined under Chapter I of this Part, the [<sup>F8</sup>Agency], in dealing with the application, shall have regard to the need to secure or, as the case may be, secure in relation to the different times or periods for which the flow is determined—
- (a) that the flow at any control point will not be reduced below the minimum acceptable flow at that point; or

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- (b) if it is already less than that minimum acceptable flow, that the flow at any control point will not be further reduced below the minimum acceptable flow at that point.
- (4) Without prejudice to sections 38(3) and 39(1) above, where—
- (a) an application for a licence under this Chapter relates to abstraction from underground strata; and
  - (b) it appears to the [<sup>F8</sup>Agency] that the proposed abstraction is likely to affect the flow, level or volume of any inland waters which are neither discrete waters nor waters comprised in an order under section 33 above,
- subsection (2) or, as the case may be, subsection (3) above shall apply as if the application related to abstraction from those waters.

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**Textual Amendments**

**F8** Words in s. 40 substituted (subject to other provisions of the amending Act) (1.4.1996) by 1995 c. 25, s. 120, **Sch. 22 para. 128** (with ss. 7(6), 115, 117); S.I. 1996/186, **art. 3**

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