

WATER ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Abstraction and Impounding

Sections 1 to 10 Restrictions on abstraction and impounding

32.

Section 1: Licences to abstract water.

This provides that abstraction licences will be of one of three types: a “full licence”, a “transfer licence” or a “temporary licence”.

33. One of these three forms of licence is required in order for a person to abstract any quantity of water which is above the licensing threshold (see section 6) and which is not otherwise exempt.
34. A “temporary licence” is required for any abstraction from a source of supply lasting less than 28 days.
35. A “transfer licence” is available for abstraction of water for 28 days or more for transfer from one source of supply to another without intervening use – for example, from one watercourse to another for the purposes of navigation. A transfer licence is also available for transfers between two points in the same source of supply where the abstraction is related to dewatering of works such as within a quarry. But it is possible to apply for a full licence if the applicant wants full protection from derogation for his transfer abstraction (see section 16).
36. A “full licence” is required for any other abstraction for 28 days or more. All current abstraction licences are of this type, by virtue of the provisions of section 102(1), even though some relate to abstractions that would require only a “transfer licence”. There is no need for existing licences to be converted unless the holder wishes to do it.
37. Provisions in this section are devolved to the Assembly.
- 38.

Section 2: Restrictions on impounding.

The current restriction on impounding of water makes it an offence to begin to construct or alter an impounding works unless an impounding licence has been obtained. This section amends the current restriction on impounding in order to impose controls throughout the lifetime of new impounding works. Impounding licences (whether issued before or after the coming into force of this section) will remain in force for the lifetime of the works, allowing the Agency to attach or modify conditions to the licence to ensure that impounding works do not cause damage to the environment.

39. Provisions in this section are devolved to the Assembly.
- 40.

Sections 3 and 4: Existing impounding works.

The new restriction on impounding introduced by section 2 does not apply retrospectively. However, there are impounding works that are unlicensed, either because their construction pre-dated the licensing regime or a licence has been revoked and some of these works are, or in the future may, cause environmental problems that cannot be addressed by the Agency under its current powers. Section 3 provides the EA with a new power to serve notice to require that an impounding licence is obtained and failure to comply with such a notice would be an offence. Section 4 provides the EA with a power to serve a works notice on the relevant person (normally the owner) to carry out remedial works on an existing impoundment that is causing environmental damage. Failure to comply with the notice is an offence.

41. Provisions in these sections are devolved to the Assembly.

42.

Section 5: Rights of navigation, harbour and conservancy authorities.

Under the current regime, all transfers of water from one area of inland water to another by navigation, harbour and conservancy authorities in the exercise of their functions as such are exempt from licence control. The effect of this section, taken with section 1, is to limit that exemption and to require the licensing of transfers of water from any source of supply to a water system operated by these authorities. While a transfer licence will suffice, those authorities may also apply for a full licence if they wish (see section 16). Transfers wholly within water systems operated by those authorities (for example, transfers from canal pounds to canal locks) do not require a licence. Neither do transfers between any such system and other inland waters which are connected only to that system (for example, ditches draining only to canals, or reservoirs capable of discharging only to canals). Where a transfer is made to another source of supply from which it is subsequently abstracted, the transfer will be licensable. Construction or alteration of impounding works by those authorities will remain exempt from licensing if the works do not have any effect beyond the authority's water system.

43. Provisions in this section are devolved to the Assembly.

44.

Section 6: Rights to abstract small quantities.

This section sets a quantity of 20 cubic metres in any period of 24 hours as the normal threshold above which an abstraction licence is required, irrespective of the source of supply or the purpose of the abstraction (unless it is otherwise exempt). This replaces the present, more complex exemptions framework for small abstractions, under which more than 20,000 abstractions of less than that quantity require licences. The section also provides that where a licence exists, the small quantity exemption does not apply in addition to the licensed quantity for abstractions for the same purpose, but it can be used in addition to a licensed abstraction for a different purpose.

45. The Agency may apply (or can be directed to apply) to the Secretary of State for an Order setting a different threshold, which may be greater or less than the normal figure in specified areas, inland waters or underground strata. If the threshold is reduced and a previously exempt abstractor is unable to obtain a licence to abstract the volume he had previously abstracted, then compensation may become payable for loss or damage caused to that abstractor.

46. Provisions in this section are devolved to the Assembly.

47.

Section 7: Rights to abstract for drainage purposes, etc.

Abstractions for dewatering mines, quarries or engineering excavations will generally require a licence (usually a temporary or transfer licence – see section 1). But this section also recognises that such abstractions may be required as an emergency measure and it therefore allows them to take place without a licence provided that the EA is notified within five days of their commencement. The Agency may determine that the abstraction is not necessary by reason of an emergency and is able to require a licence application to be made in the normal way. The Agency may also serve notice on the operator that it considers that what started out as an emergency abstraction has ceased to be one.

48. This section also removes two activities from the definition of “land drainage”, and thus from the exemption from licensing. These activities become subject to licensing control. They are: warping (which is the abstraction of water which contains silt onto agricultural land so that the silt can deposit and act as a fertiliser) and irrigation. At present, of those abstractions made for irrigation it is only those that are made for spray irrigation that require abstraction licensing. The growing use of trickle irrigation and the use of land drainage systems in reverse to maintain field water levels and for warping prompts the proposed change. Land drainage i.e. removal of flood water, remains exempt from abstraction licensing. The many minor transfers of water within an Internal Drainage Board district are exempt from licence control, but initial transfers into a Board’s district will be licensable.

49. Provisions in this section are devolved to the Assembly.

50.

Section 8: Amendments relating to section 7.

The amendments provided by this section are consequential on section 7. They move to sections 199 and 199A the provisions of sections 30 and 31 of the WRA, which require an operator to give prior notice to the EA of mining operations affecting water resources. The section provides that the Secretary of State may delegate decisions on appeals against notices to a third party. The section also brings the definition of flood defence for the purposes of defining minimum river flows in section 21 of the WRA into line with that used for flood defence purposes in section 113 of the Act.

51. Provisions in this section are devolved to the Assembly.

52.

Section 9: Power to provide for further exemptions.

This section provides the Secretary of State with the power to make regulations so that the restriction on abstraction and impounding works shall not apply in certain cases. Such cases are referred to as “exemptions”. Regulations ensure that an exemption must satisfy any prescribed conditions that may be attached to it, and provide the Agency with the power to determine whether any exemption should apply. Any exemption may apply generally or relate to a geographical area or particular source of supply. Again, this is intended to enable the Agency to exercise levels of control of water resources appropriate to the environmental impact of an abstraction in relation to local conditions.

53. Provisions in this section are devolved to the Assembly.

54.

Section 10: Orders under section 33 of the WRA, etc.

Existing legislation provides that a navigation, harbour or conservancy authority or the Agency may apply to the Secretary of State to remove the restriction on abstraction from any source of supply. This new provision provides for the Secretary of State to make regulations to revoke any such order. That revocation can include a similar order

made under any local or private Act. In addition, the orders under this section can also repeal the provision in any local or private Act containing the power to make such an exception order in future, once all orders under that power have been revoked. The section also allows an order to make provision for the continuation of existing rights to abstract without a licence and for compensation where these are curtailed and result in loss or damages.

55. Provisions in this section are devolved to the Assembly.

Sections 11 to 14 Applications for a licence

56. Provisions in sections 11 to 14 are devolved to the Assembly.

57.

Section 11: Who may apply for a licence.

This establishes the qualification necessary in order to apply for abstraction licences: a right of access to the land where the abstraction takes place. Occupation of land continues to serve as evidence of a right of access. Applicants have to demonstrate that they have the right of access for at least one year from the date on which the licence is to take effect, or for the intended duration of the licence if that is less than one year.

58.

Section 12: Abolition of combined licences.

Currently, the EA can issue a licence for both an impoundment and an abstraction as a 'combined licence', although only a small number of such licences exist. With the proposals to time limit all new abstraction licences and for an impoundment licence to remain in force until revoked, there are unlikely to be situations in future where a combined licence might be issued. This section therefore repeals section 36 of the WRA, thereby removing the Agency's power to issue a combined licence. Existing combined licences will be converted into separate abstraction and impounding licences.

59.

Section 13: Applications: types of abstraction licence.

Applicants have the initial choice of what type of abstraction licence to apply for. This section enables the EA to require an applicant for one type of abstraction licence to apply instead for another type, or to group several related applications together. The applicant can appeal to the Secretary of State against the Agency's decision.

60.

Section 14: Publication of application for licence.

Licence applications must be brought to the attention of those likely to be affected by them. This section enables the detailed publication requirements, including the circumstances in which they are dispensed with, to be prescribed in secondary legislation. Where necessary, publication requirements may be undertaken by the EA, whose costs are reimbursed as a separate element of the licence application fee.

Sections 15 to 18 Consideration of licence applications

61. Provisions in sections 15 to 18 are devolved to the Assembly.

62.

Section 15: General consideration of licence applications

This section provides that where an application for the renewal of a time-limited abstraction licence is sought on terms that would constitute a variation of the licence if the licence were continuing, the licence is considered in two stages. Firstly, those aspects

that constitute the variation element would be determined, and then the application is determined for the licence as a whole, so that the impact of the variation element on the protected rights of other abstractors (see sections 16 and 17) can be assessed for the new licence. Where renewal is sought on the same terms as the expiring licence then this two stage determination is not applied, because there would be no need to reconsider the impact on existing protected rights.

63. The section also provides that the EA is to have regard to the statutory duties of bodies such as drainage and navigation authorities brought into the licensing system by sections 5 and 7 when considering licence applications from those bodies.

64.

Section 16: Protection from derogation.

Under the current legislation, the EA cannot grant an abstraction or impounding licence that derogates from any “protected rights”, except with the consent of the person entitled to those rights. Those rights recognise an established entitlement to abstract a certain quantity of water, for certain purposes. This section limits the protection against derogation for new licence holders to rights arising from a full licence. For transfer and temporary licences however, some effective protection of licence-holders’ rights is delivered by the continuing requirement upon the EA to have regard to river flow levels and other lawful uses of inland waters when granting licences. Existing licence holders who fall outside licensing as a result of the revised threshold introduced by section 6 continue to benefit from protection from derogation. Where an application is made to renew an existing time-limited licence, then that application will be assessed against the protected rights of other abstractors which existed at the time of the original grant. The rights of those later abstractors will therefore not trump the rights of earlier, established abstractors.

65.

Section 17: Protected rights.

Currently, owners of land bordering rivers or lying above groundwater are taken for the purpose of the WRA to have rights to abstract up to 20 m³ of water per day for domestic purposes or agricultural purposes other than irrigation (e.g. for stock watering). Section 17 preserves the classes of abstractor that benefit from the protected rights. The volume of water to which the protected right applies may, however, be reduced to coincide with a lower threshold introduced by an order made under new section 27A (section 6). Should the threshold subsequently rise, the protected right will remain at the lower level. Examples of how this works are given in the box below

The exemption threshold – worked examples

Consider the case of an abstractor A who has a protected right for his abstraction from groundwater for domestic purposes and is in a position to abstract 13 cubic metres per day in an area where the exemption threshold is 20 cubic metres per day.

- i) Case 1. Where the local threshold is raised to 25 cubic metres per day. The abstractor may abstract up to 25 cubic metres per day but his protected right remains at 13 cubic metres per day (assuming he remains in a position to abstract that amount).
- ii) Case 2. Where the local threshold is reduced to 10 cubic metres per day Abstractor A will require an abstraction licence for 13 cubic metres per day, and (if that were granted) would enjoy corresponding protected rights by reason of that licence.
 - a) If abstractor A can only obtain a licence for 10 cubic metres per day, then he may be able to seek compensation in relation to losses suffered as a result of the difference in volume between what he could previously abstract, and what he can now abstract.
 - b) Where the licence is issued for 13 cubic metres per day then no loss arises.
- iii) Case 3. If the threshold under case 2 is raised at a later date to 25 cubic metres per day. In this case, the licence would no longer be required and the protected right would be

set at the previously licensed volume of 10 (case 2 a) or 13 (case 2 b). But abstractor A could take up to 25 cubic metres per day in total without an abstraction licence.

- iv) Case 4. If the threshold under case 3 is lowered to 5 cubic metres per day then a licence to abstract more than this volume would again be required. Compensation could become payable if a licence cannot be granted for the volume being abstracted under the protected right (either 10 or 13 cubic metres per day). The protected right under the licence will be set at 5 cubic metres per day. If a further change results in the threshold rising again, then the protected right for the unlicensed abstraction will remain at 5 cubic metres per day, but abstractor A can abstract volumes up to the new threshold without a licence.

66. The section also applies a protected right to those abstractors whose licence lapses by virtue of falling below the relevant volume or purpose threshold for so long as they continue to abstract. The protected right lapses after four years of non-abstraction unless the abstraction is irregular in nature (e.g. it is only required under certain conditions) in which case it may continue if the Agency agrees. These provisions will also apply where a person transfers part of his licensed abstraction rights to someone else, and that part (or his remaining part) no longer requires an abstraction licence (provided some abstraction occurs within any given period of four years).

67.

Section 18: Register of certain protected rights.

In water stressed areas, it may be necessary for the EA to have detailed knowledge of all the protected rights to which it must have regard in its licensing activity. Section 18 provides a power to make regulations to set up a Register of Protected Rights in such areas. Where a Register exists, an abstractor will need to register his protected right within two years of the Register coming into existence if he wants that right to continue.

Sections 19 to 20 Form, contents and effect of licences.

68. Provisions in sections 19 to 20 are devolved to the Assembly.

69.

Section 19: Form, contents and effect of licences.

Currently, abstraction licences granted to some types of applicants (notably water undertakers) are not required to state the purpose for which the abstracted water is used or the land on which it is used. This section places all new abstraction licences on the same footing by requiring them all to state the purpose of the relevant abstraction, but none to state the land on which the water is to be used.

70. This section also requires every new abstraction licence to state the dates on which it takes effect and expire, but it does not specify a licence length. The Environment Agency will determine licence length on a case-by-case basis according to local circumstances. There is a policy presumption, set out in *Taking Water Responsibly*, that a licence will be renewed subject to three tests being met. These tests, in outline, are: that water resources in the area are sustainable and the abstraction will not create unacceptable environmental effects; that the holder has a continuing requirement to abstract; and that the abstracted water is used efficiently.
71. Full licences must state the quantity of water authorised for abstraction but this is at the EA's discretion in the case of transfer and temporary licences. A licence with a duration of longer than 12 years must also state a minimum volume to which abstraction can be reduced without compensation being payable under section 25.

72.

Section 20: Limited extension of abstraction licence validity.

If the Agency receives a valid application to renew a full or a transfer licence which has a duration of more than twelve months on the same terms at least three months before its expiry date, this section provides that the licence will not expire until the application is determined.

Sections 21 to 22 Modification of licences

73.

Section 21: Modification of licences.

At present the EA is under a duty to revoke an impounding licence at the request of the holder, who can thereby avoid any conditions attached to the licence that impose continuing obligations. The section changes the Agency's duty to revoke to a power and allows the revocation of an impounding licence to be made conditional on removal of the works or restoration of the site to the Agency's satisfaction.

74. Provisions in this section are devolved to the Assembly.

75.

Section 22: Proposals for modification at instance of Agency or Secretary of State.

This ensures that the EA is able to vary impounding licences in a way that requires that the impounding works themselves are modified as necessary. Specific publication and notification arrangements for licence modification proposals are removed from the primary legislation.

76. Provisions in this section are devolved to the Assembly.

Section 23 Transfer and appointment of licences

77.

Section 23: Transfer and appointment of licences.

The current provisions for succession to abstraction licences are replaced by this section. The condition for allowing transfer is that the transferee has a right of access to the abstraction point. A licence may also be apportioned between two or more people as long as the total quantities of water abstracted by the new holders do not exceed the quantity authorised to be abstracted under the old licence. The holder of a licence and the proposed transferee(s) are required to give notice to the EA of their agreement to the transfer or apportionment of that licence.

78. Licences are considered to be part of the estate of a deceased holder, and of the property of a bankrupt, and vested accordingly. Full or transfer licences will lapse after 15 months if the EA is not informed of the vesting by the person in whom the licence vests.

79. Impounding licences will also be transferable in the same way as abstraction licences (but may not be apportioned), and similar arrangements apply for licence succession on death and bankruptcy.

80. Provisions in this section are devolved to the Assembly.

Sections 24 to 27 Claims and compensation

81. Provisions in sections 24 to 27 are devolved to the Assembly.

82.

Section 24: Claims arising out of water abstraction.

This section establishes a new statutory right of action against an abstractor, whether licensed or not, whose abstraction causes loss or damage to another person. It also removes the existing defence against civil actions in respect of licensed abstractions. This means that those persons who do not have protected rights or fishing rights and who have suffered loss or damage as a result of an abstraction may seek financial compensation for that loss or damage from the abstractor. The courts are not able to grant an injunction against a licence holder if that risks interrupting the public water supply, or putting public health or safety at risk. Bearing in mind the new statutory right of action, other civil claims (except for negligence or breach of contract) are now excluded.

83.

Section 25: Compensation for modification of licence on direction of Secretary of State.

The Agency has powers to revoke or vary any abstraction licence; its decision is subject to appeal to the Secretary of State. Currently, if a licence that has not been used for seven years is revoked or varied, then the holder is not entitled to compensation. This section reduces the period of non-use for this purpose to four years. The Agency would not be expected to revoke licences that are held for valid contingency planning reasons (so-called 'sleeper' licences).

84. For new licences, this section removes any entitlement to compensation if a licence is varied in order to protect water availability in the source of supply to which the licence relates. Compensation is not payable where a variation does not reduce the amount of water licensed to below the minimum amount specified in any licence. This provision only applies to a licence (of greater than 12 years duration) that has been granted after section 19 of this Act has come into force, where the variation takes effect twelve years or more after the licence was granted.

85.

Section 26: Recovery of compensation from new licence-holder.

The EA can already revoke a water undertaker's abstraction licence and grant a licence to another undertaker for water resources management reasons. In such circumstances, this section allows the Agency to recover costs from the water undertaker granted the licence to compensate the undertaker whose licence was revoked.

86.

Section 27: Withdrawal of compensation for certain revocations and variations.

This section provides that, with effect from 15th July 2012, an existing abstraction licence without a time limit may be revoked or varied without compensation. This power is confined to cases where the Secretary of State is satisfied that it is necessary in order to protect any waters, channels or underground strata, or any flora and fauna dependent on them, from serious damage. The conservation agencies and the Government will consult on guidance to define such damage.

Sections 28 to 29 Water resources management schemes

87.

Section 28: Water resources management schemes: other abstractors.

This section gives the EA the power to enter into arrangements with holders of abstraction licences other than water undertakers for securing the proper management of the waters they use and the reservoirs and works under their control. The arrangements may require reference of any questions arising under the arrangements to the Secretary of State for determination.

88. Provisions in this section are devolved to the Assembly.
89.

Section 29: Water resources management schemes: referral to Secretary of State.

Water undertakers or other abstractors may be unwilling to enter into or maintain (or vary) water management arrangements with the EA. This section gives the Agency the power to refer to the Secretary of State the question whether such arrangements should be entered into, renewed or varied and, if so, what their terms should be. The Secretary of State may refer such issues to an appointed person for determination.

90. Provisions in this section are devolved to the Assembly.

Section 30 Enforcement

91.

Section 30: Enforcement notices, and related procedures and offences.

Where abstraction or impounding takes place without a licence or does not comply with the terms of a licence, this section gives the EA the power to issue an enforcement notice. This can only be done where it appears to the Agency that the licence breach or failure to comply is causing or could cause significant damage to the environment. The enforcement notice requires cessation of the breach or failure to comply and the carrying out of specified works or operations to remedy or mitigate the effects. The Secretary of State may make regulations about enforcement notices. A person who fails to comply with an enforcement notice is guilty of an offence and liable, on summary conviction, to a fine not exceeding £20,000 or, on conviction on indictment, to a fine. If necessary the Agency may take proceedings in the High Court to secure compliance with the notice. The Agency may also carry out the works itself at the expense of the person on whom the enforcement notice is served, if the person fails to comply with the notice. The Agency may also carry out the works itself at the expense of the person on whom the enforcement notice is served, if the person fails to comply with the notice.

92. Provisions in this section are devolved to the Assembly.

Sections 31 to 33 Miscellaneous

93.

Section 31: Bulk supplies.

This section permits the EA, in consultation with the Authority, to propose to a water undertaker that they enter into a bulk supply agreement with another water undertaker where that is necessary for the proper use of water resources. The Agency would be able to take any refusal to enter into such a bulk supply agreement into account when considering whether to grant abstraction and impounding licences.

94. Provisions in this section are devolved to the Assembly.
95.

Section 32: Visiting forces.

This section ensures that visiting forces are placed in no more favourable a position than UK forces when Crown exemption from abstraction or impoundment licensing is lifted.
96.

Section 33: Application of certain water resources provisions to this Act.

The changes to the abstraction and impounding regime introduced in Part 1 of the Act generally modify the WRA. But sections 3, 4 and 10 do not, and instead they will remain as free-standing provisions of the Water Act 2003. Sections 3,4 and 10 do, though, relate

*These notes refer to the Water Act 2003 (c.37)
which received Royal Assent on 20th November 2003*

to the functions and powers under Chapter 2 of Part 2 of the WRA. The provisions of section 33 therefore apply a number of the general provisions of the WRA to these sections as if they are part of the WRA. This includes for example, the power to obtain information from abstractors under section 201.