

PROPOSED TRANSITION OF ABSTRACTION LICENSING INTO ENVIRONMENTAL PERMITTING

This short article is a brief summary of a dissertation completed as part of an LLM degree, which was supported by Envireau Water. Planned changes to abstraction licensing legislation has the potential to improve the current system, but also has potential pitfalls. The dissertation examined the experience of similar changes in the past.

The abstraction of water from surface waters or groundwater ('controlled waters') is currently controlled through the abstraction licensing system, under the Water Resources Act 1991 ('WRA 1991'), as amended by the Water Act 2003 ('WA 2003').

Discharges into surface waters were previously controlled through 'discharge consents' under the WRA 1991. These controls were transferred into the environmental permitting regime in 2010, which is now controlled by the Environmental Permitting (England and Wales) Regulations 2016 ('EPR 2016'). The permitting regime started as a framework for pollution control measures, but has developed as different activities have been added, including for example, controls on flood risk activities.

The Government has proposed transferring the controls on abstraction into the environmental permitting regime, principally as a means of 'better regulation'.

This proposed transition is linked with various fundamental reforms of the abstraction licensing system intended to update the controls and address historical problems, principally to gain a greater control over the allocation of water. The licensing system originated from abstractor protections, and was not designed to regulate all available water resources or protect the environment. This situation has led increasingly to difficulties in achieving the objectives within the Water Framework Directive ('WFD').

Proposals for some reforms were included in the WA 2003, and proposals for additional reforms, along with the transition of abstraction controls into permitting, were included in the Water Act 2014 ('WA 2014'). However, it was only on 31 October 2017 that new regulations to remove most of the exemptions from

abstraction licensing were issued, which came into force on 1 January 2018. A DEFRA policy paper 'Water abstraction plan 2017' containing a timetable of reforms and the transition of controls, was released on 15 December 2017.

The abstraction licensing system currently has more advantages for existing abstractors than the regulators, including:

-  protected rights of abstraction, with compensation for licence revocation or variation that derogated protected rights;
-  some, now limited, exemptions from abstraction licensing;
-  low costs, based on cost recovery rather than environmental impact.

However, there are also difficulties for potential new abstractors, as the water resources in a catchment are allocated first to abstractors with 'licences of right', then to existing time-limited licences. Some of these licences are unused 'sleeper' licences, and trading of water rights, particular on short time scales, is difficult.

As the abstraction licensing system originated from the protection of abstractors rather than the protection of water resources and the environment, it causes difficulties for the regulator in dealing with unsustainable abstractions and abstractions causing environmental damage. This lack of control over the majority of abstractions leads to a failure in achieving the WFD objectives.

Environmental permitting has advantages to both operators and regulators through simplifying environmental controls into a single regime, using a risk-based approach to conditions, regulation and enforcement. The inclusion of several environmental controls or multiple sites under one consolidated permit could reduce administrative costs to regulators and businesses. The change would bring the controls on discharges and abstraction back together, and may help the regulator by linking abstractions and discharges on a catchment basis.

However, this simplification could also be a disadvantage to operators if the control of some activities are over-complicated and costs increase, particularly where only an abstraction permit is required.

The use of the risk-based approach within permitting should mean that lower risk abstractions should require less regulation and hence lower charges. However, as standard rules permits cannot be varied and have no inspections, they are suitable for only a small proportion of low risk permits.

Discharge consents became bespoke permits on transition into permitting, hence it would be expected that abstraction licences would do the same, and would only be reconsidered on renewal. A limited number of new applications for abstraction permits may also be considered for standard rules. Therefore, only a small proportion of abstraction permits would have the benefit of being considered lower risk, with associated reduced requirements and costs, unless they were excluded or exempted.

The rights of abstractors and the problems with abstractions causing environmental damage are not automatically affected by a transition into permitting, but through any reforms implemented at the same time.

The controls on point-source discharges were integrated into permitting relatively easily, with some simpler controls kept for standalone permits for discharges. Therefore, there may be scope for some existing controls on abstractions to be kept within permitting.

Controls on flood risk activities were also easily integrated into permitting, again keeping some simpler requirements. Higher-risk activities need to be permitted, with lower-risk activities exempted. These controls were an example of a non-pollution control measure being integrated into permitting. The change provided greater controls for the regulators, but costs increased for the regulated.

The current control scheme in Scotland has many similarities with permitting, but with abstractions and discharges being controlled together. A major change proposed in Scotland is for less prescriptive conditions on authorisations that require operators to find their own ways of achieving the required environmental protections, such as the WFD objectives.

If a similar change is applied in England and Wales to the permitting regime, then it could have considerable impacts on operators if the objectives result in very stringent controls on abstractions and discharges.

Also, the process for undertaking a groundwater investigation in Scotland can require a greater level of control than currently required under abstraction licensing, which would have significant impacts if applied in England and Wales.

Reforms to the abstraction licensing system are required by Government as the overall lack of control on abstractions contributes to a failure to meet the Water Framework Directive objectives. Pressures on water availability are only expected to increase the problems. Integration of the control of abstractions into permitting should help the regulators concentrate their resources on the higher risk activities, linking abstractions and discharges to enable better management. However, without the reforms, there would still not be enough control over abstractions to help achieve the WFD objectives.

Undertaking the reforms without the integration into permitting would improve the control of abstractions, but the controls would remain in two different legislative regimes. If changes were made, a more flexible permitting system could be introduced in the future, using a catchment based approach that linked abstractions and discharges, with conditions set to achieve the WFD objectives for the particular water body.

The integration of abstraction controls into permitting, along with the required reforms, would provide the best opportunity for the Government to achieve the Water Framework Directive objectives, but with significant impacts on abstractors.

The proposed changes could result in a better, fairer system but they also have the potential to have hard impacts. It is important that all abstractors are aware of these changes and that they engage in the consultations that will occur over the next few years. If we don't engage in the change process, then it is likely that a better, fairer system will turn into a more expensive, less flexible system.



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