



THE WHOLLY OR MAINLY CONUNDRUM

The exemption from abstraction licensing for dewatering of groundwater or rainwater in mining, quarrying or other engineering works has been removed.

*“Where dewatering of groundwater takes place a licence will be required where the abstracted water is from water contained in any underground strata whether hydraulically isolated or not. Establishing whether and how groundwater interacts with other water sources and the impacts this may have on the environment and other abstractors is part of the considerations of an abstraction licence decision. **A licence is not required for the dewatering of wholly or mainly rainwater from an excavation.**”* (Defra/Welsh Government ‘Government response to consultation on changes to water abstraction licensing exemptions in England and Wales: New Authorisations’, October 2017).

This may seem straightforward, but there is no definition of “wholly or mainly” within legislation.

In terms of water abstraction licensing the term is used in Water Resources Act 1991 (‘WRA 1991’) in s.221(3)(b) where it refers to water contained in underground strata from an excavation shall be treated as such if “...*the level of water in the excavation depends wholly or mainly on water entering it from those strata...*”.

On this basis the Environment Agency take the view that “...if the excavation is not ‘wholly or mainly’ dependent on water entering from the strata then it doesn't meet the legal definition of a source of supply for licensing purposes.” If we take “water entering from strata” to mean groundwater, then this suggests that if the water is not “wholly or mainly” groundwater, then an abstraction licence is not required.

Looking at the opposite, the dewatering of excavations will need to be licensed if the source of water is “wholly or mainly” from groundwater, irrespective of where that groundwater comes from. For example, if the excavation is “perched” above a regional water table and a high level (shallow) seepage from the surrounding ground enters the void, then the groundwater seepage is a

source of supply. If then the seepage provides “wholly or mainly” the water abstracted via dewatering, then a transfer licence would be required. If however, the water pumped from the quarry is mainly incident rainfall, with water from the surrounding strata making up only a minor part, then a transfer licence would not be required.

THE LEGAL USE OF “WHOLLY OR MAINLY”

While the term “wholly or mainly” is not defined within abstraction licensing legislation or guidance, it is used in other areas of law. For example, the legal meaning of the words has been considered in some financial cases, in particular for the purposes of the Inheritance Tax Act 1984 s.105(3)¹. A paper by Tony Lawton² discusses the problems that have arisen over the interpretation of the words “wholly or mainly” as they appear in various pieces of legislation. It reviews the approach taken in different cases but observes that the meaning of the words in any particular case is always a question of fact not law, and that “not only may the actual percentage required to constitute ‘mainly’ vary from case to case, but that it may be necessary in mathematical terms, to look closely at the denominator as well – i.e. percentage of what precisely?”.

There is a long use of the test of “reasonableness” in English law that could be considered in the Environment Agency’s determination of “wholly or mainly”. However, the courts will only interfere in a decision made by a public authority if it can be shown that they have contravened the law, unless it is so unreasonable that no reasonable authority could ever have come to it (‘Wednesbury’³ unreasonableness). As there is no legal definition, the courts would be likely to support the Environment Agency, unless it was an extremely unreasonable decision. The onus will be on the operators to agree a position with the Agency that depends on the site-specific context.

¹ *Inland Revenue Commissioners v George* [2003] EWCA Civ 1763; [2004] S.T.C. 147 (CA (Civ Div)).

² Lawton, Tony ‘Wholly or mainly’ (2004) *Solicitors Journal* 148(46), 1392-1393.

³ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223

WHAT DOES THIS MEAN IN PRACTICE?

The legal phrase "wholly or mainly" is untested with respect to water but examples are available of where it has been interpreted in other arenas and it would seem that a reasonable and case specific approach should be taken. On that basis it is reasonable for us, the industry or professionals, to put forward a reasonable suggestion.

It may be reasonable to take the view that if 51% of the dewatered water was rainwater then it could be considered as "mainly" rainwater and not require a transfer licence. Alternatively, from a pragmatic view and taking error of quantification into account a greater percentage of rainfall might be considered, which is the view taken by the Environment Agency.

It is likely that the basis of an assessment to demonstrate that pumping water is not "wholly or mainly" water from the ground is likely to be based on:

-  Cessation of pumping during prolonged dry periods
-  A simple water balance based on annual pumped volumes, catchment area and annual rainfall
-  An event water balance based on pumped volumes following a specific rainfall event or period of wet weather, rainfall amounts and catchment area.

The Environment Agency will only assess the applications it receives. If the "wholly or mainly" position applies to any site, it is for the operator to take a view and decide whether to apply or not.

Subsequent to 1 January 2020, it will be for operators to defend their position, in the event that enforcement action was threatened or taken.

It would be possible for an operator to apply for a transfer licence irrespective of the position, and the Environment Agency may decide that a licence is not required. Alternatively, the operator may find that they are bound by a licence that is unnecessary, and related conditions that are costly.

Envireau Water suggest that for quarries where it is "obvious" or "probable" that there is no significant groundwater inflow, that an appropriate assessment is undertaken and a position taken. During the transition arrangements period there is an open dialogue with the Environment Agency and advantage should be taken of this to discuss and refine the position.

HOW CAN ENVIREAU WATER HELP?

We are the UK's leading independent, abstraction licensing and water management specialists.

Our clients include the largest mineral operators in the UK, as well as other major private abstractors. We have secured abstraction licences for clients in some of the most environmentally sensitive catchments otherwise 'closed' to new abstractions. This gives us unparalleled in-house experience of complex licensing scenarios. We specialise in technical negotiation with the Regulators and design of appropriate licences.

We have been actively involved in the development of the "new authorisations" process since it was first raised in about 1998, and more recently as active members of the Mineral Products Association Water Group. This is combined with our work across other trade associations, market sectors and related specialist interest groups; giving us a view of the issues, the policy development and regulator decisions, that no other similar consultant has.

Get in touch today on 01332 871 882 to see how we can support you.



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