

EXPLANATORY MEMORANDUM TO
THE WATER RESOURCES (ABSTRACTION AND IMPOUNDING)
REGULATIONS 2006

2006 No. 641

1. Introductory Information

1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Statutory Instrument revokes the Statutory Instruments¹ which set out the existing procedural requirements for making licence applications to abstract and impound water. It provides within a single instrument updated procedural requirements and additional procedures in line with amendments to the water resources management regime in the amended Water Resources Act 1991 and the Water Act 2003.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 There are no matters of special interest.

4. Legislative Background

4.1 This instrument is made under the powers in sections 25A, 34, 36A, 37, 37A, 43, 45, 51, 52, 55, 59, 64, 161B, 161C, 189, 199, 199A, 219 and 221 of the Water Resources Act 1991 (the “1991 Act”). Many of these provisions were amended or inserted into the 1991 Act by the Water Act 2003 (the “2003 Act”). The powers in section 3 of the Water Act 2003 are also used.

4.2 These provisions enable regulations to be made prescribing the procedural requirements governing:

- applications for abstraction and impounding licences
- applications by licence holders for the variation of an abstraction or impounding licence
- applications by licence holders for the revocation of an impounding licence
- abstraction and impounding by the Environment Agency, and
- enforcement, works and conservation notices.

4.3 This instrument prescribes how a licence application to abstract or impound water should be made and how the Environment Agency must deal with it. The instrument specifies:

¹ the Water Resources (Licences) Regulations 1965 (SI 1965/534), the Water Resources (Miscellaneous Provisions) Regulations 1965 (SI 1965/1092) and the Water Resources (Licences) (Amendment) Regulations 1989 (SI 1989/336).

- the information required to support a licence application
- the information to be included in the Environment Agency's acknowledgement of receipt of the application
- the advertising arrangements and the circumstances in which advertising is or may be dispensed with
- how the Environment Agency deals with the application
- the time limits within which appeals must be made and the procedures for appealing.

4.4 The instrument also specifies procedures and time limits for the Environment Agency to follow in respect of its own proposals for abstraction or impounding. It prescribes a process for deciding and challenging licence applications by the Environment Agency.

4.5 In addition, the instrument specifies the content of enforcement notices and works notices and applies established procedures in the Anti-Pollution Works Regulations 1999 in respect of appeals against these notices and also conservation notices.

4.6 Finally, the instrument makes a number of miscellaneous provisions including: the procedure for advertisement of proposals by the Environment Agency to modify licences; appeal procedures in respect of notices issued by the Environment Agency requiring existing impounding works to be licensed; and the information which must be contained in the Environment Agency's public register of abstraction and impounding licences.

4.7 The instrument is being made jointly for England and Wales to ensure a consistent approach is applied in both countries, and in particular to those water companies that operate in both England and Wales.

5. Extent

5.1 This instrument extends to England and Wales.

6. European Convention on Human Rights

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1 Defra and NAW have, respectively, policy responsibility for water resources in England and Wales for ensuring that the Environment Agency fulfils its duty to secure the proper and efficient use of water resources. The duties of the Environment Agency include the regulation of water abstraction from sources of supply, including rivers, lakes, canals and underground sources through a system of licensing to protect rights to abstract water and minimise damage to the environment. The Environment Agency's duties also include the regulation of impounding works.

7.2 In 1998 the Government issued a consultation paper² proposing a number of administrative and legislative changes to the existing system of water abstraction and impounding licensing in England and Wales. The drivers for these changes were our increased understanding of environmental issues and changed public attitudes since the framework for water resources licensing had been put in place in the 1960s.

7.3 The Government received over 200 written responses to the 1998 consultation exercise and in 1999 issued *Taking Water Responsibly*³ setting out its decisions in the light of the consultation. Decisions made in that document reflected the Government's intention that the abstraction authorisation system should contribute to sustainable development by protecting and, where possible, enhancing the aquatic environment whilst facilitating economic growth and higher living standards with minimum impact on water customers' bills. *Taking Water Responsibly* indicated a number of specific changes for which new legislation was needed.

7.4 As a result, in 2000 the Government published for consultation a draft of a Water Bill⁴ with a range of provisions to help manage water supplies as sustainably, reliably and efficiently as possible. One of the key features of the draft Bill comprised the changes to water resources management, including abstraction licensing, set out in *Taking Water Responsibly*.

7.5 In 2002 the Government published its response⁵ to the questions and concerns raised by respondents on the proposals set out in the draft Bill, and on a number of topics which elicited comment but on which it had not been proposed to legislate. The Water Bill was introduced to Parliament in February 2003 and received Royal Assent in November 2003.

7.6 A joint Defra/ Welsh Assembly Government consultation paper was published in September 2005 about the proposed content of this instrument. The consultation document was sent to over 100 organisations including the water industry, representative bodies of others who abstract or impound water and environmental interest groups.

8. Impact

8.1 A Regulatory Impact Assessment is attached to this Memorandum.

9. Contact

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² *The Review of the Water Abstraction Licensing System in England and Wales – Consultation Paper*. DETR and Welsh Office, June 1998

³ *Taking Water Responsibly – Government decisions following consultation on changes to the water abstraction licensing system in England and Wales*. DETR and Welsh Office, March 1999

⁴ *Water Bill – Consultation on draft legislation*. DETR, November 2000

⁵ *Water Bill – Consultation on Draft Legislation: Government Response*. DETR, May 2002

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can answer any queries regarding this instrument.

Regulatory Impact Assessment of The Water Resources (Abstraction and Impounding) Regulations 2006

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1. Purpose and intended effect of abstraction and impounding regulations

1.1 Objective

Defra and the National Assembly for Wales (NAW) have policy responsibility for water resources in England and Wales and ensure that the Environment Agency fulfils its duty to secure the proper and efficient use of water resources. The duties of the Environment Agency include the regulation of water abstraction from sources of supply, including rivers, lakes, canals and underground sources through a system of licensing to protect rights to abstract water and minimise damage to the environment. The duties also include the regulation of impounding works.

New regulations are required to implement the provisions of the Water Act 2003 as they relate to abstraction and impounding licensing. It is intended that new licensing regulations will revoke and replace the secondary legislation currently governing licensing procedures and contained in:

- The Water Resources (Licences) Regulations (SI 1965/534)
- The Water Resources (Miscellaneous Provisions) Regulations (SI 1965/1092), and
- The Water Resources (Licences) (Amendment) Regulations (SI 1989/336)

The new regulations will govern the procedures to deal with:

- applications for abstraction and impounding licences
- applications for the variation of abstraction and impounding licences by the licence holder
- applications by the licence holder for the revocation of an impounding licence
- abstraction and impounding by the Environment Agency, and
- enforcement, works and conservation notices.

1.2 Background

The Water Act 2003 makes a number of major changes to the law governing the abstraction and impounding of water through a system of licences administered by the Environment Agency. The Act provides for various matters of detail relating to the administration of the licensing regime to be prescribed in regulations.

Many of the existing Regulations date from 1965 and need to be revised and consolidated to take account of changes made by the Water Act 2003. The new Regulations will apply to both England and Wales.

One of the most significant procedural changes required by the Water Act 2003 concerns the publication by the Environment Agency of a notice of an application for a licence. The onus for advertising presently rests with the applicant. Section 14 of the Water Act 2003 requires the publication of a notice of all applications for abstraction and impounding licences (except temporary licences that are not within the scope of the provision). A presumption of regulatory control and impact therefore already exists within primary legislation approved by Parliament.

One of the objectives of the Regulations will be to provide scope for exception from the public notice requirement and discretion for the Environment Agency to decide when the normal requirement could be dispensed with in accordance with delegated powers approved by Parliament. To that extent, the measures regarding the publication of application notices will be deregulatory. Where the exception or dispensation from publication of a notice applies, their impact will be beneficial for those affected.

The Environment Agency already has considerable experience in operating a similar discretion under existing legislation⁶, but this is currently limited to abstractions of less than 20 cubic metres per day.

2. Consultation

Extensive public consultation has been undertaken by the Department and the NAW and its predecessors, the DETR and Welsh Office, regarding its review of the abstraction and impounding licensing system in England and Wales. Principal consultations affecting the licensing system to date include:

⁶ Section 37(6) Water Resources Act 1991.

- (i) *“The Review of the Water Abstraction Licensing System in England and Wales”* – June 1998.
- (ii) *“Taking Water Responsibly – Government decisions following consultation on changes to the water abstraction licensing system in England and Wales”* – March 1999.
- (iii) *“Water Bill – Consultation on draft legislation”* and *“Regulatory, Environmental and Equal Treatment Appraisals”* – November 2000.
- (iv) *“Water Bill – Consultation on Draft Legislation: Government Response”* – May 2002.

An RIA was published when the Water Act was going through the Parliamentary process⁷. This provided an overall assessment of the impact of measures in the Act including new abstraction and impounding licensing provisions.

As part of the implementation of the Water Act 2003, regulations to deal with these procedures have been developed and the proposals to be contained within the regulations were consulted upon between September and November 2005⁸. The consultation document was sent to over 100 bodies including the water industry, representative bodies of others who abstract or impound water and environmental interest groups. Comments were sought on the partial RIA which accompanied the consultation document and this RIA takes account of comments received.

This RIA identifies in more detail the potential additional costs or burdens placed upon those who abstract or impound that would be brought about by the procedural requirements of the new licensing regulations. The major change in this respect is over the arrangements for advertising licence applications.

This RIA relates to England and Wales. It sets out the views of central Government and the Welsh Assembly Government.

The Department and the National Assembly for Wales has also consulted the Environment Agency about the regulations that it will be responsible for implementing and administering.

3. Options

- (i) Do nothing. If nothing were done, notice of all applications for licences would have to be published as required by the Water Act 2003,

⁷ Water Bill – Regulatory Impact Assessment, Environmental and Equal Treatment Appraisals, July 2003 available from the Defra website:
http://defra.gov.uk/environment/water/legislation/pdf/riaupdate_030722.pdf

⁸ Consultation on Proposed new abstraction and impounding licensing regulations to apply in England and Wales and Proposed changes to the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 – September 2005

regardless of the effects of the proposal. In cases where the impact of an application on the environment were negligible or inconsequential and, the risk to other water users was low, this option would impose an unnecessary burden and administrative costs on applicants as well as the Environment Agency without any obvious benefit to society.

- (ii) Prescribe appropriate, but limited cases for exception and dispensation from the public notice requirement, according to the likely environmental impact and effect upon water users. This option would provide an appropriate level of discretion for the Environment Agency to dispense with the publication of notices and is unlikely to pose a major risk to the environment or water users.
- (iii) Prescribe appropriate, but more extensive cases for exception and dispensation from the public notice requirement, according to their likely environmental impact and effect upon water users. This option would unreasonably restrict the scope for public consultation and interest in applications for licences where there may be a legitimate cause for concern.

4. Costs and benefits

Economic

The cost of placing public notice of an application for a licence to abstract or impound water under the existing requirements can vary significantly depending on the rates charged by local newspapers, but can cost anything from £300 to £1,000.

The Environment Agency receives approximately 1,200 applications for new licences each year and a further 200 applications each year to vary existing licences. It is estimated that about one third of all of these applications will no longer be necessary after the deregulation of abstractions below 20 cubic metres per day, leaving about 938 applications and variations per year. The exercise of dispensation from the public notice requirement will depend on the effects of a particular application and each one will need to be considered on its merits. It is estimated that up to 50% of these or some 469 may be eligible for dispensation from the publication of a notice. At an average cost of say £500 per application, this would represent an overall saving of £234,500 in any year to those applicants benefiting from the dispensation from advertising.

Most applicants arrange publication of the necessary notices themselves and do not therefore incur any additional costs such as advice from lawyers or other professionals. Where exception or dispensation from placing the public notice applies, applicants will save those advertising costs and any personal time involved in undertaking that task.

To simplify the application process, the responsibility for publishing notice of an application for a licence will in future pass to the Environment Agency. The Environment Agency will not make any charge for publication of a notice

on its own web site, but where a notice needs to be published in a newspaper, the Environment Agency will recover the actual cost of that notice from the applicant. It will also need to make a modest charge to cover the cost of administering this service. Publication of any necessary notice by the Environment Agency instead of the applicant will reduce the risk of errors and additional costs of corrective action by applicants. This simplified system should also deliver cost savings to all applicants whose applications need to be published

The possibility of errors being made in the advertising process cannot be ruled out altogether and an error might require the notice to be re-advertised. If the error was made by the newspaper then the newspaper will be expected to meet the expense of rectifying it. Similarly, the Environment Agency, rather than the applicant, would bear the costs of remediation where an error was attributable to its actions. Ultimately such costs incurred by the Environment Agency would be recouped from the generality of licensed abstractors within the region concerned. The costs, though, would be imperceptible to other licence charge payers.

The administration charge made by the Environment Agency is unlikely to be greater than the cost which applicants would incur if they published the notice themselves. The Environment Agency's scheme of charges for water abstraction is currently under review following consultation on a new scheme during 2005. The consultation document proposed an administration charge of £100 that the Environment Agency will need to make in order to recover its costs for publishing notices. The Environment Agency's new scheme will continue to operate on the principle of cost recovery; there is no element of profit within the charges it makes for the services or rights it provides.

Environmental

No environmental costs have been identified but the changes to the abstraction and impounding regulatory regime introduced through the Water Act 2003, of which these regulations are an integral component, are designed to promote the sustainable use of water resources.

Social

The new regulations will replace three archaic and prescriptive sets of regulations with a single set of modern and more flexible regulations.

4.1 Sectors and groups affected

The Water Act 2003 has removed from licence control abstractions of water where these are at a rate of less than 20 cubic metres per day.

The legislation governing the publication of a notice of an application for a licence applies equally to all those who seek to abstract or impound water.

The dispensation from public notice would operate based on the Environment Agency's assessment of the likely environmental impact of the proposal and

its effect upon water users. Exercise of the discretion on this basis therefore makes no distinction between categories or groups of applicants, whether they are private individuals, small businesses, public sector bodies or water companies.

Exceptions from advertising relating to the renewal of time limited licences on the same terms and the conversion by itself of a permanent licence to a time limited status, only concern existing licences. These types of applications will have been subject to the publication of a notice when first applied for, except in the case of Licences of Right, granted under special arrangements under the Water Resources Act 1963 or the Water Act 1989. Exception for these types of application from publication of a further notice will be beneficial to the long-term sustainable management of water resources and will pose no risk to the environment or water users. The exceptions from advertising for these types of application will also make no distinction between the category of applicant and are unlikely to impose disproportionate effects on any particular group or sector. In these circumstances, the Regulations are not expected to give rise to any issues of equity or fairness.

The Crown is presently exempt from abstraction and impounding licensing control but this exemption will end under transitional arrangements to be designed for those who will become subject to licensing for the first time. There will, though, continue to be an exemption from advertising in respect of licence applications that the Secretary of State/ the Assembly directs would be contrary to the interests of national security.

5. Small firms impact test

Small firms abstracting water at rates of less than 20 cubic metres per day have been removed from licence control by provisions in the Water Act 2003 which have already been implemented. This will be particularly beneficial to farmers and other small to medium size enterprises.

Where a small firm needs to apply for a licence, the cost of doing so will depend to a large extent on the charges made by the newspaper in which it is published. These charges can vary significantly from paper to paper. These costs are beyond the control of the Environment Agency or the Regulations. The simplified arrangements for advertising coupled with the exceptions and dispensation from publishing notices should ensure that the cost to any applicant, including administration charges made by the Environment Agency, are well within affordable limits for a solvent firm of any size.

Charities do not typically abstract water in quantities greater than this level and are therefore unlikely to be affected.

6. Competition assessment

The Office of Fair Trading's guidelines for competition assessment, published in February 2002 sets out a competition filter of nine questions, the answers to which determine the need to complete a competition assessment as part of

an RIA. The following grid summarises the questions and responses that are relevant to the Regulations.

Number	Question	Response
1	In the market(s) affected by the new regulation, does the firm have more than 10 per cent market share?	No
2	In the market(s) affected by the new regulation, does any firm have more than 20 per cent market share?	No
3	In the market(s) affected by the new regulation, do the three largest firms together have at least 50 per cent market share?	No
4	Would the costs of the regulation affect some firms more than others?	No
5	Is the regulation likely to affect the market structure, changing the number or size of small firms?	No
6	Would the regulation lead to higher set-up costs for new or potential firms compared with the costs for existing firms?	No
7	Would the regulation lead to higher on-going costs for new or potential firms compared with the costs for existing firms?	No
8	Is the market characterised by rapid technological change?	No
9	Would the regulation restrict the ability of firms to choose the price, quality, range or location of their products?	No

7. Enforcement and sanctions

When implemented, section 14 of the Water Act 2003 will transfer the responsibility for publishing notices of applications for licences to the Environment Agency. An application for a licence will not be complete or valid if it is a case where a public notice is required.

Abstracting or impounding water without a valid licence already carries with it the risk of prosecution by the Environment Agency and, on summary conviction, Magistrates' courts may impose a fine of up to £20,000 or, on indictment, offenders may be liable to an unlimited fine or imprisonment or both. No additional sanctions are deemed necessary to ensure compliance with the proposed regulations

8. Implementation and delivery plan

It is planned that new abstraction and impounding Regulations will be implemented with effect from 1 April 2006.

9. Post-implementation review

The Environment Agency will monitor the effectiveness of the revised regulatory measures through its existing performance monitoring arrangements and through any complaints arising from operational experience. The Environment Agency has an established procedure for complaints.

10. Summary and recommendation

Option (ii) above to prescribe a limited number of cases for exception and dispensation from the public notice requirement appears to strike a fair balance between the public interest, costs and benefits and regulatory control. It is recommended that the Minister accepts option (ii) as the most appropriate basis on which the Regulations should be made.

11. Ministerial declaration

I have read the Regulatory Impact Assessment and am satisfied that the benefits justify the costs.

Elliot Morley

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