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27 July 2022

The Environment Agency  
Water Resources Permitting Support Centre Quadrant 2  
99 Parkway Avenue  
Parkway Business Park  
Sheffield S9 4WF

Via email: [psc-waterresources@environment-agency.gov.uk](mailto:psc-waterresources@environment-agency.gov.uk)

Dear Sirs

**DROUGHT PERMIT APPLICATION by SOUTHERN WATER SERVICES LIMITED (SW)  
TEST SURFACE WATER DROUGHT PERMIT, Sections 79A of the Water Resources Act 1991**

**Submission by Fish Legal**

Fish Legal represents angling organisations throughout the UK on legal matters.

In this instance we write in support of our member organisation Little River Management Ltd, who as directly affected stakeholders have objected to the above application.

The Drought Permit (DP) applied for seeks to vary (temporarily) SW's Testwood abstraction licence (ref. 11/42/18.16/546).

Under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, reg. 3:

- 3.—(1)** The ... Agency ... must exercise [its] relevant functions so as to secure compliance with the requirements of the WFD....  
(2) Without prejudice to the generality of paragraph (1), the ... Agency ... must determine an authorisation so as, in particular—  
(a) to prevent deterioration of the surface water status ..., and  
(b) otherwise to support the achievement of the environmental objectives set for a body of water (subject to the application of regulations 16 to 19).

- (3) In paragraph (2), "determine an authorisation" means decide whether to grant, vary or revoke, or impose conditions (and if so which conditions) on—
- (a) ...
  - (b) a licence for an abstraction or impoundment under Chapter 2 of Part 2 of the Water Resources Act 1991.

The Agency's primary duty (under the WFD Regulations) is therefore, when determining an application to vary an abstraction licence (as here), to do so "so as to prevent deterioration of the status" of the water body affected. It is accepted that the Hands-off Flow set in SW's 2018 abstraction licence is the threshold below which a WFD deterioration (in status of the lower Test water body) is at risk. If the Agency is not to meet this primary duty – to prevent the risk of deterioration when determining a licence variation under regulation 3 – we suggest that this should therefore only be as specifically permitted elsewhere in the Regulations and under the most restrictive conditions.

WFD Regulations 2017, reg. 18 states:

- 18.**—(1) A temporary deterioration in the status of a body of water is not a breach of the environmental objectives set for it under regulation 12 if—
- (a) it is the result of—
    - (i) circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods or prolonged droughts,
    - ..., and
    - (ii) all the conditions in paragraphs (2) to (4) are or will be met.
  - (2) The condition is that all practicable steps are taken—
    - (a) to prevent further deterioration in the status of the affected body of water....
    - (3) The condition is that the river basin management plan sets out the conditions under which circumstances are exceptional or could not reasonably have been foreseen including the adoption of the appropriate indicators.
    - (4) The condition is that the measures to be taken under such exceptional circumstances ... will not compromise the recovery of the quality of that body of water once the circumstances are over.

The first condition to be met allowing a temporary deterioration in WFD status under reg. 18 is therefore that "all practicable steps are taken to prevent further deterioration in the status of the affected body of water". We take "further deterioration" here to mean any WFD deterioration (in water body status) beyond a temporary one, eg. a non-temporary status reduction in the fish element.

In the present case there are predictable risks to the long-term status of, for example, the River Test salmon stock, much of which is presently 'trapped' in the lowest sections of the river and the tidal reaches, and which may be substantially impacted in terms both of immediate survival (against lowered oxygen levels)

and of migration by flows being reduced below the HoF as proposed. This predictable scenario, with substantial long-term impacts on the stock, would be “further” or long-term WFD (fish element) status deterioration. Under the reg. 18 derogation presumably being applied, “all practicable steps” must therefore be taken to (attempt to) prevent this deterioration. As argued above, in order not to infringe the Agency’s primary duty to determine the permit application “so as to prevent deterioration”, this obligation to take all practicable steps should be interpreted rigorously.

We refer to Little River Management’s submission at paragraphs 5-7 and 17-18. It is clear from paragraphs 5-7 that the proposed mitigation measures, effectively to ‘rescue’ the fish when they encounter the life-threatening conditions that will predictably be caused by the HoF flow reduction and/or by preventing essential upstream migration for breeding, have not been trialled or tested (as they could have been) and therefore risk failure. Paragraphs 17-18 provide examples of how the demand management measures recently undertaken by SW have apparently been far weaker than is possible, as is underlined by the fact that average and maximum abstraction rates have evidently<sup>1</sup> increased substantially from about October 2021 to date by comparison with the preceding two years, even while reductions in leakage and reduced per capita consumption are supposed to have been primary focuses for SW.

In short, it is clear that SW has fallen short, and continues to do so in the proposals accompanying the present application, in minimising demand and planning the required fish impact mitigation, both as needed to meet the strict requirements under WFD Regulations 2017, regs. 3 and 18. We believe that a hearing is needed to address (and as far as possible resolve) these issues, and that the Drought Permit cannot lawfully be granted unless that happens.

Yours faithfully,



Andrew Kelton  
Solicitor

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<sup>1</sup> See eg. River Test Drought Permit Application – 1.2 Reasons for the Permit, 19.7.22, p.24, Figures 10 and 11