

The operation of abstractions from the River Itchen, Candover boreholes and River  
Test

**Agreement under Section 20 of the Water Resources Act 1991**

**Between**

**Southern Water Services Limited**

**and**

**The Environment Agency**

(Abstraction licences:

Itchen - 11/42/22.7./94, 11/42/22.6/93, and 11/42/22.6/92

Candover – SO/042/0031/026

Testwood - 11/42/18.16/546)

This Agreement is made on the 29<sup>th</sup> day of MARCH 2018 under Section 20 of the Water Resources Act 1991 between:

- 1) **SOUTHERN WATER SERVICES LIMITED** of Southern House, Yeoman Road, Worthing, BN13 3NX ("the Company")
  - and
  - 2) **THE ENVIRONMENT AGENCY** of Guildbourne House, Chatsworth Road, Worthing, BN11 1LD ("the Agency")
- (together called "the Parties")

**WHEREAS:-**

- A. The Agency has a duty under Section 6(2) of the Environment Act 1995 to take all such actions as the Agency from time to time consider necessary or expedient for the purpose of conserving, redistributing or otherwise augmenting water resources and of securing the proper use of water resources.
- B. The Company holds an appointment issued by the Secretary of State under the provisions of Section 6 of the Water Industry Act 1991 (as amended) to supply water within its area.
- C. The Company holds three licences to abstract water from groundwater and the River Itchen at Otterbourne (licence numbers 11/42/22.7./94 and 11/42/22.6/93) and from groundwater at Twyford (licence number 11/42/22.6/92) in Hampshire (together referred to as "the Itchen licences").
- D. The Agency holds a licence to abstract groundwater from six boreholes in the chalk aquifer of the upper Candover catchment (licence number SO/042/0031/026) ("the Candover licence").
- E. The Company holds a licence to abstract water from the River Test (licence number 11/42/18.16/546) ("the Test licence").
- F. The licences referred to in paragraphs C, D and E above shall be referred to together as "the Licences" throughout this Agreement.
- G. The Agency proposed to vary the Itchen licences under section 52 of the Water Resources Act 1991 (as amended) ("the WRA 1991") by way of notice served on 7 November 2016. The Company objected to the proposals under section 53 of the WRA 1991 by way of a letter dated 15 December 2016 and the proposals were referred to the Secretary of State for determination.
- H. The Agency proposed to renew the Candover licence (under new licence number SO/042/0031/026/R01) with reduced annual and daily abstraction quantities, and other modifications, by way of emails to Defra on 22 December 2016. The

Company had raised objections to the proposed renewal terms by letter dated 21 November 2016, and the Secretary of State directed that the application be referred to him for determination under section 41 of the WRA 1991.

- I. The Agency proposed to vary the Test licence under section 52 of the WRA 1991 by way of notice served on 30 June 2017. The Company objected to the proposal under section 53 of the WRA 1991 by way of a letter dated 28 July 2017, and the proposals were referred to the Secretary of State for determination.
- J. The proposals referred to above have been considered at a joint Public Inquiry which opened on 13 March 2018 before Planning Inspector Mr Mike Robins MSc BSc (Hons) MRTPI, who will make recommendations to the Secretary of State.
- K. Prior to the opening of the Public Inquiry, the Company and the Agency agreed Heads of Terms in relation to the proposals, which are recorded in this Agreement made under section 20 of the WRA 1991.

**IT IS HEREBY AGREED as follows:-**

General

- 1. The following definitions shall apply to this Agreement:
  - 1.1. **"Defra"** means the Department of Environment, Food and Rural Affairs (and any subsequent or equivalent department should Defra be subject to a name change or restructure in the future).
  - 1.2. **"the Drought Plan Guidance"** means the Agency's and Defra's Drought Plan Guidance (currently found at <https://www.gov.uk/government/collections/how-to-write-and-publish-a-drought-plan>) and including any updated guidance issued by the Agency and/or Defra from time to time.
  - 1.3. **"ESOR"** means 'exceptional shortage of rain' which forms part of the test that must be satisfied under section 73(A)(1) of the WRA 1991 for a drought permit to be granted.
  - 1.4. **"Habitats Directive"** is a reference to the Habitats Directive 92/43/EEC.
  - 1.5. **"IROPI"** means 'imperative reasons of overriding public interest', the test found in Article 6(4) of the Habitats Directive.
  - 1.6. **"Secretary of State"** means the Secretary of State for Defra.
  - 1.7. **"Test Surface Water Abstraction"** means the abstraction of water by the Company from the River Test under licence number 11/42/18.16/546.

1.8. **"TTF"** means 'Total Test Flow'.

1.9. **"the WRA 1991"** means the Water Resources Act 1991 (as amended).

1.10. **"the Water Framework Directive"** is a reference to the Water Framework Directive 2000/60/EC.

2. The provisions of this Agreement shall come into effect on the date hereof and shall expire on 31 March 2030, unless agreed otherwise in writing by the Agency. If the Secretary of State does not approve the licence changes as set out in paragraphs 9 and 33 of this Agreement, the parties agree to review the implications for this Agreement.
3. Subject to clauses 35 d. and e. below, in the event of any inconsistency between this Agreement and the Licences, the provisions of the Licences shall prevail.
4. Subject to clause 23.923.9, in the event of any amendments to existing legislation and/or the introduction of new legislation and/or case law decisions that affect the arrangements in this Agreement, the Parties shall agree to review the terms of this Agreement and agree any amendments that may prove necessary to achieve legal compliance.
5. In the event of any inconsistency between the terms of this Agreement and the Company's Drought Plan 2018 (and any subsequent Drought Plans) as and when approved the Plans are approved by Defra, the Parties shall use best endeavours to agree any amendments that may prove necessary to render the Drought Plan and this Agreement consistent. In default of agreement on any matter, the terms of any approved Drought Plan shall prevail.
6. For the purposes of enforcement and in accordance with section 20(3) of the WRA 1991, a copy of this Agreement will be sent by the Agency to the Secretary of State.
7. No amendment to this Agreement shall take effect unless and until a) it is in writing and signed by a duly authorised representative of each party, or b) the Secretary of State determines that the terms of this Agreement should be varied under section 20B of the WRA 1991.
8. Any dispute as to the interpretation of this Agreement shall be referred to and determined by the Secretary of State whose decision shall be final and binding upon the Parties.

Acceptance of proposed licence changes

9. Subject to clause 36 below regarding the Test Licence, the Company accepts the Agency's proposed licence changes for Licence Number 11/42/22.6/92, Licence Number 11/42/22.6/93, Licence Number 11/42/22.7/94 ("the Itchen

Licences") as specified in the Agency's Notice dated 7 November 2016; Licence Number 11/42/18.16/546 ("the Test Licence") as specified in the Agency's Notice dated 30 June 2017; and to renew Licence Number SO/042/0031/026/R01 ("the Candover Licence") as specified in the Agency's emails to Defra of 22 December 2016, subject to implementation of the Test, Candover and Itchen Interim Abstraction Scheme (set out in clause 13 below).

10. The Agency accepts that the Company's programme of water restrictions is not sufficient to make up all of the Company's water supply requirements for the Hampshire and Isle of Wight Water Resources Zones in drought circumstances.
11. The Company agrees to use all best endeavours to implement the long-term scheme for alternative water resources ("**the Long-term Water Resources Scheme**") set out in its Final Water Resources Management Plan ("**WRMP**") 2019, as may be revised by future water resource management plans. For the avoidance of doubt the Long-term Water Resources Scheme will be Strategy A in the Company's draft WRMP 2019, subject to any changes arising from the consultation process on the draft WRMP 2019, in which the Company is statutorily required to engage. Strategy A is set out in Annex 9 to the Draft WRMP 2019. One of the objectives of Strategy A as currently proposed is for the Company not to require the Itchen and Candover Drought orders after 2027 and only to require the Test Surface Water Drought Order or Permit after 2027 in extreme drought events (1 in 500 year drought severity).
12. The Agency accepts that, for an interim period whilst the Company implements the Long-term Water Resources Scheme, there is no alternative recourse available to the Company to meet its supply obligations to the Hampshire and Isle of Wight Water Resources Zones during drought other than abstraction of greater quantities of water from the River Test, Candover boreholes or the River Itchen than would be authorised under the Agency's proposed changes to the Licences.
13. Subject to clause 21 below, the Agency agrees that the Company's proposed sequence of drought actions set out in the Company's forthcoming Drought Plan 2018 (set out in Annex 1 to this Agreement) ("**The Test, Candover and Itchen Interim Abstraction Scheme**") is an appropriate/acceptable priority of drought actions to minimise the risks of environmental damage during drought, having regard to environmental sensitivity, probability of use and likely impact.
14. It is agreed between the Agency and the Company that any relaxation of the Test licence, the Itchen licences and the Candover licence required to enable the Company to meet its supply obligations should be authorised through the drought regime (specifically drought orders and drought permits) established under the WRA 1991 (or any successor legislation) in accordance with the agreement on the process to be followed for drought order and drought permit applications set out below.

### Ecological assessment and environmental monitoring

15. The Company and the Agency agree on the further work required to develop the Company's ecological assessment of the environmental impacts of abstracting below authorised flows under a drought order/permit on the Test, Itchen and Candover. The additional requirements have been recorded in the documents listed in Annex 4 of this Agreement.

16. The Company commits to fund and support the implementation of targeted environmental improvement measures for the Test Surface Water Drought Permit and Drought Order applications, and applications for the Itchen and Candover Drought Orders, for the purpose of restoring natural function to the ecosystem, which will have as one of its effects improved resilience to drought. This will be carried out in accordance with the documents listed in Annex 4 of this Agreement. This package of mitigation will mean that the Company is application ready for the purpose of a Test Surface Water Drought Permit and Order and Itchen and Candover Drought Orders.

#### 17. Baseline environmental monitoring

17.1. The Company and the Agency agree that the arrangements set out below with respect to environmental monitoring to provide an assessment of the environmental baseline for the Test Surface Water Drought Permit and Drought Order applications and applications for Itchen and Candover Drought Orders, will ensure that the Company is 'application ready', within the meaning of the Drought Plan Guidance for the purposes of any application for a drought permit or drought order. Monitoring will be carried out in accordance with the terms of the relevant documents listed in Annex 4 of this Agreement.

17.2. With regard to the Test drought permit, the Monitoring Plan includes agreement to the following:

- a. Agreement that any monitoring downstream of the Test Surface Water Abstraction will be carried out for the purposes of gathering environmental data in order to assess the impacts of a drought permit or drought order on the River Test, as required by the Drought Plan Guidance. For the avoidance of any doubt, any such data will not be used to support increased abstraction from the Test Surface Water Abstraction beyond that authorised under the Test Licence or a Test Surface Water Drought Permit or Order.

- b. Monitoring downstream of the Test Surface Water Abstraction will be undertaken by the Agency not the Company.
  - c. The monitoring undertaken by the Agency will be non-invasive, in the sense that it will be compatible with the running of the Testwood Fishery and the presence of large numbers of adult salmon and sea trout.
  - d. The Agency will make provision for continuous monitoring at Testwood Bridge as soon as reasonably practicable.
- 17.3. For the avoidance of doubt, as far as the Agency is concerned, in respect of any Test Surface Water Drought Order or Permit, Candover Drought Order or Lower Itchen Drought Order:
- a. the Company will not be required to install monitoring points on land outside its ownership, or to undertake monitoring activity where landowner consent is withheld.
  - b. The Agency will have regard to any inability of either the Company or the Agency to obtain monitoring data resulting from the actions of third parties, when considering whether any application is 'application ready' and whether such an application should be granted. The Agency will not refuse any application for lack of evidence or decide that the Company is not 'application ready' where landowner consent is withheld without first having considered its own use of the powers under section 172 of the WRA 1991 to obtain the necessary evidence in the regular 6 monthly reviews.
18. The Company has produced and will comply with the IROPI compensation package document for the Itchen Licences and for the Candover Licence which is listed in Annex 4 of this Agreement, in line with the United Utilities IROPI document referred to in the Agency's evidence served on 6 February 2018.
19. The general principles set out in Annex 3 of this Agreement apply to the monitoring, mitigation and compensation requirements listed in Annex 4 of this Agreement for the Test Surface Water Drought Order and Drought Permit; the Candover Drought Order and the Itchen Drought Order.

Agreement as to process by which the Company will apply for drought permits and drought orders authorising relief from licence conditions to abstract from the Test, Candover and Itchen during drought conditions

(a) the Company's commitment to carry out further work

20. The Company will update its draft drought plan as requested by the Agency, as follows:

- a. Provision of a drought trigger curve/dashboard in relation to the River Test, to be used with real-time monitoring and forecasting, established by the Company and agreed by the Agency as part of the Company's multi-factorial approach to drought management decisions.
  - b. Inclusion of worked examples of how the Company's drought trigger curve/dashboard would operate under a range of historic droughts or other plausible drought events.
  - c. Commitment to initiate further liaison with stakeholders and potential objectors to ensure the requirement of the drought permit/orders and their impacts are understood.
  - d. The Company's Final Drought Plan 2018 will be updated to reflect the commitments to environmental monitoring and environmental mitigation developed pursuant to the requirements of this agreement.
  - e. Production of draft drought permit/order application documents for review by the Agency and, if appropriate, Defra.
21. The Company acknowledges that the Agency may provide further comments on the Company's draft Drought Plan during the statutory consultation process. The order in which the Company, subject to the general principle set out at the beginning of Annex 1, proposes to abstract from the Test, Candover and the Itchen is set out in Annex 1.

(b) Drought arrangements for abstraction below 355 MI/d (TTF) from the Test

22. In the event that it is necessary to abstract from the River Test in flows between 355 MI/d and 265 MI/d Total Test Flow ("TTF") in accordance with the Test, Candover and Itchen Interim Abstraction Scheme, the parties agree the principles and process set out below and the time-line at Annex 2 to this agreement.

23. Principles

- 23.1. A drought permit is the appropriate mechanism to authorise abstraction below 355 MI/d to 265 MI/d (TTF) from the Test. For the avoidance of doubt the Agency's agreement to the use of the drought permit process does not fetter the Agency's discretion to accept or refuse any drought permit application by the Company.

- 23.2. The provisions of Article 4(6) Water Framework Directive can be used in principle to enable the grant of a drought permit authorising abstraction below 355 MI/d from the Test (TTF) ("**a Test Surface Water Drought Permit**") and the low flows on the Test of between 355 MI/d and 265 MI/d are capable of constituting



exceptional circumstances for the purpose of Article 4(6) of the Water Framework Directive.

23.3. Drought permit arrangements between the parties will take place in three phases; as set out in detail in the administrative process below:

- (i) Regular review: a six monthly review of drought permit documentation; any material changes in relevant legislation and stakeholder liaison.
- (ii) Pre-application consultation with the Agency.
- (iii) The substantive application for a drought permit.

23.4. There is nothing in the statutory framework or the Agency guidance that stipulates at what point the Agency may accept for substantive consideration a drought permit application or consider the evidential basis for the ESOR test.

23.5. The Agency will accept a Test Surface Water Drought Permit application for substantive consideration where the ESOR case, at the stage the application is made, is based on actual rainfall, up to the point of application, plus rainfall forecasts in line with the threat to supply forecast.

23.6. The Agency will accept for substantive consideration a Test Surface Water Drought Permit application thirty-five (35) days (or such other period as has been agreed in pre-application discussions with the Agency) before the Company predicts that flows will fall to 355 Ml/d.

23.7. It shall be a condition of appointing any person to chair a hearing into any Test Surface Water Drought Permit application that the appointed person can comply with the timescales set out in these arrangements. For this reason, the appointed person may be one of the following:

- (i) A Planning Inspector;
- (ii) An Agency officer from another area; or
- (iii) A barrister.

23.8. The Agency recognises that in the case of extreme urgency (e.g. ESOR test only met under fourteen (14) days before flows predicted to reach 355 Ml/d) it can dispense with a hearing and determine the drought permit application.

23.9. The arrangements set out in clauses 222 to 2525 are without prejudice to any applicable provisions of primary or secondary legislation governing the process for drought permits at the applicable time. This Agreement will be reviewed and may be amended as necessary from time to time in accordance with clause 24.2

24.2 in order to ensure that it is compliant with any changes to statutory requirements.

24. Administrative process

24.1. The following administrative arrangements will apply to the regular review and stakeholder liaison process for the Company to obtain a Test Surface Water Drought Permit.

24.2. The Agency agrees to review and comment on the Company's Test Surface Water Drought Permit application documents every six (6) months (in February and September) to indicate what needs to be done to ensure that the Test Surface Water Drought Permit documents are "application ready". As part of this review, the Company and the Agency will make any necessary amendments to the process set out in this agreement for the Test Surface Water Drought Permit to ensure it is compliant with any relevant changes to statutory requirements in the preceding six months.

24.3. The Company commits to initiate stakeholder liaison in relation to the Test Surface Water Drought Permit. This will involve sending stakeholders updated Test Surface Water Drought Permit application documents every six (6) months, inviting stakeholders to a meeting to discuss and provision of detailed written information to ensure the need for the Test Surface Water Drought Permit and its impact are understood. The Agency accepts that so long as the Company has carried out these steps to engage with stakeholders, the absence of stakeholder engagement or consent will not be a barrier to the Agency accepting that a Drought Permit application is "application ready".

24.4. The following administrative arrangements will apply to the pre-application process for the Company to obtain a Test Surface Water Drought Permit:

- (1) When the Company identifies that flows in the Test are 60 days away, unless otherwise agreed, from reaching 355 Ml/d (TTF), the Company and the Agency will engage in pre-application discussions and actions, including but not limited to the following:
  - (i) the Company will send the proposed draft Test Surface Water Drought Permit, including forecast ESOR and threat to supplies, to the Agency and relevant stakeholders for review.
  - (ii) The Agency will check the draft Permit is "application ready" and advise the Company of any consents that need to be obtained.
  - (iii) The Agency will undertake appropriate consultation with other authorities in respect of the draft Permit.

- (iv) The Agency will advise the Company of any additional supporting information required for the draft Permit.
- (v) The Agency will raise and discuss any possible contentious issues in respect of the permit with the Company.
- (vi) The Agency will notify the potential appointed persons (set out in clause 23.7) of the draft Permit application having been received. The Agency will compile a shortlist of available venues with a range of room sizes, capable of accommodating variable numbers of objectors.

## 25. Application process

- 25.1. When the Company identifies that flows in the Test are thirty-six (36) days away from reaching 355 Ml/d (TTF), unless otherwise agreed, the Company will notify the Agency of the company's intention to apply for a Test Water Surface Drought Permit the following day. The parties will agree the date for any hearing required and the Agency will notify the Company of the venue for the hearing. The Agency will contact three potential appointed persons: the Planning Inspectorate, an Agency officer from another area, Counsel (i.e. a barrister in private practice). Any Counsel proposed to act as the appointed person must be agreed between the Agency and the Company, but subject to this it shall be a matter for the Agency as to whom the appointed person will be. As a precondition of appointment, the appointed person must agree and be required to determine the application in accordance with the timetable set out below:
- 25.2. When the Company identifies that flows in the Test are thirty-five (35) days away from reaching 355 Ml/d (TTF), unless otherwise agreed, the Company will apply for a Test Water Surface Drought Permit based on actual rainfall, up to the point of application, plus rainfall forecasts in line with the threat to supply forecast.
- 25.3. On the same day that it applies for a Test Surface Water Drought Permit, the Company will give notice of its application under Schedule 8 WRA 1991. The notice will include the date and venue of any hearing required in respect of the application. The date for any such hearing will be eleven (11) days from the date of application, unless otherwise agreed by the Company and the Agency.
- 25.4. Within two (2) working days of the Company's application, the Agency will acknowledge receipt of the application
- 25.5. Any objections to the application must be received within seven (7) days of the date of the application.
- 25.6. The Agency will decide within two (2) working days after the deadline for any objections as above whether a hearing is necessary

- 25.7. If there are no objections to the application, the Agency will postpone determination of the drought permit application until the Company provides updated ESOR evidence that is based on actual rainfall rather than rainfall forecasts, unless otherwise agreed by the parties.
- 25.8. Any hearing required will open within two (2) working days after the decision in clause 25.6 above and consider any or all objections which are unconnected with the statutory requirement for ESOR before adjourning. Any objections relating to ESOR will be considered at the reconvened hearing.
- 25.9. As soon as is reasonably possible before the reconvened hearing on ESOR matters, the Company will provide the objector(s) with its updated ESOR evidence that is based on actual rainfall rather than rainfall forecasts
- 25.10. The reconvened hearing will open not less than four (4) working days from the date of the provision of the updated ESOR evidence.
- 25.11. The latest date by which the person appointed to chair the hearing should issue his/her report is six (6) days from the opening of the reconvened hearing or twenty five (25) days from the date of the application for the Test Surface Water Drought Permit, whichever is the later.
- 25.12. The Agency will use reasonable endeavours to issue its written determination whether to grant or refuse the Test Surface Water Drought Permit Application within four (4) working days of receiving the appointed person's report, and in any event within nine (9) days from the latest date on which the Agency is expected to receive the report on the in the event there are no objections, the Agency will issue its decision on the grant of the permit thirty-four (34) days after the date of the application at the latest.

Drought arrangements for abstraction below 265 MI/d (TTF) from the Test

26. The Company agrees to apply for a drought order in order to authorise abstraction from the Test below 265 MI/d (TTF).

Drought arrangements for abstraction from the Candover boreholes

27. The Company agrees to apply for a Candover Drought Order to authorise abstraction from the Candover boreholes to operate the Company's proposed reconfigured Candover augmentation scheme ("**the Candover Drought Order**").

28. The Agency agrees in principle, subject to the Company obtaining a Candover Drought Order and satisfying the requirements of the Habitats Directive (addressed at clause 30 below) to the Company utilising its Candover Drought Order augmentation scheme in drought scenarios, as per the Test, Candover and Itchen Interim Abstraction Scheme, during the interim period pending implementation the Long-term Water Resources Scheme.
29. The Company will work closely with the Agency, Natural England and other stakeholders to implement the new infrastructure required to operate the Candover Drought Order as a temporary scheme during the interim period whilst the Company implements the Long Term Water Resources Scheme. For the avoidance of doubt the scheme will be decommissioned on completion of the Long Term Water Resources Scheme.
30. As regards the Habitats Directive requirements in respect of the application for a Candover Drought Order:
  - a. the Company agrees to carry out further investigation of the risks to the Itchen SAC (and SSSI) from operation of the Candover Drought Order scheme, in accordance with guidance provided by the Agency and Natural England.
  - b. the Company accepts that, for the purposes of its Drought Plan (2020 – 2025) and on the basis of the currently available ecological evidence, a likely significant effect and adverse effect on the integrity of the Itchen SAC cannot be ruled out from the operation of the Candover Drought Order scheme. Accordingly the Company will provide a relevant compensation package as outlined in clause 18 above.
  - c. The Agency agrees with the Company that for the period of subsequent Drought Plans until implementation of the long-term solution, the Company has a good case that it has no alternative solutions to its Candover Drought Order scheme, in order to maintain public water supply and that the Candover Drought Order scheme satisfies the test in Article 6(4) of the Habitats Directive. For the avoidance of doubt, the Agency is not fettering its discretion to come to a different view if circumstances material to the question of available alternative options and IROPI under Article 6(4) of the Habitats Directive change.
  - d. The Agency will work closely with the Company and others to develop the Company's Assessment carried out under the Conservation of Habitats and Species Regulations 2017 (or any successor legislation) of the 2023 to 2028 Drought Plan well in advance of 2023. That will take account of new data obtained through point (a) above and other sources, to enable a more evidence-based appropriate assessment to be made. The Agency accepts that new site-specific information is likely to enable a decision to be reached with greater certainty.

- f. The Agency agrees to maintain the necessary infrastructure (including but not limited to boreholes, pumping, power and other controls facilities) to enable abstraction of up to 27 Ml/d to enable their use by the Company to operate the Candover Drought Order scheme; or to lease the infrastructure to the Company subject to landowner consent until the Long-term Water Resources Scheme has secured alternative sources. It is envisaged that the requirements will be set out in a further agreement.

#### Drought arrangements for abstraction from the Itchen

31. The Company agrees to apply for a drought order in order to authorise abstraction from the Itchen below 198 Ml/d ("**an Itchen Drought Order**").
32. As regards the Habitats Directive requirements in respect of the application for a Itchen Drought Order the Agency agrees that, subject to any change in surrounding circumstances material to the question of available alternative options and IROPI under Article 6(4) of the Habitats Directive, the Company has a good case that it has no alternative options to its Itchen Drought Order to maintain public water supply until the Company implements the Long-term Water Resources Scheme and the Agency will not argue that it is unacceptable with regard to Article 6(4) of the Habitats Directive. For the avoidance of doubt, the Agency is not fettering its discretion to come to a different view if circumstances material to the question of available alternative options and IROPI under Article 6(4) of the Habitats Directive change.

#### Force majeure Arrangements for the Test

33. A "**Force Majeure Event**" means unexpected threat to provision of public water supply beyond the control of the Company, arising from circumstances of natural cause or force majeure which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen. The following are illustrative examples of events capable of meeting that definition:
  - a. act of terrorism, vandalism, act or omission by a third party affecting lawful abstractions (eg. flows diverted away from the Great Test into the Little Test) which severely reduces the ability of the Company to discharge its supply duty;
  - b. major pollution events or contamination of the Company's water supply sources or unforeseeable deficiencies in water resources arising from deterioration of raw water quality;
  - c. damage (e.g. significant unforeseen failure of fixed pumps or other relevant plant or apparatus or burst in a pipeline) which severely reduces the ability of the Company to discharge its supply duty;

- d. widespread interruption to power supplies to the Company infrastructure.
  - e. an exceptional inability on the part of the Company to discharge its supply duty due to flows in the River Test falling to 355 Ml/d due to natural causes but the Agency has refused an application for a Test Surface Water Drought Permit due to a failure to meet the ESOR test under the WRA 1991, or the Agency has indicated that it is not possible to meet the ESOR test under the WRA 1991.
34. The Company undertakes to take all reasonable steps to avoid Force Majeure Events and to deal with Force Majeure Events expeditiously.
35. It is agreed that the following process will be followed in the event of a Force Majeure Event:
- a. In the event that the Company becomes aware of a Force Majeure Event affecting the supply network in the Western Area, the Company will contact the Agency as a matter of urgency and notify Natural England as soon as reasonably practicable.
  - b. On contacting the Agency, the Company will provide details of the nature of the Force Majeure Event and its implications for meeting public water supply, including the quantity of water in excess of the daily abstraction limit that the Company considers necessary to abstract and the likely duration for which temporary authorisation is required.
  - c. If the Agency is satisfied that a Force Majeure Event is occurring and will threaten the reliable provision of public water supply, it will declare an emergency.
  - d. In the event that the Company does not receive a response from the Agency to a request made under clause 35(a) above within 24 hours, or in the case that any dispute arises, the Company may continue to abstract up to a maximum 96 Ml/d (with commensurate increase in the maximum annual volume specified in condition 6 of the Test Licence) OR abstract below the Hands off Flow of 355 Ml/d (TTF, until the Agency has responded to the Company's request or the Secretary of State has determined any dispute between the parties referred to him/her under section 34(e) below.
  - e. Any dispute concerning a declaration of an emergency shall be referred for determination to the Secretary of State.
36. The provisions in clauses 33, 34 and 35 (save for the dispute provisions in clause 35 d. and e.) have been recorded in the Test Licence variation accordingly.

37. To the extent permitted by the Agency when declaring an emergency, condition 9.1 of the Test Licence will cease to have effect and the Company shall be permitted to abstract water from the River Test when the combined flow in the River Test as gauged by the Agency at Testwood Bridge and at its flow gauging stations at Test Back Carrier and Conagar Bridge is equal to or less than 355 MI/d.
38. In the event the Agency declares an emergency, condition 6.1 of the Test Licence will cease to have effect and the Company shall be permitted to abstract water from the River Test up to a level specified in writing by the Agency when declaring an emergency (subject to a maximum of 96 MI/d) with commensurate increase in the maximum annual volume specified in condition 6 of the Test Licence until the Agency declares an end to the emergency.
39. The provisions in clauses 33 to 38 apply until 31 December 2027, unless the Test Licence is renewed on the same terms.

**IN WITNESS** of which the hands of the duly authorised representatives of the Parties the date first before written.

**Signed for and on behalf of the Environment Agency by:**

Signed:



Print name:

JAMES HUMPHREY

Position:

Area Director

**Signed for and on behalf of Southern Water Services Limited by:**

Signed:



Print name:

IAN MCQUINN

Position:

CEO



## **ANNEX 1:**

### **The Test, Candover and Itchen Interim Abstraction Scheme: Sequence of drought actions and abstraction from the Test outside of drought conditions**

The table below sets out the sequence in which the Company plans to implement drought actions.

The following general principle applies:

The Company will take account of ecological considerations in deciding the order of applications for Drought Orders for abstraction from the Test (at flows below 265 ml/d), the Candover boreholes and the River Itchen. In particular the company will take into account the potential greater vulnerability of fish seasonally because of their migration patterns. To assess the potential ecological implications of abstraction, the company will review and assess the most up to date data from the monitoring installed pursuant to the Environmental Monitoring Plan, and the latest up to date information on macrophytes and invertebrates, before deciding on the appropriate Drought Order. The information will be included in an environmental report submitted as part of any Drought Order application.

The Agency will take account of the environmental report and the aforementioned ecological considerations in determining its position on the application. Accordingly the sequence in this Annex may change although any such change may be dependent on the Company being able to obtain the relevant authorisation in a timely enough manner.

<b>1.</b>	<b>Utilisation of SWS water sources and bulk supplies</b>	Prior to any application for a drought permit or order SWS will utilise its own existing water sources available to supply the Hampshire and Isle of Wight Water Resources Zones within the terms of their respective licences. For the avoidance of doubt in considering the extent of water available for use this will also include water available under the Portsmouth Water bulk supply scheme (in so far as Portsmouth Water is able to supply this
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	<p>water) and any new water sources as may have been made available by SWS as part of the implementation of the Long Term Water Resources solution by the time of the impending drought.</p> <p>In considering the utilisation of water sources and supplies SWS agree the following:</p> <ol style="list-style-type: none"> <li>1. When the flow in the River Itchen, at Allbrook and Highbridge gauging station, is equal to or less than 220 MI/d or when the total flow at the tidal limit in the River Test falls to 440 MI/d or less SWS will discuss and agree with the Agency and Natural England whether to use the Portsmouth Water bulk supply. The decision making will be based on ecological considerations. For the avoidance of doubt the Portsmouth Water supply may be used at other times and its use is not restricted to the flow levels specified in this paragraph.</li> <li>2. During the month of September SWS will prioritise the Portsmouth Water bulk supply over the transfer of water from the River Test to the Southampton East WRZ when there is a need to minimise abstractions from the River Itchen in order to meet the September monthly limit on the three SWS Lower Itchen abstraction licences.</li> <li>3. The flow triggers stated above may be refined with evolving evidence and, discussion and agreement between the Agency, NE, SWS and other stakeholders</li> </ol>
2	<p><b>Level 1 water use restrictions</b></p> <p>Escalate demand-side water efficiency measures including media campaigns to reduce water use (Level 1 water use restrictions).</p>

3	<b>Level 2 water use restrictions</b>	Implement partial temporary use bans pursuant to section 76 WIA 1991 (Level 2 water use restrictions, e.g. hosepipe restrictions) before the permit is implemented unless agreed with the Agency that it unnecessary to implement temporary use bans because it will only result in minimal water savings.						
4	<b>Abstract below 355 MI/d (TTF) down to 265 MI/d (TTF) from the Test</b>	Abstract from the Test Surface Water source below the Agency's proposed hands off flow of 355MI/d (TTF) down to 265 MI/d (TTF) pursuant to a Drought Permit						
5	<b>Level 3 restrictions</b>	Apply for a drought order to authorise partial NEU restrictions Level 3, phase 1 drought restrictions)						
6	<b>Candover augmentation scheme</b>	<table border="1"> <tr> <th><b>Abstract below 265 MI/d (TTF) down to 200 MI/d (TTF) from the Test</b></th><th><b>Level 3 phase 2 drought restrictions</b></th><th><b>Abstract below 198 MI/d from the Itchen</b></th></tr> <tr> <td>When River Test flow falls below 265 MI/d (TTF): Abstract from the Test below 265 MI/day (TTF) down to a baseline of 200 MI/d (TTF) pursuant to a Drought Order.</td><td>When River Itchen flow falls below 200 MI/d when measured at Allbrook &amp; Highbridge: Implement full TUBs and full NEUs (Level 3, phase 2 drought restrictions) (subject to a drought order having being obtained to authorise Level 3, phase 2 restrictions) pursuant to a Drought Order.</td><td>When flow in the River Itchen falls below 198 MI/d (when measured at Allbrook &amp; Highbridge): as a measure of last resort abstract below the 198 MI/d hands off flow in the River Itchen down to a floor of 160 MI/d pursuant to a Drought Order. Coincident with this, Portsmouth Water will also need to abstract below</td></tr> </table>	<b>Abstract below 265 MI/d (TTF) down to 200 MI/d (TTF) from the Test</b>	<b>Level 3 phase 2 drought restrictions</b>	<b>Abstract below 198 MI/d from the Itchen</b>	When River Test flow falls below 265 MI/d (TTF): Abstract from the Test below 265 MI/day (TTF) down to a baseline of 200 MI/d (TTF) pursuant to a Drought Order.	When River Itchen flow falls below 200 MI/d when measured at Allbrook & Highbridge: Implement full TUBs and full NEUs (Level 3, phase 2 drought restrictions) (subject to a drought order having being obtained to authorise Level 3, phase 2 restrictions) pursuant to a Drought Order.	When flow in the River Itchen falls below 198 MI/d (when measured at Allbrook & Highbridge): as a measure of last resort abstract below the 198 MI/d hands off flow in the River Itchen down to a floor of 160 MI/d pursuant to a Drought Order. Coincident with this, Portsmouth Water will also need to abstract below
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River Itchen downstream of the Candover Stream, with an environmental flow into the Candover Stream pursuant to a Drought Order.			the Riverside Park hands off flow of 198 ML/d at Gaters Mill on the River Itchen in order to continue its essential supply to the Company. Portsmouth Water and the Company have reached an understanding that, as a general rule, the Company will apply for the drought order necessary to allow this.
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**Abstraction from the River Test outside of drought conditions.**

The following general principle applies in respect of abstraction from the River Test outside of drought conditions:

SWS currently abstracts typically in the range of 50 – 65 ML/day from the River Test in normal conditions. The company will continue with this typical pattern of abstraction outside of drought conditions subject to infrequent additional abstraction if needed as set out below. The revised abstraction licence stipulates maximum daily abstraction at 80ML/day, which provides the company with the necessary operational flexibility to abstract above 50 - 65 ML/day, to a maximum of 80ML/d, where necessary to provide a secure reliable public water supply pursuant to the company's duty under section 37 Water Industry Act. Outside of drought conditions, recourse to abstraction from the River Test above the typical daily range is expected to be infrequent including, but not limited to, the need to meet the requirements of nationally significant infrastructure, planned maintenance, September restrictions on the River Itchen sources and the failure of a water source.



## **ANNEX 2:**

### **Drought Permit process timeline**

The following timetable provides a period of up to 35 days for the submission, consideration and determination of the Test Drought Permit application. The inclusion of the timetable does not preclude an application being determined earlier, or actions occurring earlier, provided they accord with the relevant legislation and regulations.

<b>Day</b>	<b>Action</b>
<b>0</b>	The Company applies to the Agency, publishes last advertisement of application (if more than one advertisement is required) and gives notice of hearing on day 11.
<b>1-2</b>	The Agency acknowledges receipt, contacts PINS/EA officer from another area/Counsel, and secures potential venues.
<b>3</b>	
<b>4</b>	
<b>5</b>	
<b>6</b>	
<b>7</b>	Deadline for any objections.
<b>8-9</b>	The Agency decides if hearing is necessary.
<b>10</b>	
<b>11</b>	Hearing (into non ESOR matters). Hearing adjourned.
<b>12</b>	
<b>13</b>	
<b>14</b>	
<b>15</b>	The Company gives ESOR update (could be day 16 or 17)
<b>16</b>	
<b>17</b>	
<b>18</b>	
<b>19</b>	Reconvened hearing on ESOR
<b>20</b>	
<b>21</b>	
<b>22</b>	
<b>23</b>	
<b>24</b>	
<b>25</b>	Latest date for Agency to receive report on application.
<b>26</b>	
<b>27</b>	
<b>28</b>	
<b>29</b>	The Agency uses reasonable endeavours to issue a decision whether to grant a drought permit.

<b>30</b>	
<b>31</b>	
<b>32</b>	
<b>33</b>	
<b>34</b>	Agency's decision whether to grant drought permit (long stop).
<b>35</b>	355 MI/d Test. The Company abstracts.

For the avoidance of doubt, the Agency will not be expected to undertake any actions on a Saturday or Sunday (non-working days).

## **ANNEX 3:**

### **The Test, Candover and Itchen Interim Abstraction Scheme: Monitoring, Mitigation and IROPI Compensation Measures**

#### **General principles**

##### **General**

- 1) The following principles are agreed in relation to the programme of measures for environmental monitoring, mitigation and in the event that compensation measures are required under the Habitats Directive for the Itchen and Candover Drought Orders during the Test, Candover and Itchen Interim Abstraction Scheme.
- 2) The list of documents is set out in Annex 4. For the avoidance of doubt, the documents are not legally binding.

##### **Funding**

- 3) SWS will fund the programme of measures pursuant to a costs schedule to be agreed between the parties, with a capped ceiling cost which allows some flexibility in allocation of spend.
- 4) SWS will agree a funding mechanism for payment to third parties responsible for delivery of the measures (see further below)
- 5) Where SWS provides funding to the Agency, it will either be in the form of an annual payment on 1 April each year or a trigger payment (in the event of IROPI Compensation measures). Specific requirements are as follows:
  - a. Payments in respect of environmental monitoring shall commence as soon as reasonably possible after 1 April 2018 and take the form of an annual payment, payable on 1 April each year until 2030, with the last payment being made on 1 April 2030.
  - b. Payments in respect of environmental mitigation will commence on 1 April 2018 and will take the form of an annual payment, payable on 1 April each year until 1 April 2024, when the majority of measures are expected to have been completed.
  - c. Payments in respect of IROPI compensation will be triggered by the implementation of a Drought Order for the River Itchen and/or Candover Stream, save that SWS will ensure that sufficient funding is made available



prior to then, in order to secure landowner agreement to the compensation proposals.

### **Delivery of the measures**

- 6) Third parties will be responsible for the delivery of the programme of measures.
- 7) SWS and the Agency will select competent and experienced third parties who have the appropriate expertise to deliver the requisite measures. Examples of third parties likely to be selected include the Hampshire and Isle of Wight Wildlife Trust and the Test and Itchen Catchment Partnership.
- 8) To reduce the risk of failure of delivery, a primary and secondary delivery body will be identified for the measures identified in the following Appendices. In the event that the primary delivery body is unable to deliver the measure in question, delivery will pass to a secondary body.
- 9) To reduce the risk of failure of delivery of the IROPI compensation measures, alternative measures are specified so as to enable the delivery party to deliver an alternative measure in place of a failed measure.
- 10) SWS has discharged its responsibilities under this Agreement for the programme of measures through the provision of funding and any failure in delivery will not be considered to be the fault of SWS. For the avoidance of doubt SWS accepts that this clause is without prejudice to legal compliance under Article 6(4) of the Habitats Directive.

### **Environmental risks and application ready**

- 11) The programme of mitigation measures will significantly contribute to the objective of building ecological resilience to abstraction-related drought impacts and is likely to significantly reduce the ecological risks from the Interim Test, Candover and Itchen Abstraction scheme.
- 12) By securing the mitigation measures set out in the various mitigation packages, Southern Water is application ready for the purposes of an application by Southern Water for a drought permit or drought order required to implement the Interim Test, Candover and Itchen Abstraction scheme.
- 13) The mitigation measures contained in the various mitigation packages represent the maximum extent of currently foreseeable mitigation that is required in advance of an application from Southern Water for a drought permit or drought order.

- 14) The monitoring measures set out in the various monitoring plans constitute the maximum extent of currently foreseeable monitoring that is required in respect of an application from Southern Water for a drought permit or drought order.

#### **IROPI Compensation**

- 15) The Agency is satisfied that the programme of IROPI compensation measures satisfies EU and national guidance for IROPI compensation. However the final decision on IROPI compensation is for the Secretary of State not for the Environment Agency.

#### **The Drought Plan**

- 16) The programme of measures will be incorporated into SWS's final Drought Plan for 2018 to 2023.
- 17) Any revision of the Drought Plan in respect of the programme of measures will automatically constitute a revision of the programme of measures set out in the following appendices.

#### **Six Monthly Review**

- 18) SWS and the Agency will conduct a review every six months. The primary purpose of the review will be to ensure that the Testwood Drought Permit is application ready but the agenda will also cover a review of the monitoring, mitigation and compensation measures for the Test Drought Order, the Candover Drought Order and the Lower Itchen Drought Order, and the Company's progress in implementing the Long-term Water Resources Scheme set out in its WRMP 2019, as may be revised by future water resources management plans.

#### **Monitoring progress**

- 19) Annual reports will be provided by the Agency and/or third party delivery bodies to SWS on progress with the implementation of the programme of measures. In particular:  
  
A detailed annual report will be provided by the Agency on environmental mitigation works that SWS has funded in February each year. The Agency will supply data in relation to invertebrates and macrophytes in two data packages.

Data on macrophytes will be provided at the end of October, and data on macroinvertebrates will be provided at the end of March after all of the invertebrate samples have been analysed.

Data will comprise the taxa lists from all relevant surveys in excel form and survey sheets in Word document form, and also a summary of any sampling issues that cropped up in the year. This will be for both the surveys that SWS pay for and the ones the Agency are funding but are relevant to the interim Drought Permit/Orders, i.e. the bottom half of the Candover.

The Agency will share with SWS the drought monitoring fish survey data that SWS is funding, prior to publication of its annual report on fisheries.

### **Investigation into diurnal variation of abstraction from the River Test**

20) Currently, SWS does not normally abstract more from the River Test at night to benefit from reduced electricity costs and it does not expect abstractions from the River Test at night to vary from current practice. SWS will develop proposals to investigate diurnal variation of abstraction from the River Test to identify any potential impacts on fish migration. SWS will use its best endeavours to ensure that any investigation is concluded by mid-2021 and option appraisal by 2023. SWS will also apply to add the investigation to the Water Industry National Environment Programme (WINEP) at the earliest opportunity and the Agency will then add it to that programme.

#### **ANNEX 4:**

##### **List of Monitoring, Mitigation and IROPI Compensation Documents**

1. A Test Surface Water Drought Order and Drought Permit Monitoring Plan
2. A Candover Drought Order Monitoring Plan
3. A Lower Itchen Drought Order Monitoring Plan
4. A Test Surface Water Drought Order and Drought Permit Mitigation Package
5. A Candover Drought Order Mitigation Package
6. A Lower Itchen Drought Order Mitigation Package
7. A Candover Drought Order IROPI Compensation Package
8. A Lower Itchen Drought Order IROPI Compensation Package