

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

10th Report of Session 2017–19

Water Abstraction (Transitional Provisions) Regulations 2017

and three related instruments

Includes 5 Information Paragraphs on 5 Instruments

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to scrutinise —

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of these specified grounds:

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Blackstone

Lord Haskel

Lord Sherbourne of Didsbury

Lord Faulkner of Worcester

Rt Hon. Lord Janvrin

Rt Hon. Lord Trefgarne (Chairman)

Baroness Finn

Lord Kirkwood of Kirkhope

Baroness Watkins of Tavistock

Lord Goddard of Stockport

Baroness O'Loan

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hseclegscrutiny@parliament.uk.

Tenth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Water Abstraction (Specified Enactments) Regulations 2017 (SI 2017/1042)

Water Abstraction and Impounding (Exemptions) Regulations 2017 (SI 2017/1044)

Water Abstraction (Revocations etc.) (England) Order 2017 (SI 2017/1046)

Water Abstraction (Transitional Provisions) Regulations 2017 (SI 2017/1047)

Date laid: 31 October 2017

Parliamentary procedure: negative

Summary: These four sets of Regulations have the combined effect of ending exemptions from the requirement to obtain a licence to abstract water, a system which has been in place since the 1960s. Provisions to remove licensing exemptions were included in the Water Act 2003, and the Government have carried out two consultations about these changes, the first in 2009 and the second in 2016.

It is clear that Defra's concern to mitigate the impacts on business has been an important cause of the protracted timescale for removing these licensing exemptions, which is being achieved through secondary legislation laid 14 years after the parent Act and five years after a deadline set in an EU Directive. While the Department clearly had to consider the way in which businesses would be affected by the changes proposed, we see no reason why its reflection on the consultation process in 2009 needed to take the best part of a decade to be turned into detailed implementation.

We draw these Regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

Background – water abstraction – licensing system

1. Abstraction, or removal, of water from rivers, lakes, canals, reservoirs or from underground strata is controlled through a licensing system that was introduced by the Water Resources Act 1963 and has been subsequently refined and changed, most recently by the Water Act 2003 (“the 2003 Act”).

Ending licensing exemptions

2. In the Explanatory Memorandum (EM) to these Regulations, the Department for Environment, Food and Rural Affairs (Defra) says that, in England and Wales, there are currently around 5,000 significant water abstractions that are exempt from abstraction licensing, by comparison with around 20,000 abstractors that are licensed. Defra adds that these exemptions create an unfair playing-field, allowing some abstractors to put pressure on the environment and other water users without any controls, while requiring others to carry the burden of addressing these risks. Defra explains that the

2003 Act included provisions to remove licensing exemptions, and that these four sets of Regulations, in implementing the abstraction elements of the 2003 Act, end abstraction licence exemptions.

3. In paragraph 7.4 of the EM, Defra lists the water use activities with significant environmental impacts from which exemptions are being removed, including (for example) all forms of irrigation, other than spray irrigation which is already licensable. Paragraph 7.5 contains a list of the exemptions for abstraction with no significant impacts which are being retained, including (for example) abstraction downstream of the normal tidal limit by navigation, harbour and conservancy authorities. Defra states that it is providing a five-year transitional period to determine all abstraction licence applications: abstractors have two years to prepare and submit an application, and the Environment Agency or the Natural Resources Body for Wales have up to three years to determine licences. Abstractors can continue taking water during this period.

Consultations in 2009 and 2016

4. Defra says that there were two consultations about removing exemptions from abstraction licensing: the first in 2009, which reflected the need to comply with the abstraction-related requirements of the EU Water Framework Directive (“the Directive”: adopted in 2000);¹ and the second in 2016. Government responses to both consultations have been published.² The Department explains that, in general, licensed abstractors and those with an interest in the water environment generally welcomed the changes proposed, while the abstractors whose exemptions would end were concerned about the business impacts; and that, as a result of the 2009 consultation responses and the concern about the business impacts, it proposed a light-touch, risk-based approach to licensing in the 2016 consultation which is now being taken forward.

Length of time

5. We obtained additional information from Defra about the length of time taken to remove these licensing exemptions, which we are publishing at Appendix 1. The Department has said that there was always an intention for the 2003 Act to be subject to phased implementation: the consultation exercise in 2009 made it clear that there was a need for a licensing approach that mitigated the impacts on business, and this in turn required significant research. As regards the Directive, which set a deadline of 2012 for compliance, Defra says that the Commission has asked the UK to explain its general implementation of the EU legislation. The Commission itself, in publicising the reasoned opinion which it sent to the UK in October 2015, said that it wished to ensure that the Directive was correctly enacted in national law, and noted that national authorities in the UK might lack

1 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L327, 22 December 2000): [accessed 14 November 2017].

2 See the Government response to the 2009 consultation at Department for Environment, Food and Rural Affairs, *Changes to water abstraction licensing exemptions*, January 2016, pages 15-18: https://consult.defra.gov.uk/water/water-abstraction-licensing-exemptions/supporting_documents/Consultation%20Document%20%20New%20Authorisations.pdf and see the Government response to the 2016 consultation at Department for Environment, Food and Rural Affairs, *Government response to consultation on changes to water abstraction licensing exemptions in England and Wales: New Authorisations*, October 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656121/water-abstraction-consult-gov-response.pdf [accessed 14 November 2017].

the necessary powers to tackle negative water impacts, a requirement of EU legislation.³ While the Commission did not refer specifically to the removal of abstraction exemptions, it seems clear that these may well have negative impacts on the water environment.

Conclusion

6. In the EM, Defra says that the compliance costs of licensing and the impact on the economic output of the abstractors affected have a net present value of £74 million, although this has to be considered alongside the benefits to agricultural abstractors who are already licensed, and the wider environmental benefits. While the Impact Assessment (IA) to the Regulations states that there will be important non-monetised environmental benefits associated with reducing over-abstraction of water, most of the IA concerns itself with the costs to business of making the changes.
7. **It is clear that Defra's concern to mitigate the impacts on business has been an important cause of the protracted timescale for removing these licensing exemptions, which is being achieved through secondary legislation laid 14 years after the parent Act and five years after the deadline set in the Directive. While the Department clearly had to consider the way in which businesses would be affected by the changes proposed, we see no reason why its reflection on the consultation process in 2009 needed to take the best part of a decade to be turned into detailed implementation.**

3 European Commission, *October infringements package: key decisions*: http://europa.eu/rapid/press-release_MEMO-15-5826_en.htm [accessed 14 November 2017].

INSTRUMENTS OF INTEREST

Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) (Amendment) Regulations 2017 (SI 2017/1020)

8. The main effect of this instrument is to add another scheme, the Work and Health Programme, to the list of schemes which the Secretary of State for Work and Pensions can require Jobseeker's Allowance (JSA) claimants to attend and participate in. The effect of the instrument is that a claimant, who fails without good reason to comply with such a requirement, can be liable to a benefit sanction that is the reduction or loss of JSA for a period of several weeks. The instrument also removes a few redundant schemes from that list.

9. The original Explanatory Memorandum (EM) supplied by the Department for Work and Pensions (DWP) took too simplistic an approach: although it gave some statistics around the scope of the Work and Health Programme, it did not explain what the scheme might involve for the individual claimant. The Committee asked an extensive list of questions so that it could judge whether the requirements seemed reasonable (and therefore if sanction would be an appropriate penalty for failing to participate). The DWP has now revised the EM to incorporate the supplementary material that the Committee requested, and it is now significantly better. We have also asked that some of the material from the slides additionally offered to the Committee in explanation should be incorporated into the EM. The Department's description of its policy should not rely on providing the Committee with additional material: **the purpose of an Explanatory Memorandum is to enable any reader, including potential claimants and the organisations that help them, to have a clear idea of what is being proposed so that any concerns can be identified and raised while the instrument is still before Parliament.** We trust that the information that DWP provides to individual claimants setting out their personal "conditionality" under the Work and Health Programme will make clear what they will have to do to avoid sanctions.

Non-Contentious Probate (Amendment) Rules 2017 (SI 2017/1034)

10. There is an on-going project to modernise the way applications for non-contentious probate are made. This instrument enables the second phase of the pilot which will allow a sample group of solicitors or probate practitioners ("professional applicants") to make applications for non-contentious probate online. Additionally, for the existing pilot involving personal applicants, the instrument also permits the application to be made with a "statement of truth" included in the application form, instead of with a sworn oath. These changes are designed to provide all the information necessary to enable the Probate Service to decide whether, and on what terms, a grant can be issued. This is part of a drive by Her Majesty's Courts and Tribunals Service to improve efficiency and drive down the unit cost of administering the probate process. This initiative is quite separate from the proposal for a significant increase in fees contained in the Draft Non-Contentious Probate Fees Order 2017 laid earlier this year, which is still awaiting debate.⁴

4 See our [28th Report](#), Session 2012-13 (HL Paper 131).

Court of Protection Rules 2017 (SI 2017/1035)

11. The Court of Protection Rules were first introduced in 2007 in response to the requirements set out in the Mental Capacity Act 2005. This instrument is principally a consolidation of the amendments made over the last ten years but, in addition, reformats the Rules on the same model used in other courts. These changes have been piloted over 2016-17 together with some new rules in relation to case management and the use of expert evidence. A separate pilot addressed transparency matters, and involved representatives of the media (among other things, piloting a standard form of injunction for public hearings to restrict reporting of the subject of the hearing, “P’s”, identity). Consultation on the pilots included Court of Protection judges from all over the country and court users. **We commend what appears to be a thorough and useful piece of work.**

Mental Health Act 1983 (Places of Safety) Regulations 2017 (SI 2017/1036)

12. The Policing and Crime Act 2017 amends the provisions of the Mental Health Act 1983 which confer powers on the police to remove persons considered to be suffering from a mental disorder to a “place of safety” for the purpose of their examination, care or treatment. New section 136A provides that only those aged over 18 may be detained in a police station and that detention there should only be in exceptional circumstances. These Regulations set out the circumstances: they are that the person’s behaviour poses an imminent risk of serious injury or death to themselves or another person and that no other place of safety can reasonably be expected to detain the person. They also require the custody officer to make hourly checks to determine whether those circumstances still apply. Other safeguards in the Regulations require that, so far as reasonably practicable, a healthcare professional must be present and available during the period the person is detained at the police station and make frequent checks. The Regulations are supported by guidance jointly produced by the Home Office and the Department of Health.⁵

Environmental Offences (Fixed Penalties) (England) Regulations 2017 (SI 2017/1050)

13. The Department for Environment, Food and Rural Affairs (Defra) has laid these Regulations with an Explanatory Memorandum (EM). Among other things, the Regulations increase the levels of on-the-spot fines which local councils may impose for littering offences. Defra says that, in 2005, councils were given discretion to set the level of fixed penalties locally between £50 and £80, with a default of £75; and that these levels have not changed since 2006. This instrument increases the minimum, default and maximum fixed penalty to £65, £100 and £150 respectively (the increase in the minimum from £50 to £65 is deferred until April 2019). Defra consulted on these changes over a period of 10 weeks to 18 June of this year: 87% of respondents agreed that the fixed penalties for littering should be increased.
14. In the EM, the Department comments that increasing these levels may create the perception that fixed penalties could be used to generate income

⁵ Department of Health, *Guidance for the implementation of changes to police powers and places of safety provisions in the mental health act 1983*, October 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656025/Guidance_on_Police_Powers.PDF [accessed 13 November 2017]

for councils. It says that it has a clear view that fixed penalties should not be used in this way, and that it has given a public commitment to publish improved guidance on the proportionate use of these enforcement powers. In response to our queries, Defra has said that general guidance on the use of these powers is already in place, which states that fixed penalties should not be issued when enforcement action would be “inappropriate or disproportionate”.⁶ The guidance referred to in the EM will update this existing guidance, to strengthen and clarify the Government’s view on the appropriate use of these and similar enforcement powers. Defra intends to consult on the guidance within the next few months, and to have the improved guidance in place before the increase in fixed penalties takes effect in April 2018. **We welcome this commitment on the timing of the guidance.**

6 See: Department for Environment, Food and Rural Affairs, *Fixed penalty notices: issuing and enforcement by councils*, published March 2015, updated May 2016: <https://www.gov.uk/guidance/fixed-penalty-notices-issuing-and-enforcement-by-councils> and Department for Environment, Food and Rural Affairs, *Enforcement officers: issuing fixed penalty notices*, published March 2015, updated May 2016: <https://www.gov.uk/guidance/enforcement-officers-issuing-fixed-penalty-notices> [accessed 13 November 2017].

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Instruments subject to annulment

- SI 2017/1012 Conservation of Habitats and Species Regulations 2017
- SI 2017/1013 Conservation of Offshore Marine Habitats and Species Regulations 2017
- SI 2017/1020 Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) (Amendment) Regulations 2017
- SI 2017/1032 Healthy Start Scheme and Welfare Food (Miscellaneous Amendments) Regulations 2017
- SI 2017/1033 Family Procedure (Amendment No. 3) Rules 2017
- SI 2017/1034 Non-Contentious Probate (Amendment) Rules 2017
- SI 2017/1035 Court of Protection Rules 2017
- SI 2017/1036 Mental Health Act 1983 (Places of Safety) Regulations 2017
- SI 2017/1037 Judicial Appointments and Discipline (Amendment and Addition of Offices) Order 2017
- SI 2017/1038 Mental Health Act 2007 (Commencement No. 12 and Transitional Provisions) Order 2017
- SI 2017/1039 Mental Health Review Tribunal for Wales (Amendment and constitution of tribunals) Rules 2017
- SI 2017/1049 General Medical Council (Miscellaneous Amendments) Order of Council 2017
- SI 2017/1050 Environmental Offences (Fixed Penalties) (England) Regulations 2017
- SI 2017/1056 National Health Service (Primary Dental Services and General Ophthalmic Services) (Amendment) Regulations 2017

WATER ABSTRACTION (TRANSITIONAL PROVISIONS) REGULATIONS 2017 AND THREE RELATED INSTRUMENTS

Additional information from the Department for Environment, Food and Rural Affairs

Q1: Why has it taken 14 years from the enactment of the Water Act 2003 to bring previously exempt abstractions under licence control?

A1: The Water Framework Directive requirements of prior authorisation and control of significant abstraction needed to be met by December 2012 and so there was always an intention for the phased implementation of the Water Act 2003. Consultation took place in 2009 in order to meet the Water Framework Directive timeframe requirements.

Q2: It appears that no action was taken in the wake of the 2009 consultation exercise until 2016: why was this?

A2: It is incorrect to say no action was taken. We will be licensing activities that are lawfully taking place and, as was proposed in the 2009 consultation, to license these activities using the Environment Agency's usual licensing approach (for new activities) would have caused substantial business impacts. Following the consultation in 2009, it became clear we needed to develop a licensing approach that mitigated these impacts (or compensation liabilities for the Environment Agency or Government). This required significant research to understand potential business impacts while assessing the Environment Agency's ability to continue fulfilling its environmental duties.

Q3: Have these delays meant that the UK has not been in compliance with the Water Framework Directive and, if so, has the UK as a result faced any proceedings initiated by the European Commission?

A3: Commencing the relevant sections of the Water Act 2003 will enable us to meet a requirement of the Water Framework Directive. The Commission has asked the UK to explain its general implementation of the Water Framework Directive.

6 November 2017

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 14 November 2017, Members declared the following interests:

Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) (Amendment) Regulations 2017 (SI 2017/1020)

Lord Kirkwood of Kirkhope

Non-executive Director, The Wise Group

Attendance:

The meeting was attended by Baroness Blackstone, Lord Faulkner of Worcester, Baroness Finn, Lord Goddard of Stockport, Lord Haskel, Lord Janvrin, Lord Kirkwood of Kirkhope, Baroness O'Loan, Lord Sherbourne of Didsbury, Lord Trefgarne and Baroness Watkins of Tavistock.