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# *The Water Bill* [HL]

Bill 149 of 2002-03

The *Water Bill* [HL] is the culmination of extensive consultation on the Government's part on the issues of water abstraction, regulation and competition.

The Bill includes provision for all abstraction licences to be issued on a time-limited basis and, from 2012, to be revoked without compensation if they cause serious environmental damage. The Director of the Office of Water Services is replaced by a Water Services Regulation Authority and competition is introduced for businesses that use more than 50 megalitres of water a year. The Bill also includes miscellaneous changes to various pieces of legislation relating to water, including fluoridation.

This paper deals with the Bill as introduced in the Commons 11 July 2003 and Section IV comments on amendments introduced in the Lords. The Bill extends to England and Wales only, except for some clauses dealing with flood defence and reservoirs which also extend to Scotland.

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## Summary of main points

The Government organised a one day Water Summit in May 1997 led by the then Secretary of State for Transport, the Environment and Regions, John Prescott. During this the Government announced a ten point plan to deal with water shortages, including the intention to legislate to deal with various issues relating to water management. In addition the Labour Government had expressed its commitment during the 1997 election campaign to increasing competition in all areas, including water.

Water competition and changes to the regulatory system were included in the *Utilities Bill 2000*, but were dropped when the Government announced its intention to bring forward a Water Bill to cover a wide range of aspects relating to water, including those covered in the *Utilities Bill*. Following extensive consultation on several aspects, including abstraction licensing, and the publication of a draft Water Bill in November 2000, the *Water Bill* was introduced in the House of Lords on 19 February 2003.

The main provisions of the Bill as originally published included:

- Changes to abstraction licensing to ensure all new licenses are issued on a time limited basis.
- Inclusion in the licensing system of all abstractions of over 20 cubic metres a day.
- Removal of the right to compensation after July 2012 if a licence is revoked to prevent environmental damage.
- Unused licences could be revoked after non-use of four years instead of the current seven year period.
- The Director of Water Services, the water regulator, would be replaced by a Water Services Regulation Authority.
- The Ofwat National Customer Council and Customer Services Committees would be replaced by an independent Consumer Council for Water.
- A new type of water supplier would be created, a licensed water supplier, who could supply non-household customers who use more than 50 megalitres of water a year.
- Water companies would have a statutory duty to prepare drought plans and conserve water.
- The power for the Secretary of State to abolish local flood defence committees and replace them with regional flood defence committees.

Government amendments to the Bill included new clauses dealing with fluoridation, imposing a duty on all public bodies to conserve water, extending the powers of the Consumer Council for Water to the new licensed water suppliers and allowing some licences to be unused for more than four years before being revoked. Several opposition amendments were also successful including ones imposing a general duty on the Secretary of State to ensure everyone uses water without wasting it and another requiring the Secretary of State to set out how the Water Framework Directive would be implemented



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## I Introduction

The lack of competition and poor environmental record of the water industry were highlighted as important issues in the 1997 Labour manifesto, which included a commitment to promote competition wherever possible and to “put concern for the environment at the heart of policy-making”:

In the utility industries we will promote competition wherever possible. Where competition is not an effective discipline, for example in the water industry which has a poor environmental record and has in most cases been a tax-free zone, we will pursue tough, efficient regulation in the interests of customers, and, in the case of water, in the interests of the environment as well. We recognise the need for open and predictable regulation which is fair both to consumers and to shareholders and at the same time provides incentives for managers to innovate and improve efficiency.<sup>1</sup>

Following its election in May 1997 and the merger of the Departments of Transport and Environment to form the Department of Transport, Environment and Regions (DETR), the Government announced a one day Water Summit called by the Deputy Prime Minister and Secretary of State for Transport, the Environment and Regions, John Prescott.

The Summit took place on 19 May 1997. During this the Minister announced a ten point plan to beat the water shortages that had resulted in drought orders being in place every year but two since water had been privatised in 1989. Points included:

- Tougher mandatory leakage targets;
- A review of the abstraction licensing system, arrangements for bulk water transfers and the drawing up of drought contingency plans;
- Legislation to place water companies under a duty to conserve water in carrying out their functions;
- A review of the water charging system;
- Tighter regulations for preventing water waste in fittings and appliances;
- Provide a free leakage repair service for domestic customers;
- Consider whether there is a role for the Environmental Task Force in devising and promoting water efficiency schemes;
- Improve compensation arrangements for supply interruptions; and
- Publish additional financial and performance information.<sup>2</sup>

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<sup>1</sup> Labour Party Manifesto, May 1997

<sup>2</sup> DoE Press release 180/97, ‘Water Summit – action on leakage is the top priority’, 19 May 1997.

The Water Summit was followed by a series of consultations on various aspects of water policy, including abstraction licensing and water regulation. This included a consultation on a draft Water Bill. A list can be found below:

June 1998	Review of the Water Abstraction Licensing System in England and Wales (Consultation) <sup>3</sup>
July 1998	A Fair Deal for Consumers – Modernising the Framework for Utility Regulation (Government White Paper) <sup>4</sup>
March 1999	Taking Water Responsibly: Government decisions regarding changes to water abstraction licences <sup>5</sup>
April 2000	Extending Opportunities for Competition in the Water Industry in England and Wales (Consultation) <sup>6</sup>
June 2000	Economic Instruments in Relation to Water Abstraction (Research Report) <sup>7</sup>
November 2000	Water Bill – Consultation on draft legislation <sup>8</sup>
March 2001	Water Framework Directive: First Consultation <sup>9</sup>
July 2001	Tuning Water Taking: Government decisions following consultation on the use of economic instruments in relation to water abstraction <sup>10</sup>
May 2002	Water Bill – consultation on draft legislation, Government Response <sup>11</sup>
February 2002	Flood and Coastal Defence Funding Review (Consultation) <sup>12</sup>
July 2002	Extending Opportunities for Competition in the Water Industry in England and Wales (Consultation) <sup>13</sup>

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<sup>3</sup> DETR, *The Review of the Water Abstraction Licensing System in England and Wales. A Consultation Paper*, June 1998, <http://www.defra.gov.uk/environment/consult/waterab/index.htm>

<sup>4</sup> *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*, 25 March 1998, CM 3898

<sup>5</sup> DETR, *Taking Water Responsibly: Government decisions following consultation on changes to the water abstraction licensing system in England and Wales*, April 1999  
<http://www.defra.gov.uk/environment/water/resources/abstreview/index.htm>

<sup>6</sup> DETR, *Competition in the Water Industry in England and Wales*, April 2000  
<http://www.defra.gov.uk/environment/consult/watercomp/index.htm>

<sup>7</sup> DETR, *Economic Instruments in Relation to Water Abstraction*. June 2000  
<http://www.defra.gov.uk/environment/water/resources/econinst/>

<sup>8</sup> DETR, *Water Bill – Consultation on draft legislation*, November 2000  
<http://www.defra.gov.uk/environment/consult/waterbill/index.htm>

<sup>9</sup> DETR *First Consultation Paper on the Implementation of the EC Water Framework Directive (2000/60/EC)*, March 2001, <http://www.defra.gov.uk/environment/consult/waterframe/index.htm>

<sup>10</sup> DEFRA, *Tuning Water Taking: Government Response*, July 2001  
<http://www.defra.gov.uk/environment/water/resources/tuning/index.htm>

<sup>11</sup> DEFRA, *Water Bill., Consultation on Draft Legislation: Government Response*, May 2002  
[http://www.defra.gov.uk/environment/consult/waterbill/pdf/water\\_bill\\_response.pdf](http://www.defra.gov.uk/environment/consult/waterbill/pdf/water_bill_response.pdf)

<sup>12</sup> DEFRA, *Consultation on Flood and Coastal Defence Funding Review*, February 2002  
<http://www.defra.gov.uk/corporate/consult/fcdfunding/index.htm>



October 2002	Water Framework Directive: Second Consultation <sup>14</sup>
October 2002	Flood and Coastal Defence Funding Review (Consultation outcome) <sup>15</sup>
July 2003	Review of Existing Private Sewers and Drains England and Wales (Consultation) <sup>16</sup>
August 2003	Water Framework Directive: Third Consultation <sup>17</sup>

The Government finally introduced the *Water Bill* [HL Bill 36] in the House of Lords on 19 February 2003, after delays due to lack of available parliamentary time. The Bill covered various aspects of water policy, abstraction and regulation. A press release published by DEFRA summarised the main provisions of the Bill:

It will update the framework for abstraction licensing, promote greater water conservation and planning for the future by water companies, and help to build a more stable and transparent regulatory environment that puts the consumer at the heart of regulation.

Part 1 and elements of Part 3 of the Bill fulfil public commitments made to reform abstraction licensing in order to improve water management and conservation.

Part 2 establishes a regulatory Board to replace the existing individual Director General of Water Services (Ofwat) and a new independent Consumer Council for Water to replace the Director General's Customer Service Committees. It also introduces other provisions to improve the regulatory regime and extends the opportunities for competition in the water industry, by allowing new entrants to supply non-household customers who consume large volumes of water.

Part 3 introduces a number of provisions, which contribute to a number of other Government priorities related to water.<sup>18</sup>

The full text of the Bill, as introduced in the Commons, and accompanying Explanatory Notes, which should be referred to for a clause by clause account of the Bill, are available on the Parliament website.<sup>19</sup>

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<sup>13</sup> DEFRA, *Extending Opportunities for Competition in the Water Industry in England and Wales - Consultation Paper*, July 2002, <http://www.defra.gov.uk/environment/consult/watercomp2/index.htm>

<sup>14</sup> DEFRA, *Water Framework Directive: 2nd Consultation Paper*, October 2002  
<http://www.defra.gov.uk/environment/consult/waterframe2/index.htm>

<sup>15</sup> DEFRA, *Flood and coastal defence funding review: report on the outcome of consultation*, October 2002, [http://www.defra.gov.uk/environ/fcd/studies/Report\(All\).pdf](http://www.defra.gov.uk/environ/fcd/studies/Report(All).pdf)

<sup>16</sup> DEFRA, *Review of Existing Private Sewers and Drains England and Wales*, July 2003  
<http://www.defra.gov.uk/corporate/consult/sewers/index.htm>

<sup>17</sup> DEFRA, *Third consultation paper on the implementation of the EC Water Framework Directive (2000/60/EC)*, August 2003, <http://www.defra.gov.uk/corporate/consult/waterframe3/consultdoc.pdf>

<sup>18</sup> DEFRA, Press Release 60/03, *Water Bill published, following first reading*, 20 February 2003  
<http://www.defra.gov.uk/news/2003/030220a.htm>

<sup>19</sup> *Water Bill* [HL], Bill 149 2002-03  
<http://www.publications.parliament.uk/pa/cm200203/cmbills/149/2003149.htm>  
*Water Bill* [HL], Bill 149 2002-03, Explanatory Notes  
<http://www.publications.parliament.uk/pa/cm200203/cmbills/149/en/03149x--.htm>

## A. General reactions to the Water Bill

Ofwat, the water regulator, welcomed the proposals in the Bill:

The long-awaited Water Bill was finally published by the Government and introduced in the House of Lords in February 2003. The key provisions of the Bill in terms of Ofwat are setting out a framework for competition, changes to the water abstraction regime and changes in our organisation, including moves to an Ofwat Board and an independent consumer council. These governance changes, which I welcome, will not be implemented before April 2005, after price determinations under PR04 [Periodic review of water prices 2004].<sup>20</sup>

The industry association, Water UK, welcomed the provisions for reforming abstraction licensing and water industry regulation together with the provisions to provide a framework for water competition. However:

The Bill falls short of genuine sustainability and best practice in regulation and water resource management.

[...]

We would like to see the Bill actively promote better regulation, co-ordination of environmental, economic and social regulation, increased transparency and reduced regulatory uncertainty. We also wish to see improvements to rights of appeal and a thorough scrutiny of the compatibility of the proposals for loss of compensation with Human Rights legislation.<sup>21</sup>

The *Utilities Journal* saw the regulatory and competition provisions as setting a framework for increased competition and increasing Ofwat's regard for environmental issues:

The fact that the Water Bill published in February has changed very little from the draft version might be seen as a reason to question the timeframe for producing the final bill. However, the introduction of a duty on Ofwat to take into account sustainable development may be seen to be important, both in operationalising the government's strategy for greater import of sustainable development, and in increasing Ofwat's regard for environmental concerns generally. In addition, while some industry stakeholders may be disappointed by Defra's current strategy on competition in water, the fact that the bill provides for a licensing system for competition does mean that the water industry would have a legislative framework in place for extending competition, were the government to become more amenable to such a policy. These legislative provisions, if

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<sup>20</sup> Ofwat, *Ofwat city briefing: Philip Fletcher's presentation*, 15 May 2003  
[http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/pf\\_150503.doc/\\$FILE/pf\\_150503.doc](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/pf_150503.doc/$FILE/pf_150503.doc)

<sup>21</sup> Water UK, *The New Water Bill: Information and Briefing*, March 2003

enacted, may yet turn out to be the most significant policies to emerge from the current Water Bill.<sup>22</sup>

The Wildlife and Countryside Link, which brings together a wide range of environmental and conservation groups, welcomed the Bill, which would:

Substantially reform the archaic abstraction licensing system which has so damaged our wetland heritage. This is welcome, as many licences date back almost forty years – it is difficult to argue that all are still abstracting water in the right places, at the right volumes and at the right times. The proposal that abstraction licences without a time limit could be varied or revoked without compensation “in order to protect the water-dependent environment from serious damage” is particularly welcome.<sup>23</sup>

However, they called for the mechanism to encourage the conversion of licences to time-limited status to be made clear; the duty to use water efficiently to cover all abstractors; and for the proposed Consumer Council for Water to have a duty to further nature conservation.<sup>24</sup>

The Environment Select Committee published a short report on the Bill when it was published in draft form:

Human Rights Act 1998

6. We strongly support the proposed reforms of the abstraction licensing system, especially in order to ensure that water abstraction does not take place at the expense of the environment. [...] we remain concerned that the provision to revoke abstraction licences without compensation could face challenge under the Human Rights Act 1998.<sup>25</sup>

In its response to the report the Government set out why it did not believe that there would be a problem:

We remain of the view that, after a reasonable period of notice, it would be unreasonable for those who persist with damaging water abstractions to expect any compensation if those abstractions need to be curtailed. It is the view of the Department that the proposal to withdraw compensation for variation or revocation of abstraction licences set out in clause 17 of the Draft Bill is compatible with the Convention rights as defined in section 1(1) of the Human Rights Act 1998.<sup>26</sup>

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<sup>22</sup> The Utilities Journal, ‘The Water Bill: Worth the wait?’, March 2003

<sup>23</sup> Wildlife and Countryside Link, *Making the Water Bill work for the Environment*, February 2003.

<sup>24</sup> *ibid*

<sup>25</sup> Environment, Transport and Regional Affairs Committee, *Draft Water Bill*, March 2001  
<http://www.publications.parliament.uk/pa/cm200001/cmselect/cmenvtra/145/14502.htm>

<sup>26</sup> Environment, Transport and Regional Affairs Committee, *Draft Water Bill: Government Response*, January 2002.

The issue of sustainable development was also raised by the Committee:

#### Sustainable Development

We are concerned that the pursuit of sustainable development is not sufficiently prominent within the role of the Director-General. We therefore recommend that Ofwat should be given a duty 'to facilitate sustainable development'. So framed, the duty will help to provide an appropriately broad and balanced context in which co-operative working between the economic regulator, the Environment Agency and other actors in the regulatory process can flourish<sup>27</sup>

The Government agreed to this proposal in its response to the report. When published, the Bill included a duty for the regulator to carry out its duties in a manner in which it considers is best calculated to the achievement of sustainable development.

The third issue raised by the Committee was the impact of abstraction licensing on trickle irrigation, which is currently exempt. This is dealt with in a later section.

## II The Water Framework Directive

The Water Framework Directive (2000/60/EC) came into force on 22 December 2000.<sup>28</sup> It has a fifteen year implementation programme and introduces the concept of integrated basin management with the aim of achieving environmental objectives for all water bodies. As part of the integrated basin management there will be a requirement to produce strategic management plans at a river basin level. The Directive will have impacts on all sectors whose activities affect the water environment, through abstraction, input of waste or any other way. Measures that are required include controls on water abstractions, ensuring proper pricing policies are in place and ensuring water bodies are of a minimum environmental quality.

The principal aims of the Directive were summarised in the first consultation on the implementation of the Water Framework Directive published by the Government in March 2001. The aim of the first consultation was to give a general overview of the Directive and to examine the areas where choices were possible:

#### 1.8 The Directive will:

- require objectives to be set for *all* water bodies rather than only those that the member state chooses to designate, and in most cases for these objectives to be met within 15 years
- provide for a new system of classifying surface water according to its ecological quality status

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<http://www.publications.parliament.uk/pa/cm200102/cmselect/cmenvfru/499/49904.htm>

<sup>27</sup> Environment, Transport and Regional Affairs Committee, *Draft Water Bill*, March 2001

<http://www.publications.parliament.uk/pa/cm200001/cmselect/cmenvtra/145/14502.htm>

<sup>28</sup> 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, Official Journal L 327 , 22/12/2000 p1-73, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_327/l\\_32720001222en00010072.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_327/l_32720001222en00010072.pdf)

- require quantitative and chemical quality objectives to be set for groundwater
- promote sustainable water use based on long term protection of available water resources
- require comprehensive river basin management plans to manage surface waters and groundwater, with arrangements for providing information and public consultation
- give member states explicit requirements to take account of pressures on water quality from point and diffuse sources and ensure that necessary measures to meet quality objectives are selected, including the management of water quantity where appropriate to meet quality objectives
- require member states to ensure that there is no deterioration in the ecological status of water bodies
- place on a statutory basis much of the Environment Agency's existing good practice
- in meeting the Directive's obligations, contribute to achieving the objectives of international agreements, including those which aim to prevent and eliminate pollution of the marine environment such as OSPAR
- establish a framework for the protection of water which conserves aquatic ecosystems, and with regard to their water needs, wetlands directly depending on them.<sup>29</sup>

The key deadlines for complying with the Directive were also outlined in the consultation.<sup>30</sup>

<b>Timing</b>	<b>Deadline</b>
22 Dec 2000	Directive entered into force (article 22)
+ 3 years	Bring into force the laws, regulations and administrative provisions necessary to comply with the Directive (ie to come into force by 22 December 2003) (article 24)
+ 3 years	Identify competent authority (article 3)
+ 3 1/2 years	Provide Commission with list of competent authorities (article 3)
+ 4 years	For each District, complete analysis of characteristics of the surface and groundwaters, review the environmental impact of human activity (industry, farming etc) and prepare economic analysis of water use (article 5)
+ 4 years	Establish register or registers of Protected Areas (articles 6 and 7)
+ 6 years	Make operational monitoring programmes to ensure comprehensive view of water quality status within each River Basin District (article 8)
+ 6 years	Publish and consult on a timetable and work programmes for the production of River Basin Management Plans for each River Basin District (article 14)
+ 6 years	In the absence of agreement at Community level, for substances included on the first priority list (see article 16), member states to establish environmental quality standards for all surface water affected by discharges of those substances and controls on principal sources of discharges (same obligation to apply 5 years after

<sup>29</sup> DETR *First Consultation Paper on the Implementation of the EC Water Framework Directive* (2000/60/EC), March 2001, <http://www.defra.gov.uk/environment/consult/waterframe/index.htm>

<sup>30</sup> DETR *First Consultation Paper on the Implementation of the EC Water Framework Directive* (2000/60/EC), Annex A, March 2001, <http://www.defra.gov.uk/environment/consult/waterframe/index.htm>

	subsequent inclusion of a priority substance in the list, in the absence of Community agreement) (article 16)
+ 7 years	Publish and consult on an interim overview of significant water management tissues for each River Basin District (article 14)
+ 8 years	Publish and consult on drafts of the River Basin Management Plans (at least 6 months to be allowed for comments in all the above cases) (article 14)
+ 9 years	Establish programmes of measures in each River Basin District in order to deliver environmental objectives (article 11)
+ 9 years	Publish first River Basin Management Plan for each River Basin District, including environmental objectives for each body of surface or groundwater and details of programmes of measures (article 13)
+ 10 years	Ensure proper water pricing policies are in place (article 9)
+ 12 years	Make operational programmes of measures in each River Basin District to deliver environmental objectives (article 11)
+ 12 years	Interim progress reports to be prepared on progress in implementing planned programmes of measures (article 15)
+ 15 years	Main environmental objectives to be met (article 4)
+ 15 years	And every 6 years thereafter – review and update plans (with same consultation and interim reporting arrangements described above) (articles 13,14 and 15)

A second consultation was published in October 2002. This included a summary of responses to the first consultation and further proposals. The accompanying press release set out the issues covered:

In this new document the Government (and Welsh Assembly Government) are consulting on the key issues which will determine how the Directive will be put into practice in England and Wales. The consultation, which covers issues as diverse as diffuse pollution, water abstraction, discharge consent system and wetlands, sets out:

- How the Government plans to transpose the directive - through regulations, ratcheting up much existing water quality legislation and providing additional powers where necessary;
- The major proposal for a new power to prevent or control diffuse pollution. Diffuse pollution remains the area of water pollution which has yet to be effectively tackled. How and in what ways the power might be used will not have to be decided until some time later. Likely use will depend on what other action is taken to tackle diffuse pollution which is currently under consideration;
- Whilst there are a number of areas where powers are not needed (for example abstraction), the Directive will require new powers in areas such as setting environmental objectives and establishing a classification system to determine 'good status' of water bodies;

- In addition, the Environment Agency will be given a central role in implementing the Directive, including new duties to co-ordinate production of river basin management plans.<sup>31</sup>

A third consultation was published in August 2003. This included draft regulations for implementing the Directive and an updated regulatory impact assessment.<sup>32</sup>

## A. Legislation or Regulation?

The Government view, expressed during evidence by the Minister Elliot Morley to the Environment Select Committee enquiry into the Water Framework Directive, is that a limited amount of primary legislation is required to implement the Directive:

We have well-established primary legislation which covers water policy that is in place, well established within England certainly. Therefore, the bulk of the implementation will be by secondary legislation, and it is true that there will be reviews by the European Standing Committee in that sense, but there will be a range of statutory instruments, most of which will be debatable, open to scrutiny, and of course, there is the normal scrutiny of the parliamentary process in terms of how this Directive will develop over time, which will give parliament ample opportunity for discussing the details, as, indeed as part of the process you are having with the Select Committee.<sup>33</sup>

The DEFRA memorandum submitted to the committee stated that the intention was to provide for some transposition elements in the Water Bill. It also made clear that some changes would be needed to the current arrangements for licensing abstraction of water, in addition to proposed measures contained in the Water Bill.<sup>34</sup>

The view of the committee was that there could be a need for primary legislation:

Defra proposes that the Water Framework Directive should be brought into force through secondary, rather than primary, legislation. The Minister told us that "we have well-established primary legislation that is in place ... Therefore, the bulk of the implementation will be by secondary legislation". South West Water Limited, however, reported to us that "primary legislation is recommended strongly as the preferred vehicle to enable the transposition of the Water Framework Directive into national legislation". We do not make a judgement on this point: although the status and comprehensive nature of the Directive amply

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<sup>31</sup> DEFRA Press Release 437/02, Long term plans for sustainable water management- new consultation on Water framework Directive, 29 October 2002 , <http://www.defra.gov.uk/news/2002/021029a.htm>

<sup>32</sup> DEFRA, *Third consultation paper on the implementation of the EC Water Framework Directive (2000/60/EC)*, August 2003, <http://www.defra.gov.uk/corporate/consult/waterframe3/consultdoc.pdf>

<sup>33</sup> Environment, Food and Rural Affairs Select Committee, *Fourth Report :The Water Framework Directive*, 19 March 2003 Report HC 130-II, Q 547

<http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmenvfru/130/13002.htm#evidence>

<sup>34</sup> *ibid*



justifies the introduction of a 'standalone' bill, the important point is the effectiveness of the transposition of the Directive into national law, not the means by which that is achieved. But until the administrative arrangements which will enable the Environment Agency to function as the competent authority have been properly explored, Defra cannot be certain that primary legislation is not required. We therefore repeat our recommendation that possible shortcomings in such administrative arrangements be identified as early as possible, and we recommend that the Government keep an open mind about the need for primary legislation to address such shortcomings. To address this issue the Government should publish a legislative impact study on the requirements of the Directive. In particular it should examine how it relates to existing law in planning, abstraction controls, discharges and flood defence requirements. It should also address the question of whether any new laws are required, particularly in areas such as groundwater management.<sup>35</sup>

The other point of conflict that was mentioned was between the five year cycle of price reviews by the Water Regulator and the six year cycle of Basin Management Plans:

We have already discussed the difficulties of co-ordinating planning policies and decisions made in respect of river basin management plans. Similar issues apply to co-ordination with the water industry and its regulator. The water industry currently follows a five-year cycle of periodic reviews, regulated by Ofwat. The Water Framework Directive will introduce a 6-year River Basin Management Plan cycle. Several witnesses asked that Ofwat might consider synchronising the two cycles, since the River Basin Management Plan is likely to have a strong bearing on investment decisions by water companies. We recommend that Defra, together with Ofwat, consider whether or not to synchronise the periodic review and River Basin Management Plan cycles. We recommend that they report back to us about the benefits and disadvantages they perceive would be the result of such synchronisation.<sup>36</sup>

## **B. The Directive and the Water Bill**

The Environment Agency, the regulatory body for the environment in England and Wales, in their position statement generally welcomed the Water Bill and its role in implementing parts of the Directive. However they had reservations about one issue:

Navigation authority reservoirs

We are concerned that the current proposal to allow some of navigation authority reservoirs to remain outside the water resources regulatory and management framework is inconsistent with the underlying principles of the Bill, which otherwise seeks a comprehensive system of licensing all significant abstractions.

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<sup>35</sup> Environment, Food and Rural Affairs Select Committee, *Fourth Report: The Water Framework Directive*, 19 March 2003 Report HC 130-I

<http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmenvfru/130/13002.htm>

<sup>36</sup> *ibid*



The proposal will have the effect of allowing nearly 60% of British Waterways' reservoirs to pose a risk of impact on watercourses without any statutory control to protect the environment or to safeguard other abstractors and manage water resources in a sustainable way. If the Bill were to remove this anomaly we would be better prepared for the implementation of the Water Framework Directive.<sup>37</sup>

During the Second Reading debate and the first Grand Committee of the *Water Bill* in the Lords there was extensive discussion about the timing for introduction of the Bill in relation to implementation of the Water Framework Directive. Lord Beaumont of Whitley summarised concerns as follows:

Although I welcome the Bill, I have one or two doubts about it. Certainly, there are steps that we can take to improve it at a later stage. The first problem has been raised by every speaker so far—the overlap with the EU Water Framework Directive. It is difficult to see why, when the Water Framework Directive is being incorporated into UK law, we should not wait until it has been incorporated before having our own Water Bill or do the whole thing at one time, rather than, in this peculiar way, doing the two things alongside each other. We should consider that point.

Some of the Bill does not live up to what the directive requires. Article 11(3)(e) of the Water Framework Directive refers to controls on abstraction. The recent consultation on the directive by the Department for Environment, Food and Rural Affairs specifically identified the requirement for such controls to be reviewed periodically. That is a requirement for the time-limiting of licences. The continuation of permanent licences, without a timetable and a mechanism for conversion, would represent a failure to transpose the directive adequately and, hence, would be a breach of its conditions.<sup>38</sup>

and

There is also the issue of the promotion of efficient and sustainable water use. That also comes under Article 11(3)(e) of the directive, and it must be written more firmly into the Bill. When the noble Baroness who spoke from the Liberal Democrat Benches said that they hoped to put down amendments that would write sustainability more firmly into the Bill, it rang a bell with me. I shall join them in that matter.<sup>39</sup>

An amendment to incorporate the principles of the Water Framework Directive was tabled by Baroness Miller of Chilthorne Domer, Liberal Democrat spokesperson for Environment, Food and Rural Affairs, during Grand Committee. Although it was withdrawn it received considerable support. Lord Whitty, Parliamentary Under-Secretary

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<sup>37</sup> Environment Agency, *Water Bill Position Statement*, February 2003

<sup>38</sup> HL Deb 6 Mar 2003 c978

<sup>39</sup> *ibid*

of State, Department for Environment, Food and Rural Affairs, responded for the Government:

The key issue today is not whether the Water Framework Directive is desirable—most contributions indicate that it is—but whether we should give it legal effect via the Bill or follow our intention to do so by secondary legislation under the European Communities Act 1972. That is the normal way of doing so and we have already begun the consultation period.<sup>40</sup>

On the issue of a single piece of legislation to implement the Directive he said:

Effectively that would mean producing a consolidated Bill that includes all the regulations, all the old legislation and all new legislation. No doubt that would detain us in Grand Committee in the Moses Room for considerably longer than the five days allocated for this Bill. Given that much of that legislation already exists, we are consulting on much of the legislation coming from the directive. We have a perfectly adequate way of transposing that—as we normally do.<sup>41</sup>

However a further, this time successful, amendment was tabled during Report stage:

An amendment tabled by Baroness Miller will oblige the Secretary of State to ensure through regulations that a "working framework" to "further the establishment of practices" required by the Directive is introduced in a "timely" fashion.

Specifically, the regulations will have to prevent deterioration of the aquatic ecosystem, promote sustainable water use, and enhance protection of the aquatic environment through measures such as progressive reductions in discharges of priority hazardous substances - among other measures required by the Directive.

In addition, the amendment obliges the Secretary of State and Welsh Assembly to set targets for achieving these measures, beginning at the end of 2004.<sup>42</sup>

In his response to the proposed amendment Lord Whitty reiterated the Government's position, stating that the Water Bill was not the most desirable way of implementing legislation relating to the Water Framework Directive:

My Lords, to return to the central issue, in response to the noble Lord, Lord Livsey, it is not an absolute that one cannot transpose through primary legislation. But it is normal for us to transpose through secondary legislation unless we are dealing with a completely congruent set of primary legislation. The Bill is not primarily about the same areas that the Water Framework Directive deals with. It is about the governance, competition, consumer organisations and structure of the water industry. It is not about the quality of water supply in the same way; it is

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<sup>40</sup> HL Deb 27 Mar 2003 c44GC

<sup>41</sup> *ibid* c46GC

<sup>42</sup> "Stronger water efficiency provisions inserted in Water Bill", *Ends Report*, July 2003 No 342.

about regulation and the various powers of regulation. There is an overlap but not congruence.

There would be stronger arguments for extending the scope of the Bill to include the whole Water Framework Directive if we had been dilatory in consulting and starting the transposition process. We have not. We have already had two stages of consultation. There will be a third one in the autumn, and we intend to complete the transposition by the end of the year. Therefore, it is not a valid argument to say that the Government are not getting on with transposition. We are, and, in so doing, we are taking into account the responses to the various consultations. Simply to bang the provisions into a Bill that deals largely with related but not congruent matters would not be a sensible procedure for the House. I therefore ask the noble Baroness not to proceed with the amendment.

The amendment was passed by 94 votes to 89 and is now **clause 2** of the Bill. As already mentioned the Government published a third consultation which included draft regulations for implementing the Directive on 4 August 2003.<sup>43</sup>

### III Water Abstraction

#### A. Background

Fresh water is a limited resource which has many competing uses. In addition to its use for drinking water supplies, irrigation and industry, it is used for navigation and recreation and has a vital role to play in wildlife conservation. It also has significant general amenity and landscape value. Abstractions of water from surface and groundwater bodies for irrigation and drinking water purposes can affect the natural water cycle, which can result in changes in flows affecting aquatic ecology. In addition, abstractions are most commonly made during dry periods when river flows are naturally low, exacerbating drought conditions and their impact on the aquatic environment.

The Government published *Directing the Flow* in November 2002. This is a policy document aiming to define the Government's strategic vision for the direction of water policy and its place among broader Government objectives in England. The document highlighted how the amount of water taken out of the water environment through abstraction can affect water quality in a river and the quality of water (e.g. pesticide content) can affect its suitability for abstraction:

The balance in a catchment between water quality improvements, abstraction and flood management can jointly contribute to biodiversity; water needs to be seen as part of an ecological system;

On present trends, it is far from clear that there will be sufficient water resources available beyond 2025 to meet demand. [...] abstractions from surface water are

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<sup>43</sup> DEFRA, *Third consultation paper on the implementation of the EC Water Framework Directive (2000/60/EC)*, August 2003, <http://www.defra.gov.uk/corporate/consult/waterframe3/consultdoc.pdf>

already at their limit in the summer for much of England and also in the winter for parts of the south and east.<sup>44</sup>

The document set out the planned changes aimed at improving supply: reforms of abstraction licensing, preparation of drought plans by water companies and a duty of water companies to use water efficiently. In addition the Environment Agency is reviewing abstraction and discharge consents to mitigate impacts on Natura 2000 sites (important nature sites designated under the Habitats Directive) thought to be adversely affected by abstractions or discharges, and considering the appropriate remedial measures.

Rainfall and availability of supply differs significantly throughout England and Wales. The Environment Agency's strategy for managing water abstraction summarised the position as follows:

Rainfall amounts vary across England and Wales. Most of our weather systems come from the west, and this means that the higher land in the west receives more rain than the flatter land in the east. The average rainfall in England and Wales is 897 mm/year, but the total amount ranges from over 4000 mm/year in the mountains of Wales to less than 550 mm/year in parts of East Anglia.

However, year-to-year variability in rainfall can be significant. Long dry periods that span several years can also be important. England and Wales are commonly perceived as wet. The natural variability of our climate means that we experience extremes of flood and drought. While on average some parts of England and Wales receive relatively large volumes of rain, we also have a high population density. The result is that, for each person, there is relatively little water.

In particular, parts of south east England have to cope with very limited rainfall per person. This is an important fact, and one which is not often recognised.

According to the Environment Agency position statement on the *Water Bill*:

In an *average* year there is less water per person in England and Wales than in Spain or Portugal. In parts of the south and east of England there is less per person than in Ethiopia or the Sudan. This scarce resource needs very careful management if we are to ensure that there is enough for us to use in our homes, in industry and for agriculture. But the natural environment also needs water. We have to find a sustainable balance to these conflicting needs.<sup>45</sup>

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<sup>44</sup> DEFRA, *Directing the Flow*, November 2002  
[http://www.defra.gov.uk/environment/water/strategy/pdf/directing\\_the\\_flow.pdf](http://www.defra.gov.uk/environment/water/strategy/pdf/directing_the_flow.pdf)

<sup>45</sup> Environment Agency, *Water resources for the future: A strategy for England and Wales*, March 2001  
[http://www.environment-agency.gov.uk/commondata/105385/national\\_report\\_english.pdf](http://www.environment-agency.gov.uk/commondata/105385/national_report_english.pdf)

Appendix 1 contains maps of England and Wales showing rainfall and availability of surface water and ground water for abstraction. From this it can be seen that areas where levels of abstraction are at or above sustainable limits are mainly concentrated in the South East and East Anglia. Not only does this create difficulties for water supply due to competing demands in the most populated areas of the country, it also has a serious impact on protected wildlife sites, as highlighted by the Chief Executive of the Environment Agency, Baroness Young:

nearly 400 of our river or wetland wildlife sites designated by law as nationally or internationally important are currently threatened by abstraction, so there is a real need to bring abstractions into a logical framework.<sup>46</sup>

A review of abstraction licensing was announced during the Water Summit, when the Government stated that a key aim was to ensure that the need of the environment was given due weight in decisions:

The review will examine ways in which the environmentally-damaging abstractions, which often date from the issues of licences of right in the very different circumstances of the early 1960s, can be equitably curtailed. We need to be sure that the abstraction licensing system provides full protection for the water environment while enabling fair and flexible arrangements for access to water resources.<sup>47</sup>

A consultation document was published in June 1998 by the Department of Environment, Transport and Regions, *Review of the Water Abstraction Licensing System in England and Wales*. This stated that in 1996 there were over 48,000 licences to abstract water from 'sources of supply' throughout England and Wales and that:

In all some 24,500 million cubic metres of water per year are authorised to be abstracted from non-tidal surface waters and groundwaters throughout England and Wales but on average only 53% of this is actually abstracted

The latest available figures, for the years 1996 and 2000, can be found in the table below. These show that though the total number of licences has not changed dramatically, the volume of water that is licensed for abstraction has doubled. However, the proportion of water that is actually abstracted compared to the amount that is licensed has fallen from 54 to 45%. The actual volume of water abstracted has increased from 13 to 21 million megalitres per year: an increase of more than 60%. Electricity and public water supply are by far the greatest users of abstracted water. Details of number of abstraction licences and volume of water abstracted, for the year 2000, a regional level, can be found in Appendix 2.

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<sup>46</sup> HL Deb 6 March 2003 c993

<sup>47</sup> DoE, PR180/97, 'Water Summit – Action on Leakage is the Top Priority' 19 May 1997

**Abstraction licences and volume abstracted by purpose, 1996 and 2000***number of licences/water abstracted - megalitres per annum*

	1996			2000		
	number of abstraction licences	licensed abstraction (megalitres p.a.)	actual abstraction (% of licensed)	number of abstraction licences	licensed abstraction (megalitres p.a.)	actual abstraction (% of licensed)
Public Water Supply	2,116	9,949,046	64	1,905	11,103,651	56
Spray Irrigation	11,933	307,491	44	11,920	345,597	31
Other Agriculture	23,052	135,501	37	22,897	152,356	36
Electricity Supply	352	8,752,474	39	419	26,972,509	43
Other Industry	4,276	2,537,522	47	5,506	6,425,643	31
Fish/Cress Farming; Amenity Ponds	1,173	2,285,935	69	910	2,117,592	85
Other (inc private water supply)	5,691	646,168	53	4,642	1,106,850	18
Totals	48,593	24,614,140	53	48,199	48,309,659	45

Source: Environment Agency; DEFRA

1 Megalitre = 1 million litres = 1000 cubic metres

**B. Current system**

According to the *Water Resources Act 1991*, abstraction in relation to water contained in any source of supply, means the doing of anything that removes water from that source of supply, whether temporarily or permanently, including anything that removes water for the purpose of being transferred to another source of supply.<sup>48</sup>

The current licensing system was set up under the 1963 *Water Resources Act*, which came into force in 1965. It made provision for the granting of licences of right in circumstances where abstractors were already entitled to abstract under a statutory provision or where they had abstracted from a source of supply during the previous five years. In total some 48,000 licences of right were granted to abstract at a total rate of approximately 100,000 megalitres per day (Ml/d). The number of licences of right reduced significantly when abstraction charging was introduced in 1969 but around two-thirds of the 48,000 licences held in 1998 were licences of right. The Act also made provision for abstractors to apply for licences, which could be in force for a time limited period or until revoked.

The *Water Resources Act 1991* and *Environment Act 1995* amended and consolidated the legislation on water abstraction, though they did not fundamentally alter the abstraction licensing regime.

The regulatory body for abstraction licensing in England and Wales is the Environment Agency. They are responsible for granting and administering licences, for a charge, and ensuring that licence conditions are complied with.

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<sup>48</sup> *Water Resources Act 1991*, s221 (1)

The following types of abstraction are currently exempt from licensing:

- one-off abstractions of 20 cubic metres or less;
- abstractions from boats, for the purposes of land drainage, navigation, dewatering of mineral excavations or for fire fighting;
- domestic abstractions of 20 cubic metres a day or less;
- riparian agricultural abstractions of 20 cubic metres a day or less where the abstraction is from a surface water source, except for spray irrigation.
- abstractions to test for the presence, quality or quantity of groundwater; and
- areas of England and Wales which have been exempted by Statutory Instrument

A licence will normally state the following:

- how much water can be taken and at what time of year it can be used;
- what the water can be used for;
- the land on which it will be used, except for public water supply purposes;
- the expiry date, if there is one;
- the location where the water can be taken;
- how the water is to be abstracted;
- what special conditions apply such as requiring abstraction to cease when river flow drops below a specified level; and
- how the abstraction must be measured.

If licences are revoked by the Environment Agency or the Secretary of State the licence holder may be compensated for any loss, unless the licence has not been used for over 7 years. Provisions also exist for licences to be transferred when changes are made to the occupation of the land for which the licence is held.

### **C. Proposed changes to legislation**

Following consultation on water abstraction licences a summary of the responses to the consultation together with the Governments proposed changes were published in *Taking Water Responsibly* in April 1999. This set out the proposed legislative and non-legislative changes of abstraction licensing that would be implemented:

1.6 The Government confirms that the Environment Agency should issue abstraction licences on a time-limited basis. The Agency's detailed policy on time limiting licences will be founded on the development and periodic review of an Abstraction Management Strategy (AMS) for each catchment area. Each strategy will complement the LEAP [Local Environment Agency Plan] by describing the water resources position in each catchment and by setting out a strategy to deal with pressures on water resources, but will be physically separate so as to present the more detailed information which will underpin the strategy.

Research and development work will continue to be directed at improving this information.<sup>49</sup>

There would be a general presumption of renewal of licence, with a six-year notice period if this were not to be the case. The initial proposal for the duration of licences was 15 years:

1.8 The duration of time-limited abstraction licences will be determined by the Agency to ensure proper protection of the environment while reflecting reasonable needs of abstractors. The Government expects that, in many cases, the duration will be of the order of 15 years, but recognises that some abstractions, particularly those associated with major infrastructure, may need licences with significantly longer time limits.<sup>50</sup>

This has since been reduced to 12 years. Administration procedures would be simplified:

1.9 In line with the consultation proposals, the Government expects the Environment Agency to simplify its procedures for administering the abstraction licensing system. Revised regulations in respect of licensing applications and form and content of licences will be made within the framework of the current legislation to assist that process as far as possible and to deliver some new features of the system. The Government will also draw up, as necessary, further guidance or rules on the conduct of abstraction authorisation appeals.

1.10 The Environment Agency is continuing to seek voluntary action by abstractors whose abstractions are shown to be the cause of damage to Special Areas of Conservation, Special Protection Areas or other Sites of Special Scientific Interest, but stands ready to proceed with curtailment in cases where no agreement can be reached. In that connection, the Agency is drawing up guidelines on the assessment of the compensation which might be payable. The Agency will also seek to refine the water abstraction charging scheme to accommodate compensation costs and charges for drought orders.<sup>51</sup>

Legislation was proposed to assist implementation of some of the proposed changes:

1.12 As soon as Parliamentary time allows, the Government will bring forward legislation for the following changes:

- Alterations to the application and succession requirements so that the only precondition is right of access to the point of abstraction.

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<sup>49</sup> DETR, *Taking Water Responsibly: Government decisions following consultation on changes to the water abstraction licensing system in England and Wales*, April 1999  
<http://www.defra.gov.uk/environment/water/resources/abstreview/index.htm>

<sup>50</sup> *ibid*

<sup>51</sup> *ibid*



- The establishment of two new forms of abstraction authorisation - permits and consents - and the removal of most authorisation exemptions currently given on grounds of use.
- Provision of Environment Agency powers to remove "exempt area" status and to establish volume exemption thresholds on a catchment basis; and to establish a Register of exempt abstractions where appropriate, with non-registered exempt abstractions losing protection from derogation in these regions.
- Provision of the power to revoke an authorisation without compensation after 4 years without beneficial use.
- Removal of the defence against civil action in respect of future financial losses incurred as a result of continuing water abstraction.
- Removal of administrative details from primary to secondary legislation.
- Additional Environment Agency enforcement powers to deal with breaches of authorisation conditions.
- Removal, from 1 July 2012, of the right to compensation if a licence without time limit is curtailed on the direction of the Secretary of State on the grounds that the abstraction is causing significant environmental damage.
- Provision of powers for the Environment Agency to require abstractors to enter into enforceable water management arrangements, and recover the reasonable costs of such agreements from the abstractor.
- Provision of Environment Agency powers to compel (i) one water company to seek bulk supply from another and (ii) transfer of abstraction licences from one water company to another.
- Provision of Environment Agency powers to require provision of information from abstractors relevant to the Agency's discharge of its duty to secure the proper use of water resources.
- Creation of a statutory requirement for all water companies to agree publicly available drought plans with the Environment Agency.
- Creation of enforceable duties upon (i) water companies, to conserve water in carrying out their functions, and (ii) all other abstractors, to use water abstracted under authorisations in an efficient and effective manner.<sup>52</sup>

Many of the measures will help England and Wales comply with Article 11(3e) of the Water Framework Directive, which states the following basic programme measures that will be required, on controls of water abstraction, for compliance:

(e) controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water, including a register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment. These controls shall be periodically reviewed and, where

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<sup>52</sup> *ibid*

necessary, updated. Member States can exempt from these controls, abstractions or impoundments which have no significant impact on water status.<sup>53</sup>

## **1. Progress to date**

### **a. Catchment Abstraction Management Strategies (CAMS)**

No new legislation was required for the Government proposals for Abstraction Management Strategies and work on these began in 2001. The Environment Agency has divided England and Wales into a total of 129 CAMS areas. Work on 25 began in 2001 and on a further 26 in 2002 and 7 had been completed by July 2003. The Environment Agency aims to produce all 129 by 2008.

In addition to their central role in abstraction management the Environment Agency envisages CAMS as having a role in complying with the Water Framework Directive's requirement for River Basin Management:

These Directives require the Agency to undertake activities to protect designated sites. CAMS must ensure that the water requirements of these site are met. The European Water Framework Directive, 2000, establishes a common framework for the protection and management of surface water and groundwater by providing an integrated and consistent approach. It has significant implications for the Agency's management of water resources. CAMS will play a key role in providing the information required to formulate River Basin Management Plans, required by the Directive.<sup>54</sup>

### **b. Time limited licences**

All abstraction licences issued by the Agency are now issued on a time limited basis. There are provisions in the Bill that require the Environment Agency to state the date from which the licence takes effect and the date of expiry for all new licences, therefore removing the possibility of an open-ended licence. Licences will generally run for a maximum of twelve years and there will be a presumption of renewal as long as three tests, set out in the Explanatory Notes, are met:

- that water resources in the area are sustainable and the abstraction will not create unacceptable environmental effects;
- that the holder has a continuing requirement to abstract;
- and that the abstracted water is used efficiently.

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<sup>53</sup> 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, Official Journal L 327 , 22/12/2000 P. 0001 – 0073, [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_327/l\\_32720001222en00010072.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_327/l_32720001222en00010072.pdf)

<sup>54</sup> Environment Agency, *Managing Water Abstraction*, July 2002  
[http://www.environment-agency.gov.uk/commondata/105385/mwa\\_english.pdf](http://www.environment-agency.gov.uk/commondata/105385/mwa_english.pdf)

In *Taking Water Responsibly*, the Government summarised how it expected the implementation of time limited licences to take place:

The Government therefore expects the Environment Agency to develop, as part of its Abstraction Management Strategies, administrative systems which will embody presumption of renewal and which will give abstractors a minimum of six years' notice of likely non-renewal of time-limited authorisations. These arrangements will not be legally binding, although the Government will hold the Environment Agency to account for any significant departure from them. Ministers will, if necessary, give the Agency further guidance on how abstractors' interests should be safeguarded in respect of non-renewal. The Government will bring forward, when Parliamentary time allows, legislation to enable authorisation renewal to proceed by the simplified process envisaged in the consultation paper.<sup>55</sup>

The Environment Agency will be publishing a consultation shortly on abstraction charging, one of the options being considered in this is a differential charging system for time-limited licences that might encourage their uptake.

**c. *Drought Plans***

These do not yet have a statutory basis but have been prepared by all water companies and presented to the Environment Agency. Further information on provisions in the Bill to place drought plans on a statutory basis can be found in section V.

**d. *Licence Trading and Economic Instruments***

Following consultation on the Draft Water Bill the government set out how they intended to apply economic instruments, including licence trading, to water abstraction:

- water abstraction charges will remain limited to recovery of the Environment Agency's water resources management costs. The Agency has been asked to consult, by June 2002, on changes to the current charging scheme within that framework.
- abstraction licence trading will be facilitated by a variety of means, within the Agency's existing powers to ensure that trading does not harm the water environment. Simplifying the trading arrangements should also assist competition in the water industry.
- the changes to the abstraction licensing system in the Water Bill will further facilitate trading.<sup>56</sup>

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<sup>55</sup> DETR, *Taking Water Responsibly: Government decisions following consultation on changes to the water abstraction licensing system in England and Wales*, April 1999

<http://www.defra.gov.uk/environment/water/resources/abstreview/index.htm>

<sup>56</sup> DEFRA, *Water Bill., Consultation on Draft Legislation: Government Response*, May 2002

[http://www.defra.gov.uk/environment/consult/waterbill/pdf/water\\_bill\\_response.pdf](http://www.defra.gov.uk/environment/consult/waterbill/pdf/water_bill_response.pdf)

The provisions in the *Water Bill* that are intended to facilitate trading are the removal of the requirement for specifying the land that water abstracted will be used on, and making the only requirement for qualifying for a licence to be a right of access to water. Currently it is only possible to qualify for a licence if you own land that abuts a surface water source or is above a groundwater source.

Other than the above there are no legislative changes necessary to implement trading. The Environment Agency is going ahead with its implementation programme and published a consultation document on abstraction licence trading, *Trading Water Rights*, in June 2003. This set out the Agency's preferred option for regulating trading to ensure that it did not result in environmental damage as a result of sleeper licences being reactivated in water scarce areas:

The principle that trades should not cause damage to specific sites and should demonstrate a long-term overall environmental benefit. This principle would be particularly important for trading in over licensed and over-abstracted catchments. It would not provide a mechanism by which buyers or sellers could judge exactly how much water they would be able to trade, or on what terms, but would indicate the general approach we would take to any trading proposals in over-abstracted or over-licensed catchments.<sup>57</sup>

#### **D. The Water Bill**

Part 1 of the *Water Bill* deals with abstraction and impounding. The main provisions of this part of the Bill deal with changing the abstraction licensing regime in England and Wales with the aim of improving water management and conservation. **Clauses 1 and 2** are more general, introduced as opposition amendments in the Lords, imposing a general duty on the Secretary of State to ensure that everyone uses water without wasting it and placing a requirement on the Secretary of State to set out how the Water Framework Directive will be implemented.

- Two new types of licences are created in **clause 3**, a transfer licence and a temporary licence, to complement the existing, time-limited one, which will be known as a "full licence". A temporary licence will be required for any abstraction lasting less than 28 days. A transfer licence will be required for abstractions lasting 28 days or more which transfer water from one source of supply to another. A full licence will be required for any other abstraction lasting 28 days or more.
- Restrictions on impounding of water are increased, with an impounding licence remaining in force for the lifetime of any works (**clauses 4 to 6**).
- The general need for a licence is removed for uses of less than 20 cubic metres a day. Above this all abstractions, including those previously exempt will need a

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<sup>57</sup> Environment Agency, *Trading water rights – a consultation document*, June 2003

licence. This will particularly affect agriculture (including trickle irrigation), and dewatering operations. The Secretary of State is given powers to extend or decrease areas under licensing controls if necessary, and to vary the daily volume limit requiring a licence in certain areas (**clause 8**).

- **Clauses 13 to 25** modify licence application and processing procedures, together with modification and transfer of licences. Included is a change so that a right of access to an abstraction point will be the only precondition to an application being made. Licences, except those for public water supply or supply to third parties, currently have to specify the land on which the abstracted water is authorised to be used. This requirement is to be removed.

Various changes are intended to make it easier to address environmental damage caused by over abstraction:

- **Clause 26** removes the defence in civil action in respect of licensed abstractions. This would mean that any third party damaged by an abstraction would be able to sue an abstractor for damages; this was previously not possible. The fact that abstraction is being carried out within licence conditions will no longer be a defence.
- All licences will be time limited and the Agency will be able to revoke a licence without compensation if it has not been used for 4 years, rather than the existing 7 (**clause 27**). This would not apply to licences that are valid for contingency planning reasons (sleeper licences).
- The Agency will be able to recover from a water company to which an abstraction licence is transferred compensation costs paid to the original water company holding the licence for its revocation (**clause 28**).
- There will be no right to compensation after 15 July 2012 if the Secretary of State revokes a licence that is causing serious environmental damage (**clause 29**).
- The Agency will have the power to enter into arrangements with abstractors, other than water undertakers to ensure proper management of waters (**clause 30**) and will have the power to refer the matter to the Secretary of State if they refuse to do so (**clause 31**).
- The Agency is given increased powers of monitoring, enforcement and entry (**clause 32**) together with powers to require abstractors to provide information on how abstracted water is used (**clause 73**). Penalties for abstraction and impounding offences are increased. **Clause 63** of the Bill would increase the penalty for abstracting without a licence or in contravention of licence conditions from £5,000 to £20,000.

#### *a. Trickle Irrigation*

Trickle irrigation is a form of irrigation where water is supplied directly to plants through pipes or other apparatus, without being ejected into air in the form of a jet or spray, resulting in greater water efficiency. The proposal to bring water abstracted for trickle irrigation of crops within the abstraction licence regime has caused considerable

concerns. The Environment Select Committee, in its report on the Draft Water Bill summarised what these were:

Trickle irrigation is an efficient form of irrigation. We urge the Government to consider how trickle irrigation can be guaranteed fair treatment in the new system of abstraction licensing. Where resources are scarce, the needs of existing trickle irrigators whose use has been notified to the Environment Agency must be considered equal to those of existing licensed abstractors. The Environment Agency will be responsible for implementing the licensing system and they must be provided with a very clear framework by Government which defines how trickle irrigators are to be introduced to the scheme whilst ensuring that environmental protection is not compromised.<sup>58</sup>

The Regulatory Impact Assessment that accompanied the publication of the Water Bill suggested that approximately 900 trickle irrigators would come under licence control, assuming the threshold norm of 20 m<sup>3</sup>/day.

Under the current legislation, abstractions for trickle irrigation are exempt from licence control and measurements of the amounts abstracted are not routinely undertaken. However, an estimate of the volume abstracted for trickle irrigation is 4.2 million m<sup>3</sup> a year based on 688 holdings.<sup>59</sup> Weatherhead and Knox have estimated the use of trickle irrigation by type of business:<sup>60</sup>

#### **Estimated use of trickle irrigation by type of business**

*proportion of businesses using trickle irrigation*

Orchard fruit (Dessert apples, pears, cider apples, plums, cherries)	~ 9.5%
Soft fruit (strawberries, raspberries, blackcurrants)	~ 11.5%
Glasshouse production	~ 15.5%
Agriculture (Potatoes, carrots, parsnips, onions, cauliflower, runner beans, asparagus, celery, leeks, lettuce, sweetcorn)	~ 16.5%
Horticulture	~ 17%
Landscape and Amenity	~ 23%
Other (wine grapes, hops)	~ 7%

Environment Agency; Weatherhead and Knox (2003)

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<sup>58</sup> Environment, Transport and Regional Affairs Committee, *Draft Water Bill*, March 2001 <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmenvtra/145/14502.htm>

<sup>59</sup> Estimate supplied by the Environment Agency based on 2001 data.

<sup>60</sup> Knox, J.W. and Weatherhead, E.K on behalf of the Environment Agency *Trickle Irrigation in England and Wales: Technical Report* (2003, forthcoming).

The table below shows that a large proportion (64%) of trickle irrigation holdings known to the Environment Agency are found in the Southern, Anglian and Thames regions where strains on water resources are greatest, as can be seen in the maps in Appendix 1. Further information on trickle irrigation, including information on how much land in the UK is irrigated compared to other European countries, can be found in Appendix 3.

**Number of trickle irrigation holdings known to Environment Agency,  
by Environment Agency Region, 2001**

<b>Environment Agency Region</b>	<b>Number</b>	<b>%</b>
Anglian	119	17
Midlands	118	17
North East	34	5
North West	5	1
South West	83	12
Southern	210	31
Thames	111	16
Environment Agency Wales	8	1
<b>Total</b>	<b>688</b>	<b>100</b>

Source: Environment Agency *Trickle Irrigation in England and Wales* (2003)

In response to concerns expressed about bringing trickle irrigation within the new licensing system the Environment Agency published a briefing on the issue, setting out why it is important they are included within any licensing scheme:

There are a number of reasons why the Agency supports the licensing of these abstractions:

- Trickle irrigation is currently seen (legitimately) as a means of developing water resources in areas where licences are no longer available because resources are fully or over exploited.
- Unregulated abstraction of water for trickle irrigation has the potential to impact the environment, particularly in drier parts of the country. The impact of abstraction for trickle irrigation on available water resources in some areas has meant that licensed abstractors have been unable to take their entitlement. In one particular example this resulted in the bankruptcy of a licence holder.
- Its inclusion within the regulatory system will improve our overall ability to manage the water resources of a catchment. There will be greater knowledge and understanding of what is going on and decisions will be taken on a more informed and assured basis. This is particularly important with the implementation of the Catchment Abstraction Management Strategies (CAMS) programme and the need to meet the requirements of the Habitats Directive.
- We will be in a better position to manage our response to climate change and changing patterns of water use and environmental expectations, since the granting of the exemption under the 1963 Water Resources Act.

- The potential for environmental improvement and protection will be enhanced, by restricting damaging abstractions where appropriate, especially where water is abstracted in an inefficient or uncontrolled manner or is having a damaging impact on the environment.<sup>61</sup>

The Agency also set out how the licensing process for trickle irrigation would be put in place:

In *Taking Water Responsibly* the Government provided the framework for bringing existing abstractions for trickle irrigation under control. Under this framework, the Agency will:

- give at least two years for applicants to submit applications to the Agency to enable preapplication discussions to take place
- provide current trickle irrigation abstractions with protected right status during this period
- have up to three years to determine all applications, and attach priority to the most significant abstractions
- provide the maximum possible formal notice to applicants of any significant material alteration in abstraction regime considered necessary in the interests of overall water resources management

Applicants dissatisfied with the Agency's response to their application will have a right of appeal to the Secretary of State and, if upheld, the opportunity to claim compensation for any losses resulting from curtailment of their abstraction rights.<sup>62</sup>

However this did not reassure Peers and a successful amendment to the Bill was tabled in the Lords to safeguard the rights of abstractors converting to a licensed system.<sup>63</sup>

## IV Regulation

The privatised water industry in England and Wales is regulated by the Office of Water Services, Ofwat, headed by the Director General. His general duties are set out in Section 2 of the *Water Industry Act 1991*. These require that the Director acts in a way he considers is best calculated to ensure that:

- the functions of a water and sewerage company, as specified in the Act, are properly carried out;
- companies are able to finance their functions, in particular by securing a reasonable rate of return on their capital.

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<sup>61</sup> Environment Agency Briefing, *The Water Bill: Trickle Irrigation*, March 2003  
[http://www.environment-agency.gov.uk/commondata/105385/tricklei\\_466142.pdf](http://www.environment-agency.gov.uk/commondata/105385/tricklei_466142.pdf)

<sup>62</sup> *ibid*

<sup>63</sup> HL Deb 12 June 2003 c372



Subject to these primary duties, the Director has a secondary duty to protect customers and also looks at the quality of service. The Director has to ensure that no undue preference is shown and that there is no undue discrimination in the way companies fix and recover charges, and that rural customers are protected. This means that a customer's bill should, in general terms, reflect the costs which that customer imposes on the water and sewerage systems for a supply of clean water, disposal of dirty water and draining surface water.<sup>64</sup>

Other responsibilities include:

- promoting economy and efficiency
- enforcing the duty placed on water companies by the Environment Act 1995 to promote the efficient use of water by customers (Environment Act 1995)
- facilitating competition between suppliers and potential suppliers and ensuring that a framework exists in which competition can develop.
- enforcing company licences
- limiting charges

Although the Director has a number of duties which require him to have regard to the environment, it is the Environment Agency of England and Wales which regulates and enforces water quality standards in inland, estuarial and coastal waters. With respect to drinking water, it is the Secretary of State for the Environment, Transport and Regions who sets standards for the quality of drinking water which are regulated by the Drinking Water Inspectorate.

## A. The Utilities Bill 2000

When the Labour government came to power in May 1997 it initiated a range of reviews to inform its future policy including one on regulation of the utilities. The utilities review was initiated by the then President of the Board of Trade, Margaret Beckett. In answer to a parliamentary question on 30 June 1997, she set out the objectives and terms of reference, focusing mainly on the gas, electricity, telecommunications and water industries:

**Mrs. Beckett:** I am announcing today an inter-departmental review of the regulation of the utility industries. My aim is for the review to report to Ministers by the end of the year.

The Government's objective for the review is to set a long-term stable framework for utility regulation which is seen as fair by all the interest groups involved, particularly by consumers. Without fairness, there can be no long-term stability.

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<sup>64</sup> The role of the regulator, Ofwat Information Note No. 26, March 1994 (revised October 2002) <http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/Content/infonote26>

We want the regulatory framework to deliver value, quality and choice to consumers while providing incentives to managers to innovate and improve efficiency. The guiding principles must be transparency, consistency and predictability of regulation.

The terms of reference for the review are to consider whether changes are required to the system of regulation of the utility industries in order to ensure open and predictable regulation, fair to all consumers and to shareholders, and which promotes the Government's objectives for the environment and sustainable development, whilst providing sufficient incentives to managers to innovate, raise standards and improve efficiency

The results of the review were published in a Green Paper, *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*, on 25 March 1998.<sup>65</sup> It set out strategic proposals for regulation over the next decade. Following consultation on the Green Paper the Government announced that it intended to legislate to implement the proposals as soon as parliamentary time permitted.<sup>66</sup> Key decisions were set out in a press notice:

- the regulatory framework should be able to address structural change in the utility markets, including multi-utilities;
- consumer protection should be the regulators' primary duty;
- independent consumer councils should promote consumer interests;
- RPI-X should be retained as the fundamental system of price regulation; however regulators should consider the exceptional circumstances where it may be appropriate to refine RPI-X to reflect the Green Paper principles on price regulation;
- a clearer link should be made between the prices utilities can charge and the customer service standards they achieve;
- full information should be available on companies' performance on customer service standards and on the links between this performance and the remuneration of directors;
- Ministers should issue statutory guidance on social and environmental objectives; and
- the energy and telecommunications regulators, but not the water regulator, should be replaced by executive boards.

The *Utilities Bill* was published on 21 January 2000. The Bill would have retained the Office of Director General of Water Services, as established by the *Water Act 1989* and continued by section 1 of the *Water Industry Act 1991*. Though there was no provision for a regulatory board, the Bill would have set up a new committee to advise the Director

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<sup>65</sup> *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*, 25 March 1998, CM 3898

<sup>66</sup> HC Deb 27 July 1998 c 53-54w

in the exercise of his functions. This committee would have been known as the Water Advisory Panel, the members of which would be appointed by the Secretary of State (after consulting the Director and the National Assembly for Wales).

The Bill would also have established the Consumer Council for Water, replacing the existing Customer Service Committees, WaterVoice. The Bill also placed a new duty on the regulator of protecting the interests of consumers, which would have become an additional primary function. The DTI's explanatory notes summarised this as follows:

This clause amends existing general duties which affect the manner in which the Director, the Secretary of State and the National Assembly for Wales exercise specified functions under the Water Industry Act 1991 ("the 1991 Act). They are given a new consumer objective to protect the interests of consumers of regulated water and sewerage services, wherever appropriate through promoting effective competition. They are under a duty to further that objective, to secure that the functions of water undertakers and sewage undertakers are properly carried out throughout England and Wales and to secure that companies holding appointments are able to finance the proper carrying out of those functions.

Due regard would also have to be given to potentially disadvantaged consumers. Guidance on social and environmental matters could be issued by the Secretary of State. The Consumer Council for Water would have powers to investigate a wide range of matters (beyond complaints) affecting the interests of consumers. However, it would first have to "consult" (rather than "notify" as in the other utilities) the Director of Ofwat and the Secretary of State (and the National Assembly for Wales).

Any company holding an appointment, under Chapter I of the *Water Industry Act 1991*, to supply water or sewerage services would have to publish an annual statement on the links between service standards and directors' remuneration.

Ian Byatt, the then Director of Water Services, commented on the *Utilities Bill* during a speech to industry practitioners in January 2000.<sup>67</sup> He said the objective of the new Bill had been to raise the level of customer representation and protection. This was being done while giving equal priority to the duty to ensure that the functions of the water companies are properly carried out and can be financed. However, some areas of the Bill were over-prescriptive and bureaucratic.

Mr Byatt was also concerned that the proposed complaints procedures would be more bureaucratic than the "one-stop shop" currently offered by Ofwat and its Customer Service Committees. He looked forward to the development of market competition allowing the possible relaxation of regulation in the future. These sentiments represent a

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<sup>67</sup> Ofwat Press Notice PN 01/00, *Details need to be clarified if the Utility Bill is to benefit water customers, says Ian Byatt*, 26 January 2000

detectable echo from a lecture he gave on 13 September 1999 at the London School of Economics:

Our liberal civil society - a community of citizens - benefits from a plurality of institutions. Utility regulators are a recent but a significant addition. They can take their place alongside other non-Ministerial decision making bodies. They take their authority from their statutory duties, establishing their credibility through openness, integrity and fairness.

There are those, however, with a more centralised view of society who do not like the independence of the regulator from Ministers. They appear to want to counter the privatisation of utilities with the nationalisation of regulation.<sup>68</sup>

During the Committee stages of the *Utilities Bill* in March 2000 the Government announced its intention to remove all reference to water from the Bill and publish a Water Bill in the near future. The clauses removed were as follows:

I propose to invite the Committee to disagree to clause 104 and clauses 105 to 123, clause 125, clause 129 and schedule 4. I shall also speak to amendments Nos. 442 to 447, Nos. 450 to 453 and Nos. 455 to 465, which will remove references to water from clauses 124 and 130, schedules 3, 5, 6 and 7 and the Bill's title.

As my hon. Friend the Minister for Competition and Consumer Affairs told the Committee last Thursday, and as my right hon. Friend the Secretary of State told the House later that day, we no longer intend the provisions relating to the water sector to remain in the Bill. Instead, we intend to include the provisions in a new water Bill, which will be published in draft later this year. We aim to introduce legislation as soon as parliamentary time permits. The water provisions were originally included in the Bill to follow up the commitment given in the White Paper, "A Fair Deal for Consumers", which was published in July 1998, and subsequent ministerial statements. We shall still honour those commitments.<sup>69</sup>

## **B. The Water Bill**

The provisions contained in Part III of the *Utilities Bill* dealing with regulation of the water industry have been reintroduced in Part II of the *Water Bill*. The main difference is that the Water Advisory Panel which was originally proposed has been replaced following consultation by a Water Services Regulation Authority which will take over the Regulator's role.

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<sup>68</sup> "Checks, Balances and Competing Pressures - Looking Forward at the Role of the Regulator", Lecture by Ian Byatt, Centre for the Study of Regulated Industries, 13 September 1999

<sup>69</sup> SC Deb(A) 7 March 2000 c331

- Schedule 4 in the *Utilities Bill*, (dealing with Water Services Regulation Authority and the Consumer Council for Water) is now Schedules 1 and 2 of the *Water Bill*.
- Clauses 125 and 129 dealing with the Competition Commission are now clauses 57 and 58 of the *Water Bill*.
- The part of Schedule 6 referring to customer service committees is now in Schedule 2 paragraph 21.
- Schedule 3 (further provisions), Schedule 5 (minor and consequential amendments) and Schedule 7 (repeals) are now Schedules 3, 7(2) and 9(2) respectively of the *Water Bill*.

## 1. The Water Services Regulation Authority

The *Utilities Act 2000*, which created the Electricity and Gas Markets Authority and abolished the Electricity and Gas regulators, included (as noted) arrangements for putting in place an advisory board for the Water Regulator. The provisions regarding water were dropped and now appear in the *Water Bill*. However in the interim the Government's position has changed and **clause 37** of the Bill now includes provision for the creation of a Water Services Regulation Authority (the Authority). The Authority will consist of a chairman and at least two other members appointed by the Secretary of State and will take over the role of the Director of Water Services, whose position is abolished.

The reasons for the change, which was first mentioned in the Government response to the consultation on the Draft *Water Bill*, were as follows:

74. Respondents to the consultation have argued that the remit of an advisory panel would not be clear in relation to the Director General, and the Consumer Council for Water, would not serve sufficiently to depersonalise regulation, and that a regulatory board would have a stronger role to play in reaching regulatory decisions. A Board would also lend itself more readily to the regulation of a more competitive water industry. The Better Regulation Task Force report also considered that a Board would offer more transparent accountability and avoid the risk of uncertainty due to policy shifts when there is a change in individual regulator.

75. The Government finds these reasons persuasive and propose to amend the draft Bill to provide for a small regulatory board along the lines of that adopted for the energy industry. The Director General of Water Services would then continue as the Chief Executive and Chairman. Ofwat is content with these proposals.<sup>70</sup>

In addition to changing structure the water regulator will have new statutory duties and powers. The main ones are summarised below:

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<sup>70</sup> DEFRA, *Water Bill Consultation on Draft Legislation: Government Response*, May 2002  
[http://www.defra.gov.uk/environment/consult/waterbill/pdf/water\\_bill\\_response.pdf](http://www.defra.gov.uk/environment/consult/waterbill/pdf/water_bill_response.pdf)

- The Authority (and the Secretary of State) will have to carry out their duties “in a manner in which it or he considers is best calculated to the achievement of sustainable development” (**clause 42(4)**).
- The Authority would have a duty to have regard to statutory guidance about the making of a contribution towards the attainment of any social or environmental policies which the Secretary of State (or the Welsh Assembly Government) may issue (**clause 43**). In addition, when considering the interests of consumers the Authority (and the Secretary of State) will have regard to the interest of:
  1. individuals who are disabled or chronically sick;
  2. individuals of pensionable age;
  3. individuals with low incomes;
  4. individuals residing in rural areas; and
  5. customers or companies whose premises are not eligible for supply by the new licensed water suppliers.
- The Authority will have power to impose a reasonable penalty on a company that fails to achieve its set standards of performance (**clause 51**). According to the explanatory notes in no instance should this be more than 10% of the undertaker’s annual turnover, as determined in an order by the Secretary of State.
- Statutory undertakers will have to make a statement to the Authority on any arrangements for linking remuneration to directors to standards of performance; this will be a statutory requirement. The Authority will have the power to publish details of these if it sees fit (**clause 53**).

## 2. Consumer Council for Water

**Clause 38** of the Bill creates an independent Consumer Council for Water (the Council) which would replace the existing Ofwat National Customer Council (ONCC) and statutory Customer Service Committees. All of these have collectively been known as WaterVoice since April 2002. The Customer Service Committees were set up by the Regulator, as part of his duties under the *Water Industry Act 1991*, to represent customers’ interests at regional level. The ONCC was set up as a non-statutory body by the Regulator in 1993 to represent customers on issues of national importance.

These provisions were generally welcomed during consultation with a limited number of respondents focusing on this issue.

**Clause 38** establishes the Consumer Council for Water. The general functions of the Council are set out in **clause 46**; **clause 47** sets out the duties of the Authority, statutory undertakers and licensed water suppliers to provide information to the Council and vice-versa. The Council will also have duty to publish statistical information for consumers (**clause 48**). How the Council will deal with consumer complaints and carry out investigative work are set out in **clauses 49** and **50** respectively. **Clause 38** includes a requirement for the Council to have regard where relevant to the benefits to consumers from the achievement of sustainable development. This was introduced as a Government amendment in the Lords following calls for the Council to have similar duties regarding sustainable development as the Regulator.

WaterVoice generally welcomed the provisions for its transition to the Consumer Council for Water when they were first published in February 2003. However there were various issues they were concerned with:

There are a number of areas where we believe the Water Bill provisions need to be improved if the CCW is to be seen as credible and effective – as well as independent – in representing water customers’ interests:

- access to information from water companies and Ofwat
- publication of information
- Ofwat duty to consult the CCW
- investigation of consumers’ complaints and their resolution statistics on water companies’ performance<sup>71</sup>

Water UK, the industry association of water companies, strongly supports the creation of an independent Council, though it has also expressed strong opinions on how its role should be limited:

We believe that the rights and duties of the Council are sufficient to ensure that customers are well-represented without the Council adding to many costs that would eventually be borne by the customers. We have proposed that Council costs should be capped and would not agree that it should have the power to impose fines. It should not have an adjudicatory role, because it ought not to be advocate for consumers and judge the disputes between consumers and companies. The adjudicatory should remain wholly with Ofwat as the body charge with balancing the interest of consumers and water companies, in particular enabling companies to finance their functions.<sup>72</sup>

### 3. Competition

The Government expressed its commitment to increasing competition in all the utilities in March 1998 when it published the Green Paper *A Fair Deal for Consumers: Modernising the Framework for Utility Regulation*. Since then it has published two consultation papers on increasing the competition in the water industry, in April 2000 and July 2002.

The first consultation set out why the Government wanted to increase competition:

3.5 The extension of competition to water and sewerage services has so far been limited. The existing regulatory framework for water is based on the premise that customers served by a monopoly or pre-competitive industry need protection. In

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<sup>71</sup> WaterVoice, *Water Bill: Consumer Council for Water proposals*, February 2003  
<http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/Content/navigation-watervoice-currentnationalissues-issue4>

<sup>72</sup> Jeanne Golay ‘The Water Bill: good for customers?’, *Water Magazine*, 23 July 2003.

the absence of actual and effective competition for customers, the regulator operates a system of comparative competition [...] to ensure that customers' interests are protected. But simulating competition through regulation cannot be as effective as direct market pressure. A significant increase in real competition in the water industry could potentially reduce the need for economic regulation.

3.6 Much depends, however, on the way competition develops. Economic regulation will be needed until truly effective market competition has been fully established. However, some aspects of the industry (such as the distribution infrastructure) are a natural monopoly which will always require some degree of economic regulation; and the need for regulation of quality and environmental issues will not diminish.

3.7 It is important that competition is introduced in such a way as to maximise real efficiency and innovation. It would not be desirable simply to create opportunities to exploit cross-subsidies, giving benefits to some consumers at the expense of others, without promoting real efficiency gains.<sup>73</sup>

The key policy objectives set out by the Government were as follows:

- Safeguarding public health and the environment
- Increasing efficiency and innovation to benefit customers
- Safeguarding services<sup>74</sup>

The options set out for increasing competition in the consultation included trading of abstraction licences, further development of bulk water transfers between companies, increases of cross-border supplies and extending the scope of inset appointments. Inset appointments allow Ofwat to appoint a new statutory undertaker for customers who are not currently connected to a mains supply or customers connected to the mains who are using more than 250 megalitres of water per year. Uptake of this option has so far been limited. By July 2002 nine appointments had been made with a further 18 potential applications under discussion.

The second consultation set out the benefits the Government hoped to achieve: increased choice, keener prices, a greater variety of services, increased innovation and efficiency. The consultation also proposed a new kind of licence to supply water as follows:

38. The licence will authorise market entrants to operate anywhere in England and Wales, except where a licensee is an associated company of an undertaker. In the interests of transparency, undertakers will need to establish separate associated companies, if they wish to apply for a licence. Where this is so, the licensee will be prohibited from operating in the associated undertaker's area of appointment.

39. A licence will provide licensees with certain rights. The most important are:

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<sup>73</sup> DEFRA, Competition in the Water Industry in England and Wales, April 2000  
<http://www.defra.gov.uk/environment/consult/watercomp/index.htm>

<sup>74</sup> *ibid*



- The right to access an undertaker's distribution network (defined as from the exit point of a treatment works to the point of connection with an eligible customer's supply pipes) on reasonable terms and conditions, for the supply of water to an eligible customer; and
- The right to purchase water from an undertaker, on reasonable terms and conditions, for retailing water to an eligible customer.<sup>75</sup>

**Clause 59 and Schedule 4** of the *Water Bill* would create this new type of water carrier, a licensed water supplier who would be allowed to retail water only or also input water into a statutory undertaker's network.

During Report stage in the Lords, Lord Whitty summarised the aims of the new licences:

The Bill provides the essential framework for a workable system of competition. It sets up a licensing regime to make sure that the licensed water suppliers—the new competitive players—act properly and do not endanger the water supply that they feed into. It also regulates the relationship between licensed suppliers and existing undertakers so that they are all operating in a fair market.

The two types of licence are defined in Schedule 4:

- The retail authorisation is an authorisation to the company to use a water undertaker's supply system for the purpose of supplying water to the premises of customers of the company.
- The supplementary authorisation is an authorisation to the company to introduce water into a water undertaker's supply system, by means of which any particular supply of water in accordance with the retail authorisation is to take place, in connection with that supply. This would be called a combined licence. Granting of this kind of licence will require consultation with the Drinking Water Inspectorate, regarding the suppliers suitably to introduce water into the public supply system.

Licensed suppliers would only be able to supply non-household customers who require at least 50 megalitres of water per annum. The second consultation document estimated this would be approximately 2000 customers with a total demand of 420,000 megalitres a year, which equates to approximately £210 million of revenue to undertakers. Water undertakers will be able to function as licensed suppliers, but not in the same geographical areas in which they are already operating as undertakers.

The benefits to customers generally that the Government expects to see from creating the new type of licence are set out in the Regulatory Impact Assessment (RIA) of the Bill published by DEFRA:

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<sup>75</sup> DEFRA, *Extending opportunities for competition in the water industry in England and Wales*, July 2002 <http://www.defra.gov.uk/environment/consult/watercomp2/pdf/watercomp2.pdf>

133. While customers above the threshold will experience direct benefits by exercising choice and changing supplier, other customers should benefit from indirect benefits in the longer term. These will accrue as undertakers change prices and/or levels of service in response to the threat of entry. Experience in the water supply market has already shown that undertakers introduced lower tariffs and other service improvements in response to the introduction of the inset appointment regime, even though insets themselves are rare.<sup>76</sup>

However the RIA also included results from a modelling study that looked at the impact on household customer bills when undertakers lost 10%, 30% or 100% of their market share. The results of the 30% scenario resulted in increases to customers' bills:

138. The modelling study calculated that impacts on average annual household bills would vary greatly according to the location of the property. The analysis suggested that at a 50MI threshold, increases in householders' average annual water bills due to undertakers losing 30% of the large user market share could range from 24p per year to £ 5 per year, depending on location. Lowering the threshold to 10MI would increase these numbers, to 61p per year to £6.13 per year.

139. In addition to financial risk arising from loss of market share, there may be some additional costs arising from the need to comply with the competition proposals that cannot be recovered directly from licensees. In particular, data management costs, although likely to be small, would probably increase if lower thresholds were applied.<sup>77</sup>

The potential increase in prices for customers as a result of increased competition were commented on during the Second Reading of the Bill in the Lords by Lord Elliott of Morpeth, who was chairman of a water company for 10 years and for 13 years was president of the then Water Companies' Association:

I fear that the advent of new entrants obtaining water from existing reservoirs and mains will present a considerable number of problems. The proposals in the Bill suggest that if there are new entrants, they will attract large customers from the incumbent company in each area. Large customers are always important to every company. Water is a regulated, price-capped industry with income set in advance. Therefore, if large users leave a company, prices for domestic customers will rise. Surely, that is the opposite of what competition should achieve.<sup>78</sup>

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<sup>76</sup> DEFRA, Water Bill - Regulatory Impact Assessment, Environmental and Equal Treatment Appraisals (Second Edition), July 2003

[http://www.defra.gov.uk/environment/water/legislation/pdf/riaupdate\\_030722.pdf](http://www.defra.gov.uk/environment/water/legislation/pdf/riaupdate_030722.pdf)

<sup>77</sup> *ibid*

<sup>78</sup> HL Deb 6 March 2003 c981

**a. *Reactions to the competition provisions***

The Water Regulator, Philip Fletcher, welcomed the provisions in the Bill though he felt they did not go far enough:

We broadly welcome the competition proposals but have some concern that the high threshold for competition may mean that the benefits could be limited. We think that setting the threshold for competition at 50MI/yr could risk leaving the potential market – some 2000 customers – too small to encourage significant entrants.<sup>79</sup>

Water UK again expressed concerns that competition would be limited to a few large customers:

Water UK has long called for such water-specific legislation and we are pleased that it should be introduced. However, we are concerned that competition will be limited to a few large business customers, which new entrants will be able to cherry-pick by undercutting the incumbent (whose prices are averaged) without offering a genuinely new competitive product.

The risk is, therefore, that the dynamic effects of competition will not appear, while the costs are likely to increase for those customers who stay with the original supplier (and domestic customers will not have a choice). Competition should be good for all customers, not a few large business ones only.<sup>80</sup>

WaterVoice, the organisation representing water customers within Ofwat, and which is due to be replaced by the Consumer Council for Water, also welcomed increased competition :

WaterVoice welcomed proposals for developing competition in the water industry, but again urged the Government to re-consider the details.

Mr Terry said: “Although we do not think water competition should apply to households, we are pleased to see the proposed introduction of competition for non-domestic customers. However, we still believe that the initial threshold of 50 megalitres will not test the market adequately. Only 2,000 customers in England and Wales would be eligible.”<sup>81</sup>

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<sup>79</sup> Ofwat, *Ofwat city briefing: Philip Fletcher's presentation*, 15 May 2003  
[http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/pf\\_150503.doc/\\$FILE/pf\\_150503.doc](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/pf_150503.doc/$FILE/pf_150503.doc)

<sup>80</sup> Jeanne Golay ‘The Water Bill: good for customers?’, *Water Magazine*, 23 July 2003.

<sup>81</sup> WaterVoice Press Release, WV 4/03, New Water Bill: WaterVoice welcomes proposals for regulatory reform and competition, 20 February 2003  
[http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/wv\\_council\\_pn0403/\\$FILE/wv0403.doc](http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/AttachmentsByTitle/wv_council_pn0403/$FILE/wv0403.doc)

## V Miscellaneous

Part III of the Bill deals with various miscellaneous issues relating to water. These include: provisions to change the legal name for Drinking Water Inspectors in England and Wales; controls of prices of water resale; various issues dealing with water management; water fluoridation; clarification of the definition of significant pollution in relation to water and contaminated land; liability for costs of replacing fire hydrants; placing the powers of the Coal Authority to deal with water pollution caused by mines on a statutory basis; introducing a statutory procedures for the transfer of discharge consents and determining what constitutes trade effluent; payment for the requisition of water mains; and adoption of sewers and drains.

Detailed explanation of all the clauses in Part III can be found in the Explanatory Notes to the Bill. Further detail on some of these, including the controversial issue of water fluoridation, can be found below.

### A. Fluoridation

#### 1. Current Legislation

##### *The Water (Fluoridation) Act 1985*

The *Water (Fluoridation) Act 1985* (since consolidated into the *Water Industry Act 1991*), states that water companies may add fluoride to water at the request of the District Health Authority. It is the Health Authority which bears the cost of fluoridation and the legislation does not preclude the water company from refusing to fluoridate the water supply. So far as is reasonably practical, water companies are required by the legislation to maintain levels at 1.0mg/l.

If a District Health Authority wants to make or withdraw an application to the water company for fluoridation it is subject to the conditions for publicity and consultation set out in Section 89 of the *Water Industry Act 1991*. This section requires that, at least three months before implementing their proposal, the District Health Authority:

- publishes details of the proposal in one or more newspapers circulating within the area affected by the proposal
- gives notice of the proposal to every local authority whose area falls wholly or partly within that area.

Before implementing the proposal, the District Health Authority also has to consult each of the local authorities to which it gave notice of the proposal. The District Health Authority then has a duty to have regard as it considers “appropriate” to any representations which have been made to it as well as the consultation with the local authorities. In addition, the Act prevents the exclusion of the public from any meeting of a District Health Authority where the issue of whether the Authority should make or withdraw an application for fluoridation is being considered. The Secretary of State can

direct that these requirements do not apply to a proposal to withdraw an application for fluoridation.

Pro-fluoridation campaigners have expressed concerned that several water companies have proven reluctant to fluoridate even when asked. This led to calls for a review of the 1985/1991 Act to clarify the law and remove the water companies' discretion, which has led to the water companies to refuse to fluoridate for reasons other than technical difficulties, including concerns about public opinion.

## 2. Reviews

### a. *The 1998 Green Paper*

The Government's position on fluoridation was set out in the Green Paper, *Our Healthier Nation*<sup>82</sup> which was published for consultation in February 1998. Regarding fluoridation, the Paper commented:

3.33 There is still unacceptably wide inequality in the levels of tooth decay in children. The evidence shows that fluoridation of the water supply to the optimum level of one part in a million can substantially reduce the amount of decay in children from similar backgrounds.

3.34 Current legislation leaves the water industry in the position of deciding whether to agree to local Health Authority requests for new fluoridation schemes. The Government believes this needs to be reviewed but acknowledges the strongly held views on the issue of water fluoridation. It is concerned to explore ways of bridging the gap between those that are opposed to any fluoridation of the water supply and those that believe that the only way the children most at risk be protected against the damaging effects of tooth decay. The Government would therefore welcome ideas on how best to test public opinion in particular localities, but it is of the view that fluoridation offers an important and effective method of protecting the population from tooth decay.

The Government made it clear at the time that a forthcoming White Paper on public health would clarify the Government's position taking into account the responses to the Green Paper.

In July 1997, the Department of Health commissioned an independent report to contribute to the development of the White Paper and a new strategy for health. The inquiry, chaired by Sir Donald Acheson reported in November 1998.<sup>83</sup> The report recommended the fluoridation of the water supply<sup>84</sup> and an amendment to the *Water Fluoridation Act 1985* to ensure fluoridation of the water supplies in areas where this had been

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<sup>82</sup> Our healthier Nation: A contract for health, February 1998, Cm 3852

<sup>83</sup> Donald Acheson, *Independent Inquiry into Inequalities in Health Report*, November 1998

<sup>84</sup> *ibid*, p 72

recommended following the present legal processes. Over 60 health authorities have completed the publicity and consultation required by the Act but cannot have their decisions on fluoridation implemented because the water companies involved are exercising the element of discretion afforded to them by the Act.

**b. *The White Paper***

On 6 July 1999, the Government published the Health White Paper entitled *Saving Lives: Our Healthier Nation*. Regarding fluoridation it said:

'Water fluoridation improves dental health and significantly reduces inequality'  
There are wide variations in dental health across the country. The Acheson Inquiry reinforced the fact that there is strong evidence that water fluoridation improves dental health and significantly reduces inequality in dental health. Children in deprived areas where the water supply is not fluoridated can have up to four times more tooth decay than children in affluent areas, or where water is fluoridated. Responses to the Green Paper were overwhelmingly in support of fluoridation in areas where the level of tooth decay was high.

'The present legislation on fluoridation is not working'  
It is clear that the present legislation on fluoridation is not working. No new schemes have been implemented since 1985. Once a health authority has established that there is strong local support for doing so it may request a water company to fluoridate the water supply. Over 50 health authorities have made such requests to water companies, but to date none has been agreed. The companies are reluctant to take this step when a small but vocal minority are opposed to it. As a result there is deadlock.

'We have commissioned an expert scientific review of fluoride and health'  
We are conscious that the extensive research linking water fluoridation to improved dental health was mostly undertaken a few years ago. So we have commissioned the Centre for Reviews and Dissemination at York University to carry out an up-to-date expert scientific review of fluoride and health. If it confirms that there are benefits to dental health from fluoridation and that there are no significant risks, we intend to introduce a legal obligation on water companies to fluoridate where there is strong local support for doing so. And to ensure that the extent and validity of that public support is beyond all doubt we envisage transferring from health authorities to local authorities the requirement to undertake public consultation on fluoridating the local water supply.<sup>85</sup>

**c. *The Scientific Review***

The scientific review was led by Professor Jos Kleijnen, Director, National Health Service Centre for Reviews and Dissemination (CRD) at the University of York. His team included two research Fellows from the Centre and a Senior Lecturer in Dental Public Health. An

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<sup>85</sup> *Saving Lives: Our Healthier Nation*, 5 July 1999, Cm 4386, p 112, para 9.18-9.20

advisory group offering a range of expertise and perspectives was also appointed to oversee its scientific rigour and impartiality. This was chaired by Professor Trevor Sheldon, from the York Health Policy Group at University of York.

The review was generally welcomed by all involved in the debate. In response to the Government's green paper on health, the National Pure Water Association had already made it known that it wanted to see a full, independent inquiry into the effects of water fluoridation, studying available evidence published and unpublished over the past 20 years. The review was a scientific one and did not examine issues such as the economic or the ethical implications of a mass programme of fluoridation.

The contract between the Department and Professor Kleijnen began in August 1999 and the review was published in September 2000. The process of the review has been praised by all sides for the openness with which it was carried out, with various report drafts and minutes of all meetings available on the Internet.<sup>86</sup>

The Review Panel had the following remit:

#### Abstract of research

Many studies and reviews are available on fluoridation, but no systematic review has been undertaken. The aim of this systematic review is to assess the evidence on the efficacy and safety of population wide drinking water fluoridation strategies to prevent caries. To achieve this aim four objectives have been identified:

1. Assessment of the positive effects of fluoridation of public water supplies in preventing caries (is a causal relationship likely?).
2. If fluoridation is shown to have positive effects, what is the effect over and above that offered by the use of alternative interventions and strategies (i.e. fluoridated toothpaste, educational programmes, and increased self awareness of health issues?).
3. Assessment of the negative health effects of fluoridation.
4. Determination of whether fluoridation results in a reduction of caries across social groups and between geographical locations.

In addition information on cost-effectiveness will be collected where it is available and if possible a cost-effective analysis will be constructed.

#### Policy relevance of the research

The overall debate regarding a national policy decision on water fluoridation centres on four major issues:

1. The likely positive effects (reduction in average levels of caries and its distribution)
2. The likely positive effects above that offered from other interventions (e.g. fluoridated toothpastes)
3. Negative health effects
4. Ethical, environmental and legal issues

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<sup>86</sup> NHS Centre For Reviews and Dissemination, *Fluoridation of Drinking Water: a Systematic Review of its Efficacy and Safety*, <http://www.york.ac.uk/inst/crd/fluorid.htm>

This research will provide answers to the first three of these four issues by preparation of a systematic review of the best available research evidence.<sup>87</sup>

The criteria for studies to be included in the Review was based on an initial relevance screen:

The criteria for this are that the study:

1. Relates directly to fluoride in public drinking water supplies
2. Is a primary study (not a review of studies)
3. Research involves only human subjects
4. Involves two groups with different fluoride concentrations in water supply
5. For caries studies: evaluates two points in time, one of which is less than one year since the change of water fluoridation status in one of the groups

Following this two further inclusion criteria were used:

#### Inclusion Criteria (set 1)

Studies measuring positive effects (i.e. caries)

1. At least two populations compared
2. Different fluoride levels in different populations
3. Prospective study design, assessing two points in time
4. Start of study less than one year since change in fluoridation status
5. Measurable outcome reported (i.e. Decayed, Missing and Filled Teeth score)

#### Inclusion Criteria (set 2)

Studies measuring negative effects (i.e. Cancer, fluorosis, etc.)

1. At least two populations compared
2. Different fluoride levels in different populations

As a result of the screening process 214 studies were included in the Review.

#### ***d. Conclusions of the Review***

One of the main conclusions of the Review was that the quality of research carried out into the issue was surprisingly low:

Given the level of interest surrounding the issue of public water fluoridation, it is surprising to find that little high quality research has been undertaken. As such, this review should provide both researchers and commissioners of research with an overview of the methodological limitations of previous research conducted in this area.<sup>88</sup>

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<sup>87</sup> NHS Centre For Reviews and Dissemination, Review Abstract and Protocol, <http://www.york.ac.uk/inst/crd/fluorid1.htm>

<sup>88</sup> NHS Centre for Reviews and Dissemination, *A Systematic Review of Public Water Fluoridation*, October 2000. <http://www.york.ac.uk/inst/crd/fluores.htm>



The review had five objectives. The first was to determine the effects of fluoridation of drinking water supplies on the incidence of caries:

The best available evidence suggests that fluoridation of drinking water supplies does reduce caries prevalence, both as measured by the proportion of children who are caries free and by the mean change in dmft/DMFT score. The studies were of moderate quality (level B), but of limited quantity. The degree to which caries is reduced, however, is not clear from the data available.<sup>89</sup>

The second objective was, if an effect on caries was found, to determine what the effect over and above that offered by the use of alternative interventions and strategies was. The study concluded that, in those studies completed after 1974, a beneficial effect of water fluoridation was still evident in spite of the assumed exposure to non-water fluoride (for example, in toothpaste) in the populations studied.

The third objective was to determine whether water fluoridation results in a reduction of caries across social groups and between geographical locations, bringing equity. The report concluded:

The quality of the evidence of the studies was low, and the measures of social class that were used varied....There appears to be some evidence that water fluoridation reduces the inequalities in dental health across social classes in 5 and 12 year-olds.

However

The small quantity of studies, differences between these studies, and their low quality rating, suggest *caution* in interpreting these results.<sup>90</sup>

Objective four was to determine any negative effects of water fluoridation. The most widely studied effect was found to be dental fluorosis. There were 88 studies included but these were of low quality:

The prevalence of fluorosis at a water fluoride level of 1.0 ppm was estimated to be 48% [...] and for fluorosis of aesthetic concern it was predicted to be 12.5%.<sup>91</sup>

The study also found no association of fluoridation with increased bone fractures. In addition, no clear association between water fluoridation and incidence or mortality of bone cancers, thyroid cancer, all cancers or other health problems was found.

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<sup>89</sup> *ibid*

<sup>90</sup> *ibid*

<sup>91</sup> *ibid*

The final objective was to determine if there are differences in the effects of natural and artificial water fluoridation. The review found that there were not enough studies in this area and the evidence was not adequate to draw a conclusion regarding this objective.

The summary of the report also concluded that:

The evidence of a benefit of a reduction in caries should be considered together with the increased prevalence of dental fluorosis. The research evidence is of insufficient quality to allow confident statements about other potential harms or whether there is an impact on social inequalities. This evidence on benefits and harms needs to be considered along with the ethical, environmental, ecological, costs and legal issues that surround any decisions about water fluoridation. All of these issues fell outside the scope of this review.

Any future research into the safety and efficacy of water fluoridation should be carried out with appropriate methodology to improve the quality of the existing evidence base.<sup>92</sup>

The full report is available on the website for the NHS Centre for Reviews and Dissemination at <http://www.york.ac.uk/inst/crd/fluores.htm>

The Government welcomed the publication of the Review. The Department of Health, in its press release, made it clear its view that the review supported water fluoridation as an effective way of reducing caries in the children:

The Government will encourage health authorities in areas with particular dental health problems to consider adding fluoride to their water to help reduce tooth decay.<sup>93</sup>

and

Welcoming the report, the Government said it clearly shows that fluoridating water helps to reduce tooth decay. In areas where overall health is lower than average, dental health is much higher if the water is fluoridated.

The report also responds to concerns about the health effects of water fluoridation. It concludes that no association has been shown between water fluoridation and cancer, bone fracture or Down's Syndrome.<sup>94</sup>

Following the publication of the review the Government announced its intention to establish a working group to determine if further research into fluoridation and health was needed:

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<sup>92</sup> *ibid*

<sup>93</sup> Department of Health Press Release, *Government welcomes new report on water fluoridation*, 6 October 2000, <http://www.doh.gov.uk/newsdesk/archive/october/4-naa-06102000.html>

<sup>94</sup> *ibid*

### Fluoridation

**Mr. Gordon Prentice:** To ask the Secretary of State for Health if he will introduce legislation to provide for the fluoridation of the water supply in areas where this does not happen; and if he will make a statement.

**Mr. Denham:** We will be discussing the report of the systematic review of water fluoridation undertaken by the National Health Service Centre for Reviews and Dissemination at the University of York with representatives of the water industry. The Medical Research Council is establishing a working group to advise on whether further research in the area of water fluoridation and human health is required. We will review the need for legislation when this action is complete.<sup>95</sup>

The British Dental Association on behalf of the National Alliance for Equity in Dental Health issued the following statement in response to the publication of the review:

The National Alliance for Equity in Dental Health welcomes the findings of the independent review of the benefits and safety of water fluoridation. The review, published today by the University of York's NHS Centre for Reviews and Dissemination, confirms that water fluoridation is safe and effective. These findings are in line with at least 18 other reviews by eminent scientific, medical and legal bodies. The Alliance will now be pressing Government to act on its White Paper pledge to introduce new legislation to ensure that decisions about fluoridation are taken by local communities, not water companies.<sup>96</sup>

This view is not supported by the All Party Group against Fluoridation, which highlighted the low quality of research found by the York Review:

The report of the systemic review, although the most (because the only) reliable work in fifty years of water fluoridation, was thus constrained in many ways, and when it speaks of the "best available evidence" suggesting a certain conclusion... this needs to be borne in mind. At no point was the best available evidence good evidence, and for this reason the York report follows other less rigorous reports in calling for more studies to be done to clarify an uncertain evidence base in a contentious area of public health.<sup>97</sup>

The National Pure Water Association criticised the review for not including studies which used animals or looked at exposure to fluoride from sources other than water.<sup>98</sup>

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<sup>95</sup> HC Deb 29 November 2000 c 631w

<sup>96</sup> Alliance for Equity in Dental Health Press Release, *Health organisations welcome water fluoridation review and call on government to act on pledge to change law*, 6 October 2000  
[http://www.derweb.co.uk/bfs/york\\_rev.html](http://www.derweb.co.uk/bfs/york_rev.html)

<sup>97</sup> All Party Group Against Fluoridation, *Limitations of the systematic scientific review of water fluoridation by the NHS Centre for Reviews and Dissemination*, 18 November 2000.

<sup>98</sup> National Pure Water Association Website, 18 January 2000  
[http://www.npwa.freereserve.co.uk/sheldon\\_letter.html](http://www.npwa.freereserve.co.uk/sheldon_letter.html)

Professor Trevor Sheldon, the Chair of the Review Advisory Panel, wrote an open letter which expressed concerns that the results of the review had been misinterpreted:

The review team was surprised that in spite of the large number of studies carried out over several decades there is a dearth of reliable evidence with which to inform policy. Until high quality studies are undertaken providing more definitive evidence, there will continue to be legitimate scientific controversy over the likely effects and costs of water fluoridation.<sup>99</sup>

*e. Medical Research Council Report*

The working group on fluoridation set up by the Medical Research Council published its report *Fluoridation and Health* in September 2002:

The MRC's expert working group considered areas of uncertainty regarding the balance of benefits and risks of water fluoridation and its report makes a number of specific research recommendations. These include proposals for new studies to investigate an individual person's total exposure to fluoride and to discover if there are any differences in the way fluoride is absorbed from naturally and artificially fluoridated drinking water, including looking at the influence, if any, of water hardness.

Dr Paul Harrison, Director of the MRC Institute for Environment and Health, chaired the group. He said: "There's no reason to think that water fluoridation is responsible for any adverse health effects. But there is a lack of research on some important aspects, which is why we're highlighting the need for more research."

"Because of the wide use of toothpastes and other dental health care products containing fluoride, we need a better understanding of how much fluoride we're all absorbing. It's also important to know if there are any differences in the uptake of fluoride from natural and artificial sources."

The group highlighted the need for a number of new studies on dental health. These include the need for up to date research to provide an estimate of the effects of water fluoridation on dental cavities in children and adults against a background of widespread use of fluoride toothpaste. The report also calls for new studies on the extent of dental fluorosis in fluoridated and non-fluoridated areas and further studies to address the issue of social inequalities in relation to water fluoridation, dental cavities and fluorosis.

The group looked at a number of possible health outcomes, other than dental health, related to water fluoridation. The possibility that fluoride plays a role in hip fractures, cancer and a number of other health areas was considered. Evidence to date suggests that fluoride has no effect on hip fractures. But such an effect could be important in public health terms. The group concluded that if new studies show that the uptake of fluoride from artificially fluoridated water is substantially higher than from naturally fluoridated water, then it will be

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<sup>99</sup> Open Letter, Professor Trevor Sheldon, Department of Health Studies, University of York, 3 January 2001.

necessary to further investigate the long term effects of fluoridation on hip fractures.

There is currently no firm evidence linking water fluoridation to cancer in general, or to specific cancers. But the group recommended an updated analysis of the data on fluoridation and cancer rates and suggested that any new studies on the causes of bone cancer could easily include an assessment of exposure to fluoride.

The group considered suggestions that fluoride may be implicated in various other health effects. The group concluded that there was no evidence for these suggestions and therefore, made no specific recommendations for research to be undertaken in these areas, although it would be appropriate to keep the area under review.

The Department of Health is to commission a project on the absorption of fluoride in accordance with the recommendations of the report<sup>100</sup>.

The full report is available on the MRC website at [http://www.mrc.ac.uk/pdf-publications-water\\_fluoridation\\_report.pdf](http://www.mrc.ac.uk/pdf-publications-water_fluoridation_report.pdf). The Government in a press release published in response to the publication of the report welcomed the findings:

This report demonstrates once again that water fluoridation is an important and effective method of protecting the population from tooth decay and reduces inequalities in dental health. We are taking immediate steps to commission a project on the absorption of fluoride as recommended by the MRC.

There is nothing in this report to suggest any reason why water fluoridation should not be considered as a public health measure in areas where dental health remains a serious problem. I have today therefore asked the Chief Medical Officer, Sir Liam Donaldson and the Chief Dental Officer, Dame Margaret Seward to advise on the implications of the report for government policy on fluoridation.<sup>101</sup>

The National Pure Water Association was critical of the report. The Association published on its website a critique of the report written by Earl Baldwin of Bewdley, a member of the Advisory Panel on the York Review. The summary stated as follows:

4.1 This is a curate's egg of a report. With all its good points, it has neither the thoroughness nor transparency of York, and it lacks the safeguard that York had in this contentious area of including a balance of informed representatives of different points of view\* which did much to avoid unintentional bias. It is a fair question to ask why the MRC was given a remit to do what York had in great part already done to a high standard ("Provide advice on current scientific evidence", "Consider what further research"), in effect second-guessing the original

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<sup>100</sup> MRC, *Fluoridation and Health*, September 2002

[http://www.mrc.ac.uk/pdf-publications-water\\_fluoridation\\_report.pdf](http://www.mrc.ac.uk/pdf-publications-water_fluoridation_report.pdf)

<sup>101</sup> DoH, 'Government welcomes new report on fluoridation' 4 September 2002

<http://www.info.doh.gov.uk/doh/intpress.nsf/page/2002-0365?OpenDocument>

reviewers. At the same time it has not done what it was uniquely placed to do, namely translate the research needs into firm recommendations about the types of study which will give the reliable answers which have been lacking because of poor methodology. Those of a sceptical turn of mind will note the Department of Health's reactions to the debate from the beginning: a firm upholding of the policy of fluoridation to which it had long been committed, and a welcome to both reports on the basis that they supported its case, with examples intended to show this which are not scientifically accurate. There was no mention in its press release of the possible problems of total fluoride exposure, which was a principal finding of the MRC report, nor recognition of any discrepancy in praising fluoridation as a health measure while admitting that too little was known about its effects.

4.2 The MRC report should do some good, but has undermined itself to a considerable extent by a lack of discrimination over quality of evidence, compared with the York report, and by a tendency to overvalue the positive effects of water fluoridation and possibly to undervalue the negative. This could, if borne out by events, have unfortunate and expensive consequences.<sup>102</sup>

The British Dental Association, however, welcomed the report:

The BDA welcomed the recent Medical Research Council's (MRC) report calling for further research and would expect this to include trials (population studies) in areas where local communities want fluoridation. The report underlined that fluoridation reduces tooth decay and gave reassurance on any wider health issues related to fluoridation. The BDA would like to see more and better public information about fluoridation prior to local referenda being held.<sup>103</sup>

The All Party Parliamentary Group on Primary Care and Public Health carried out an enquiry into fluoridation and published its report in March 2003. This recommended that:

As a matter of public health policy, targeted water fluoridation be stated as a legitimate and effective means of tackling dental health inequalities.<sup>104</sup>

With regard to the MRC report the group stated:

In our view it became clear that the only are from the MRC report which remained to have any real necessity of further research was the question of the public's perception an impact of dental fluorosis.<sup>105</sup>

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<sup>102</sup> NPWA, *Fluoridation after the York review: The MRC working group report*, 27 September 2002  
<http://www.npwa.freeserve.co.uk/baldwin.html>

<sup>103</sup> BDA, 'Parliamentary briefing for fluoridation adjournment debate', 12 March 2003.  
<http://www.bda-dentistry.org.uk/site/pages/shownews.asp?>

<sup>104</sup> APPG on Primary Care and Public Health, *Inquiry into Water Fluoridation*, March 2003

<sup>105</sup> *ibid*

In an adjournment debate on fluoridation that took place on 13 March 2003 the Government stated that it expected the report on the findings on absorption of fluoride to be available by September 2003:

York university's systematic review of water fluoridation found not only evidence that fluoridating water helps to reduce tooth decay, but no clear evidence of adverse effects on general health, other than dental fluorosis. However, York university was critical of the quality of that evidence, which is why the Government asked the Medical Research Council to advise on any further research priorities in the light of the York review findings. The MRC reported last September and we have already acted on the most fundamental of its recommendations on research into the absorption of fluoride. We expect to have the results of that study in September.<sup>106</sup>

*f. Water companies*

Water companies have asked for clarification from Parliament regarding the legal liabilities they face should they choose to fluoridate water on request. Currently, the final decision on whether to fluoridate rests with the water companies and there is debate around the extent of indemnity that should be allowed.<sup>107</sup>

In December 1998, Water UK, the trade association which represents the water and sewerage companies, agreed a new position with its members and called for the removal of the current discretion of water operators to decide whether to accede to a health authority's application for fluoridation.<sup>108</sup> Water UK proposed that health authorities should be given the power to make the binding decisions over whether to fluoridate supplies, with companies acting as contractors backed by full legal indemnities.

Water UK also proposed that "real" public consultation would be needed to make sure that all water customers have enough information about the issue to make a reasonable and informed decision. To date, companies have not been sufficiently convinced that the public has backed requests to fluoridate. They would like to see more thorough public awareness schemes akin to those which took place in the West Midland and the North East. With the agreement of both water companies, both of these consultations included public meetings, leaflets, petitions, press conferences, media adverts, and telephone information lines.<sup>109</sup>

Water UK reacted to the publication of the York Review by again calling for legislation to be changed to remove any responsibility for decisions to fluoridate from water companies:

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<sup>106</sup> HC deb 13 March 2003 c520

<sup>107</sup> HC Deb 21 July 1999 c545W

<sup>108</sup> Position of Water UK on fluoridation of water supplies, Water UK, December 1998

<sup>109</sup> Brushing up the law on fluoridation, *Water*, No.36, p6, 8 January 1999

Decisions on whether to fluoridate a water supply should rest entirely with the Health Authority. The law should be changed to remove discretion from the water industry and replace it with a nationally agreed public consultation process and indemnity cover trusted by the industry.<sup>110</sup>

### 3. The Water Bill

As noted, the current *Water Bill* deals mainly with changes in water abstraction licensing and the regulation of the private water companies. However during its progress through the Lords there were calls for the introduction of an amendment to deal with the issue of fluoridation. An Early Day Motion tabled by Andy Burnham in December 2002 had received 148 signatures by July 2003:

That this House notes with concern the strong association between child poverty and severe tooth decay; further notes the wide variations in children's dental health across the country, where in Greater Manchester, over 62 per cent. of 5-year-olds have at least one decayed tooth and 13 per cent. have had teeth extracted, many under general anaesthetic and in Birmingham, by comparison, just 31 per cent. of 5-year-olds have tooth decay and 4 per cent. teeth extracted; believes these differences are explained by the fact that water supplies in Birmingham have been fluoridated since 1964; notes that, despite the health benefits, only 10 per cent. of the United Kingdom population receives a fluoridated water supply; is concerned that over 60 health authorities have undertaken statutory consultations on fluoridation as required by existing legislation and found public support but had requests for fluoridation turned down by water companies; is encouraged by recent reports from the Medical Research Council and Audit Commission underlining the importance of water fluoridation in reducing health inequalities; and calls on the Government to give communities the power to choose water fluoridation by allowing an amendment to the Water Bill and obliging water companies to fluoridate supplies where clear majority want it.

However an EDM tabled by John Butterfill in May 2003 which rejected the above proposals had received 89 signatures by July 2003.

That this House considers that the only chemicals which should be added to public water are those which are essential for its purification for public consumption; believes that the addition of medicines to public water supplies is a breach of fundamental human rights; and rejects any proposals to amend legislation to permit the addition of fluoride to public water supplies.

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<sup>110</sup> Water UK, *Fluoride report is here but will government act to sort out the legal mess?*, 5 October 2000



The Government announced that it would be tabling an amendment on fluoridation during the Lords report stage of the Bill. As a result the Bill was returned to Committee so the amendment could be debated in full.

The Committee stage took place on 9 July 2003. The amendment introduced by the Government amends section 87 to 90 of the *Water Industry Act 1991* and will oblige water undertakers to fluoridate water supplies at the request of the health authority.

The explanatory notes for the Bill summarise the provisions as follows:

322. *clause 61: Fluoridation of Water supplies.* The current provisions within section 87 to 91 allow health authorities to request water undertakers to fluoridate water supplies but place no duty on water undertakers to accede to such requests. This clause replaces sections 87 and 89 to 91 of the WIA (fluoridation of water supplies at the request of health authorities). These provide for fluoridation of water supplies where Strategic Health Authorities (in relation to England) and the National Assembly for Wales (in relation to Wales) make arrangements with undertakers.

323. New section 87 puts water undertakers under a new statutory obligation to accede to requests from Strategic Health Authorities (in relation to England) and the National Assembly for Wales (in relation to Wales) to enter into arrangements to fluoridate water supplies. Water undertakers are not required to enter into arrangements unless an indemnity under new section 90 has been given.

324. New subsection (5) restates that the concentration of fluoride in the water supply shall be maintained at a target concentration of one milligram per litre. New subsection (8) provides that the relevant authority shall consult with the Water Services Regulation Authority in relation to the terms to be included in the agreement, particularly those which affect the operation of the water undertaker's supply system.

325. New subsection (9) prohibits any person from increasing the fluoride concentration of water supplies outside the arrangements of section 87 but provides for two exceptions. The first is where an increase in fluoride may be made by a third party on behalf of the undertaker. This would allow a licensed water supplier who operated its own water treatment works to fluoridate supplies in accordance with the arrangements where it had agreed with the water undertaker to do so. The second is where a water undertaker may effect a small incidental increase in the concentration of fluoride in the water supply of an area, where for operational reasons, it is required to introduce water that may have a higher natural fluoride concentration.

326. New section 87A introduces provision for determination of terms, where the relevant authority and a water undertaker fail to agree the terms of an arrangement to fluoridate.

327. New section 87B restates the two chemical compounds which are permitted to be used in fluoridating water supplies and also allows water companies to supply fluoridated water in areas not covered by arrangements under section 87 where it is necessary to do so due to operational constraints such as dealing with serious deficiency in supply.

328. New section 88A introduces new regulation making powers for the Secretary of State (and by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999, the National Assembly for Wales) to reduce the target concentration of fluoride to below one milligram per litre. This might be appropriate if, for example, it was found that as a result of increased use of discretionary fluorides like toothpaste, the desired reductions in tooth decay could be achieved at lower concentrations of fluoride in the water supply.

329. New section 89 provides for consultations. It introduces new regulation making powers for the Secretary of State (and the National Assembly for Wales) to make regulations on the consultation process which relevant authorities will have to follow before requesting water undertakers to enter into arrangements or varying or terminating them.

330. New section 90 provides for the Secretary of State (with the consent of the Treasury) and the National Assembly for Wales, to indemnify water undertakers in respect of liabilities which they may incur in complying with the arrangements for fluoridation and introduces a new regulation making power enabling the Secretary of State (and the National Assembly for Wales) to make provision in relation to the matters in respect of which an indemnity may be given and the forms and terms of such indemnity.

331. Subsections (7) and (8) repeal the provisions of section 91 of the WIA and Schedule 7 to the WIA that related to pre-1985 fluoridation schemes.<sup>111</sup>

When introducing the amendment Lord Warner, the Parliamentary Under-Secretary of State, Department of Health, stated:

We do not intend that water should be fluoridated come what may in those areas which do not currently receive naturally or artificially fluoridated water at a level capable of reducing dental decay. In fact, the enactment of the amendment may not lead to any new fluoridation schemes—that would depend on what people decided locally—but it would give local communities the choice of having their water supply fluoridated.<sup>112</sup>

Following extensive debate the amendment was agreed to by 153 votes to 31 and is now **clause 61** of the Bill. The full debate can be found in the Lords Hansard of 9 July 2003, columns 295 to 388.

## **B. Water Management**

### **1. Water Management and Conservation**

**Clause 1** of the Bill imposes a general duty on the Secretary of State to implement measures to ensure that all entities and persons use water without wasting it.

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<sup>111</sup> Water Bill [HL], Bill 149, Explanatory Notes, 18 July 2003

<http://pubs1.tso.parliament.uk/pa/cm200203/cmbills/149/en/03149x-d.htm>

<sup>112</sup> HL Deb 9 July 2003 GC c300

**Clause 65** of the Bill introduces a statutory requirement for water undertakers to prepare Water Resources Management Plans which set out how water they will manage and develop water resources so as to be able to meet their obligations. They would have to be revised every 5 years and include estimates of water required by the undertaker, what measures the undertaker will take to ensure it can meet its obligations and the timing of any implementation measures.

**Clause 84** would extend the environmental duties of water undertakers to include the aim of furthering water conservation. **Clause 85** introduces a duty on public authorities listed to take into account the desirability of conserving water supplied to their premises. The authorities listed include Government Departments, Ministers of the Crown, the Welsh Assembly, local authorities, statutory undertakers and “any other public body of any description”.

## 2. Drought Plans

The Government announced during the May 1997 water summit that it would expect water companies to agree drought contingency plans and make them publicly available. It also committed to making them a statutory requirement when the opportunity arose.

Since then the Environment Agency has produced guidelines on the preparation of drought plans.<sup>113</sup> It has also been reviewing the plans on a three-yearly basis since 2000 at the request of the Government. The latest report in June 2003 found that all water companies had drought plans in place; however several areas of further work were identified:

In June 2000, we identified a number of areas in water companies’ drought plans that needed improvement or further work. Good progress has been made although there are a number of companies with work outstanding from the previous review. We have identified some further ways that the plans could be improved and we will be looking for this work to be completed by the end of 2003.<sup>114</sup>

And

It is important that water companies should continue to keep their drought plans up-to-date. Plans should be reviewed annually and any changes should be reported to the Environment Agency. We welcome the proposals in the Water Bill to make the regular submission of drought plans a statutory requirement.<sup>115</sup>

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<sup>113</sup> Environment Agency, *Water Company Drought Plans Guidelines*, November 2002  
<http://www.environment-agency.gov.uk/commondata/105385/dplans.pdf>

<sup>114</sup> Environment Agency, *Review of Water Company Drought Plans*, June 2003  
[http://www.environment-agency.gov.uk/commondata/105385/review\\_drought\\_03.pdf](http://www.environment-agency.gov.uk/commondata/105385/review_drought_03.pdf)

<sup>115</sup> *ibid*

**Clauses 66 to 68** amend the *Water Industry Act 1991* and the *Water Resources Act 1991*. They make drought plans a statutory requirement and set out matters that they should address within the plan and a list of statutory consultees. The *Water Resources Act 1991* is amended to allow the Environment Agency to recover costs incurred during a drought order application.

### **3. Land Drainage and Flood Defence**

**Clauses 69 to 72** of the Bill deal with land drainage and flood defence. **Clauses 69 and 71** give the Secretary of State the power to abolish local flood defence committees and replace them with regional flood defence committees. **Clause 70** deals with flood defence committee appointments by the National Assembly for Wales and **clause 72** clarifies legislation allowing Ministers to make block grants for flood defence to the Environment Agency.

An Environment Agency briefing on flood defence prepared in response to the publication of the Bill summarised how the current system works:

There are ten statutory Regional Flood Defence Committees (RFDCs) covering the Agency's seven regions in England and Environment Agency Wales. The ten RFDCs are based on the boundaries of the former Water Authorities and follow river catchments.

The membership of the Regional Committees is made up of a chairman and members appointed by Defra (Department for Environment, Food and Rural Affairs) and NAW (National Assembly Wales), the Environment Agency and local authorities. The local authority members have a majority of one on each Committee. Membership numbers vary from 13 to a maximum of 23.

In three of the Agency's regions (Anglian, Southern and Wessex in South West region) and in Wales there are also a total of 17 statutory Local Flood Defence Committees (LFDCs). In North West region there are three non-statutory advisory committees. The LFDCs operate under delegated powers from their Regional Flood Defence Committees and agree the flood defence levies in their areas. The Local Committees are appointed in part by the Regional Committee, but again have a local authority majority.<sup>116</sup>

As far back as 1998 the Agriculture Select Committee highlighted the complexity of flood defence organisation and recommended that efforts should be made to simplify this:

We are firmly convinced that the functions of Local Flood Defence Committees and Internal Drainage Boards would be more appropriately discharged by Regional Flood Defence Committees, which should be responsible for the delivery of all inland flood defence policy nationally working under the guidance and supervision of the Environment Agency. The decision on how policy should

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<sup>116</sup> The Environment Agency, *The Water Bill: An Opportunity for Flood Defence*, May 2003  
[http://www.environment-agency.gov.uk/commondata/105385/flood\\_defence\\_final\\_briefing.pdf](http://www.environment-agency.gov.uk/commondata/105385/flood_defence_final_briefing.pdf)

be implemented in particular regions - for example, by bodies represented within the RFDC, or by letting contracts - would be the responsibility of the relevant Committee in consultation with the Environment Agency and, where appropriate, Regional Development Agencies. This does not necessarily imply the abolition of IDBs, although the decision whether or not to devolve duties relating to the implementation of inland flood defence policy would rest with the appropriate RFDC. They would remain in existence and would retain, at the very least, an important consultative role.<sup>117</sup>

However in its response to the report the Government did not agree and stated that it did not intend to make any fundamental changes:

the Government does not propose making fundamental changes to the present institutional arrangements.

Local Flood Defence Committees may be established in areas where a need has been identified. The Government will be considering with the Regional Flood Defence Committees and the Environment Agency the preparation of guidance on the continued need for local committees, and the appropriate number and composition of regional committees.<sup>118</sup>

In its follow-up report, published after the October 2000 floods the Committee did note the Government's intention to increase regional committees:

More recently, the Government has brought forward proposals to allow for an increase in the number of Regional Flood Defence Committees, thus enabling them to replace local flood defence committees and removing one barrier to a move towards a single tier of such Committees. Nevertheless, we reiterate our belief that there is a need for far more fundamental institutional reform.<sup>119</sup>

The Environment Agency welcomed the proposed changes in the Bill, both in organisation and funding:

The Agency welcomes the Government's announcement and the clause in the Water Bill. We believe that it will improve efficiency and clarify responsibility without loss of local democratic input. We have the advantage of working with both single tier Regional Committees and of Regional Committees operating with Local Committees, and we know that the single tier committees work effectively and that local voices are still heard and have influence.

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<sup>117</sup> Agriculture Select Committee, *Sixth Report: Flood and Coastal Defence* 5 August 1998, HC 707-I Session 1997-98

<sup>118</sup> Agriculture Select Committee, *Fifth Special Report*, 29 October 1998 HC 1117, Replies by the Government and the Environment Agency to the Sixth Report from the Agriculture Committee, session 1997-98, "Flood and Coastal Defence" (HC707)

<sup>119</sup> Agriculture Select Committee, *Third Report - Flood and Coastal Defence: Follow-up*, 31 January 2001 HC 172, Session 2000-2001

It is anticipated that there may be 14 single tier Committees in the final arrangement (compared with the present 27 committees), however, this number will very much depend on local consultation.<sup>120</sup>

And:

The Bill will enable a move to a single block grant to the Agency covering both capital and revenue expenditure. Once implemented by Defra/NAW, this will remove many of the present uncertainties surrounding the annual funding available for flood defence from local authorities. We welcome the proposed new arrangements as they will enable Committees and the Agency to plan ahead over a longer period than at present, to provide greater consistency in delivering the flood defence service.

A further important aspect is that the powers of Committees will not change. Committees will still be able to raise local funds for local priorities.<sup>121</sup>

#### **4. Reservoirs**

**Clauses 77 to 83** of the Bill amend the *Reservoirs Act 1975*. The Bill makes the Environment Agency the relevant authority, replacing local authorities, in relation to the Act, which deals with issues relating to reservoir safety. The powers of the Agency are extended under the Act to allow them to carry out necessary work if the undertaker refuses to do so and recover any costs incurred. The amendments will also require undertakers to prepare flood plans for large raised reservoirs and imposes restrictions on their publication if it is considered a matter of national security. The provision of the Act will be extended to the Crown.

### **C. Water Supply and Sewerage**

#### **1. Supplying Water Unfit for Human Consumption**

**Clause 64** of the Bill would increase the maximum penalty available in a magistrates' court for supplying water unfit for human consumption from £5,000 to £20,000.

In 2001, the Drinking Water Inspectorate successfully completed prosecutions against three water companies for supplying drinking water deemed unfit for human consumption in England and Wales:

- Dwr Cymru Cyfyngedig – discolouration of supplies at Merthyr Tydfil in July 2000; fined £12,000 plus £5,777 costs.

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<sup>120</sup> The Environment Agency, *The Water Bill: An Opportunity for Flood Defence*, May 2003  
[http://www.environment-agency.gov.uk/commondata/105385/flood\\_defence\\_final\\_briefing.pdf](http://www.environment-agency.gov.uk/commondata/105385/flood_defence_final_briefing.pdf)

<sup>121</sup> The Environment Agency, *The Water Bill: An Opportunity for Flood Defence*, May 2003  
[http://www.environment-agency.gov.uk/commondata/105385/flood\\_defence\\_final\\_briefing.pdf](http://www.environment-agency.gov.uk/commondata/105385/flood_defence_final_briefing.pdf)

- Anglian Water – discolouration of supplies at Meppershall in August 2000; fined £21,000 plus £7,345 costs.
- Yorkshire Water – Discolouration of supplies at Thornton and Denholme in February 1999 (one other case in Pudsey in May 1998 was also taken into consideration, see below); fined £15,000 plus £8,261 costs.

Formal cautions were also issued during 2001 to two water companies relating to five incidents that occurred in England and Wales between 1998 and 2000:

- Mid Kent Water – discolouration of supplies at Small Hythe in June-July 1998.
- Yorkshire Water – discolouration of supplies at Leeds Moortown in February 1999.
- Yorkshire Water – discolouration of supplies at Pudsey in February 1999.
- Yorkshire Water – discolouration of supplies at High Stoops in October 1999.
- Yorkshire Water – discolouration of supplies at Holmfirth in March 2000.

Between 1998 and 2001, the Drinking Water Inspectorate investigated 567 incidents of drinking water contamination, of which 31 resulted in successful prosecutions and 15 in formal cautions.<sup>122</sup>

## 2. Water Mains and Sewers

Clauses **92** to **94** amend the *Water Industry Act 1991* to allow offset payment for a requisitioned water main to be paid in a lump sum rather than the 12 year period stipulated. They also set out the procedure for setting up an agreement between a developers and water undertakers for the construction of domestic water mains and service pipes intended for adoption by the water undertaker.

**Clauses 95** to **100** of the Bill amend several sections of the *Water Industry Act 1991* and deal with the requisition and adoption of public sewers. **Clause 95** changes the options for offset payment for a requisitioned sewer to a one off payment or a 12 year period (as for water mains above).

Problems often arise regarding costs relating to the adoption of sewers by water undertakers, usually because they are not built to acceptable standards and require work to be carried out by the owner before the undertaker will agree to take them over. However the Government issued guidelines applicable to all new sewers built from April 2002:

From 1 April all new sewers must be built to one agreed standard, so that householders can have their sewers adopted by sewerage companies without worrying about the expense of their future upkeep.

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<sup>122</sup> Drinking Water Inspectorate *Drinking Water 2001* (2002)

By building all new sewers to one agreed standard, householders can be reassured that their sewers will be adopted by sewerage companies and so will not have to worry about the expense of their future upkeep.

The new standards, controls and procedures for building new sewers and drains to an adoptable standard have been agreed following discussions between Building Regulations Advisory Committee, Water UK and the House Builders Federation. It will apply to all new-build sewers and drains.<sup>123</sup>

**Clause 96** removes the cut off date in the section of the *Water Industry Act 1991* which sets out conditions under which an undertaker will have to provide a public sewer to a building if drainage from it is likely to have an adverse impact on the environment. There are various conditions on this, including that the cost should not be excessive and that the building should have been completed by 20 June 1995. The effect of the clause is to remove the date restriction.

**Clause 97** and **98** contain provisions that allow the requisition of lateral sewers and the requirement that all new laterals (the part of the drain between the curtilage of the property and the sewer) which connect to a public sewer to be constructed to a standard that will enable them to be adopted by the sewerage undertaker on completion.

## **VI Lords Stages of the Bill**

### **A. Second Reading**

Second Reading of the Bill took place on 6 March 2003.<sup>124</sup>

On introducing the Bill Baroness Farrington of Ribbleton, Government spokesperson for Environment and Rural Affairs, said that whilst the principles of sustainability were apparent throughout the Bill it did not contain the whole of the Government's policies on water, which also included implementing the Water Framework Directive and the water pricing 2004 Periodic Review.

While generally welcomed by the opposition there was a general feeling among peers that the Bill did not go far enough, particularly when it came to implementing the Water Framework Directive. The Conservative spokesperson for Environment, Food and Rural Affairs, Baroness Byford, feared the Bill would add levels of bureaucracy and cost, and did not deal sufficiently with water conservation or flooding. She expressed concerns about the impacts of time limited licences on businesses, but welcomed the removal of the need for licences for abstraction of less than 20 cubic metres per day. She also expressed concern about the impacts of new licences requirements on trickle irrigation, the reduction of non-use period before licences are removed from seven to four years and

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<sup>123</sup> DEFRA Press Release 84/02, *Householders to save money on sewers repairs*, 5 March 2002  
<http://www.defra.gov.uk/news/2002/020305a.htm>

<sup>124</sup> HL Deb 6 March 2003 c968



the power to remove a licence of right (which is not time-limited) causing environmental damage without compensation after 2012.

The Liberal Democrat spokesperson, Baroness Miller of Chilthorne Domer expressed disappointment with the Bill. It concentrated hard on regulatory issues but lacked guiding principles, and the Liberals would be introducing amendments to redirect the Bill towards sustainability principles. They welcomed the changes in the licensing system to take account of the environment but regretted the lack of any measures or targets to ensure efficient use of water. The creation of a Consumer Council for Water was welcomed but its proposed powers were worryingly limited. The aim of the Bill should not be limited to better regulation.

Concern was expressed by several peers with links to the water industry. The concerns of Lord Elliot of Morpeth regarding competition have already been highlighted; he also expressed concern about time limited licences:

My other major concern is that the Bill proposes time-limited abstraction licences, with the agency preferring a 12-year duration. That has been mentioned several times today. As anyone associated with the water industry knows, equipment lasts much longer than 12 years. As anyone associated with the industry also knows, investment by water companies is a big thing—an enormous amount of money is invested. Investments should be protected for longer than 12 years, so is there not a need for the Environment Agency to grant licences for considerably longer than 12 years?<sup>125</sup>

Lord Borrie, chairman of Vivendi Water UK, regretted the proposals for the replacement of an individual Director by a regulatory board:

The merit of knowing precisely where you are when dealing with one individual rather than a committee is being lost. Unless the largely part-time board members are content to confine themselves to broad strategic decisions, we may have slower and less-decisive decision-making. Still, I accept as a reality that boards are now the vogue and I do not propose to try to swim against the prevailing tide.

However, I ask for flexibility and for boards which are not too large. The minimum membership provided under Schedule 1 is a chairman and two other members. I suggest, if I may bravely do so, to my noble friend the Minister that at least as regards initial appointments the board does not go above a total number of five.<sup>126</sup>

Baroness O’Cathain, a director of South East Water, felt that the legislation was:

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<sup>125</sup> *ibid* c982

<sup>126</sup> *ibid* c984

a one-sided attempt to deal with the serious problem of water resources, pollution, flood control, land drainage and other issues. It is long on processes and bureaucratic arrangements, but extremely short on demand management. Indeed, there is not even a nod in that direction.

Those close to the water industry are aware of the inherent problems of water shortages, while those not involved in the industry may find it difficult to believe that we do have serious resource problems.<sup>127</sup>

She suggested compulsory water metering as a solution to dealing with water demand. She also expressed the opinion that that Part 2 of the Bill dealing with regulation was “cumbersome, overly bureaucratic and potentially very costly”. A flaw of the legislation was that it did not require all the regulators to talk to each other.

Baroness Young, chief executive of the Environment Agency, particularly welcomed three groups of provisions:

- Those that related to a more effective regulatory system, including the extended scope of abstraction licences. The Bill’s provisions for more efficient and sustainable management of water resources.
- The introduction of improved water resource planning arrangements, including requirements for water companies to have resource and drought plans.
- The simplification of flood defence arrangements.

However, the pace set for time limited licences was not fast enough and there was an anomaly in that some navigation authority reservoirs fell outside the regulatory arrangements. The Consumer Council for Water was welcome but was lacking a duty to promote sustainable development. Finally, licensed abstractors did not have a duty to use water efficiently. Overall, the Bill was vital as it would “balance the needs of households, businesses, agriculture, wildlife and the environment”.

## **B. Committee Stages**

The Lords committee stage debates on the Bill took place on 27 March and 1, 3, 8, 10 and 29 April 2003. Convention during Committee stage debates means that amendments opposed by the Government are not put to the vote. The debates highlighted various issues that resulted in divisions on opposition amendments during the Report stage of the Bill.

The failure of the Bill to transpose the Water Framework Directive created substantial debate (see Section II of this paper).

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<sup>127</sup> *ibid* c986

The length of time limited abstraction licences was also a controversial issue. No time limit as such is set out in the Bill, with length being determined on a case-by case basis according to local circumstances by the Environment Agency. There will also be a presumption of renewal, though this is again not stated in the legislation.

Baroness Byford moved an amendment that would have made a presumption of renewal statutory “except where in the opinion of the [Environment] Agency the resource is already fully utilised.”<sup>128</sup> She also tabled an amendment which would provide for a 25 year licence because it was important that businesses had continuity for planning purposes:

As I have tried to reflect, the amendment does not apply to one particular little group. It applies to the sectors that I mentioned and many others—CBI, the soft drinks industry, quarrying, water companies and farming. Their needs are very different. One would not have thought that watercress worked on a 50-year cycle, but one would naturally have assumed that water companies do, by the nature of their infrastructure.<sup>129</sup>

Baroness Farrington responded for the Government that the Bill did not fix the duration of licences; it simply required that a time limit be placed on them:

The Agency is required to give reasons for decisions, in cases in which a licence is granted or not granted or departs in any material way from the form in which it was sought. That said, a presumption of renewal will apply to all time-limited licences. That commitment was given by the Government and by the agency in its recent guidance. Time limits are there to provide an opportunity for review in the light of climate change.<sup>130</sup>

The four year limit allowed for non-use of sleeper licences was also highlighted, with an amendment tabled to keep the current seven year limit. Lord Whitty responded for the Government stating that granting of a licence to someone who needed one should not be obstructed due to extended protected rights:

If failure to use protected rights over a period of time prevents the Environment Agency considering the possibility of a neighbouring farm or a neighbouring business having access to that water, then there must be a cut-off period. In our judgment, the previous seven-year period was too long and we can reduce that to four years. But the provision will not affect people who are already using their abstraction licences and doing so on a rotational basis.<sup>131</sup>

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<sup>128</sup> HL Deb 1 April 2003 GC c125

<sup>129</sup> *ibid* GC c127

<sup>130</sup> *ibid* GC c134

<sup>131</sup> *ibid* GC c144

An amendment was also tabled by Lord Sutherland, chairman of the Quarry Products Association, to require abstraction licences for dewatering operations to run as long as the planning permission for a mine or quarry. It also required compensation to be paid if this was not the case. In response the Government said it already intended to make compensation payable under provisions in the Bill:

We propose to make, and clause 95 [now clause 103] provides for, transitional measures to ensure that compensation would be available in the circumstances described in the amendment. That is where a mine, quarry or engineering works operator is refused a licence or granted a conditional licence and as a result cannot take full advantage of any planning permission granted for the operation.<sup>132</sup>

During the third committee sitting, amendments were tabled imposing a duty to use abstracted water efficiently and setting time limits on all licences from July 2012. Lord Whitty stated in response to these that the Environment Agency already has the power to impose on licensees conditions relating to the efficient use of water. In addition:

the Government want all abstraction licences to be subject to a time limit, over time. However, that is best done on a voluntary basis, and we look to the Environment Agency to encourage existing holders of abstraction licences to move to a time-limited basis voluntarily. If we asked them all to do so at 2012, it would create a huge concentrated burden of work on the Environment Agency, which would have to consider all existing licences all at once. But the kind of compensation issues which relate to renewal are also relevant. Converting an existing abstraction licence to time-limited status could, of itself, raise compensation issues. Therefore, it would not only be an extremely time-consuming exercise; it could also be an extremely expensive one if we were to require a mandatory switch to time limits. The aim of the whole policy is to make time-limited licensing and the new system far more attractive.<sup>133</sup>

The issue of setting out a presumption of renewal of a licence in the regulations was returned to as were unused (or sleeper) licences being allowed for seven rather than four years before being removed, particularly for agricultural and horticultural activities.

A number of amendments were tabled to extend the both the role of the Consumer Council for Water itself and the duties of the Water Authority to consult with the Council. There were also calls for the powers for the Council to deal with licensed water suppliers to be more explicitly stated. In response Lord Whitty stated that there were no restrictions in the Bill regarding the Council duties extending to licensees.<sup>134</sup>

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<sup>132</sup> *ibid* GC c87

<sup>133</sup> HL Deb 3 April 2003 GC c156

<sup>134</sup> *ibid* c 188

The fourth sitting saw the part of the Bill dealing with regulation further debated. An amendment was tabled to require the authority to abide by the principles of good regulatory practice as set out by the Better Regulation Task Force. Lord Whitty did not support this approach. However he did state:

We do not usually legislate on the basis that there is no good argument against a particular provision. We legislate on the basis that it is necessary. In general, we do not need a repetition of the reference to various principles of regulation that are set out in the amendment. However, I shall have another look at it to see whether there is a version of it that would be helpful.<sup>135</sup>

Amendments were also tabled that would require the Authority to make a statement of policy; requiring coordination between different regulators and setting up a statutory right of appeal against decision under the act which do not have any. The various powers and duties of the new Council were also debated.

The desirability of replacing local flood defence committees for regional flood defence committees received a great deal of attention on the last day of the committee debate. Concerns were expressed about the loss of vital local knowledge. Amendments were tabled to retain local committees when regional ones are created and to require Ministers to have regard to need to involve all those who local knowledge in the set up of regional flood defence committees. The Government rejected these amendments as unnecessary and Baroness Young, chief executive of the Environment Agency, spoke in favour of the changes proposed in the Bill:

Perhaps I may reassure the noble Lord, Lord Livsey, on his concern about the Severn. The Severn Trent is currently a single-tier flood defence committee and it appears to work rather well. It is one of the largest committees and can therefore use its money very effectively. Certainly the consultation that takes place on individual flood defence schemes within the context of a committee, large or small, provides an effective way of hearing the local public voice, and that effectiveness is not necessarily dependent on the size of the committee or the number of people on it. There are many stakeholders in individual flood defence schemes and they all need to be heard.

Two-tier committees are very confusing for the public. What has become abundantly clear during times of flooding is how confused the public are about who is responsible for what. I believe that a two-tier committee system lends confusion to the public. It also adds duplication and cost to a system in which, quite frankly, the most important thing is to spend the money on protecting people and property rather than on elaborate superstructures of bureaucratic machinery. Therefore, I believe that Amendments Nos. 175 and 176, which suggest that two-tier committees should be retained, present a problem.<sup>136</sup>

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<sup>135</sup> HL Deb 8 April 2003 GC c21

<sup>136</sup> HL Deb 29 April GC c128

## C. Report

The report stages of the Bill took place on 12 and 24 June 2003. During these the Government suffered several defeats which resulted in various amendments.

Baroness Byford tabled an amendment which now stands as **clause 1** of the Bill which gave the Secretary of State “a duty to devise and implement measures to ensure that all entities and persons who use water do so without wasting it”. This was agreed to by 89 votes to 76. A further amendment, tabled by Baroness Miller, outlining regulations that should be put in place to implement the Water Framework Directive was agreed to by 94 votes to 89 and is now **clause 2**.

Another amendment, tabled by Baroness Byford, which imposes a duty on the Environment Agency to “have regard to the length of time such abstraction has been practised and the purposes to which it has been put” when extending abstraction licensing to irrigation, was also successful. The amendment was agreed to by 91 votes to 89 and now stands as **section 6 of clause 9** of the Bill.

In addition, in response to an amendment tabled by Baroness Byford, the Government agreed to bring forward its own amendment that would allow a licence holder to have a sleeper licence for more than four years if he could prove that the pattern of abstractions involved a longer time period. An example given was the longer rotation period required to reduce disease in potato crops. The Government amendment was introduced during Third Reading and is now **section 9(b)** of the new Section 39A of the *Water Resources Act 1991* inserted by **clause 19** of the Bill.

An amendment tabled by Baroness Miller to extend the power of the Environment Agency to revoke a time-limited licence without compensation if it is resulting in environmental damage was rejected by the Government as it would remove an incentive to convert to time-limited licences:

This amendment would extend the provision to some time-limited licences. However, such time-limited licences will already have been subject to rigorous scrutiny by the Environment Agency when they were issued. It is fair to say that the holders of such time-limited licences are entitled to confidence in the agency's decision. It is right that the agency, in turn, should carry the responsibility if the decision subsequently requires review before the licence expires.

There should be no cases where such serious environmental damage arises from a time-limited licence. The essence of a time-limited regime is that it facilitates gradual small-scale adjustments needed to deal with changing environmental factors such as climate change. In the unlikely event of serious damage arising from a time-limited licence that was based on Environment Agency conditions, it is right that the holder should be entitled to receive compensation on the basis of a licence that was granted by the Environment Agency's decision in the first place.

Government policy is to encourage the holders of permanent licences to agree to their voluntary conversion to time-limited status, as we debated earlier. One of

the attractions of doing so is that holders would have both notice and compensation were those licences to be revoked. The amendment would cut across the incentive to convert to time-limited licences.<sup>137</sup>

A further successful opposition amendment introduced the right of appeal for water undertakers against Ofwat enforcement orders, other than competition related orders where the right already exists (**clause 33**).

The Government introduced various amendments, including a requirement for the Secretary of State and the Authority to have regard of the principles of best regulatory practice (**section 42(4)**); extension of the list of those to whom the Authority and the Council should have special regard (**sections 42(3)** and **46(1)**); various amendments to extend the remit of the Council to monitor licensed water suppliers and ensure they are kept informed of new and amended licences; and an amendment to give the Secretary of State powers to prescribe the parties to whom a water resource management plan would have to be sent (**clause 65** (Section 37B(3c) of the *Water Industry Act 1991* as amended)). During the debate it was made clear that planning authorities would be one of these parties.

#### **D. Committee and Third Reading**

During report stage the Government announced that it would be tabling an amendment dealing with the fluoridation of water. As a result of this the Bill would be returning to Committee on 9 July 2003 and receive Third Reading on the same day.

Fluoridation has already been covered in Section V of this paper. The amendment was accepted and is now **clause 61** of the Bill.

Third reading resulted in a large number of amendments by the Government, many of them of a technical nature, though some were in response to points raised in previous debates. Amendments were agreed that would oblige the Council to have regard to sustainable development when carrying out its functions (**clause 38**, section 27A(12) of the *Water Industry Act 1991* as amended); requiring co-operation between the various water regulators when carrying out their functions (**clause 55**); imposing a duty on public authorities and other public bodies to conserve water supplied to their premises (**clause 85**); and extending compensation to those businesses who have existing or planned abstraction rights curtailed as a result of the legislation, for operations that were planned before a licence was required (**clause 104(3)**).

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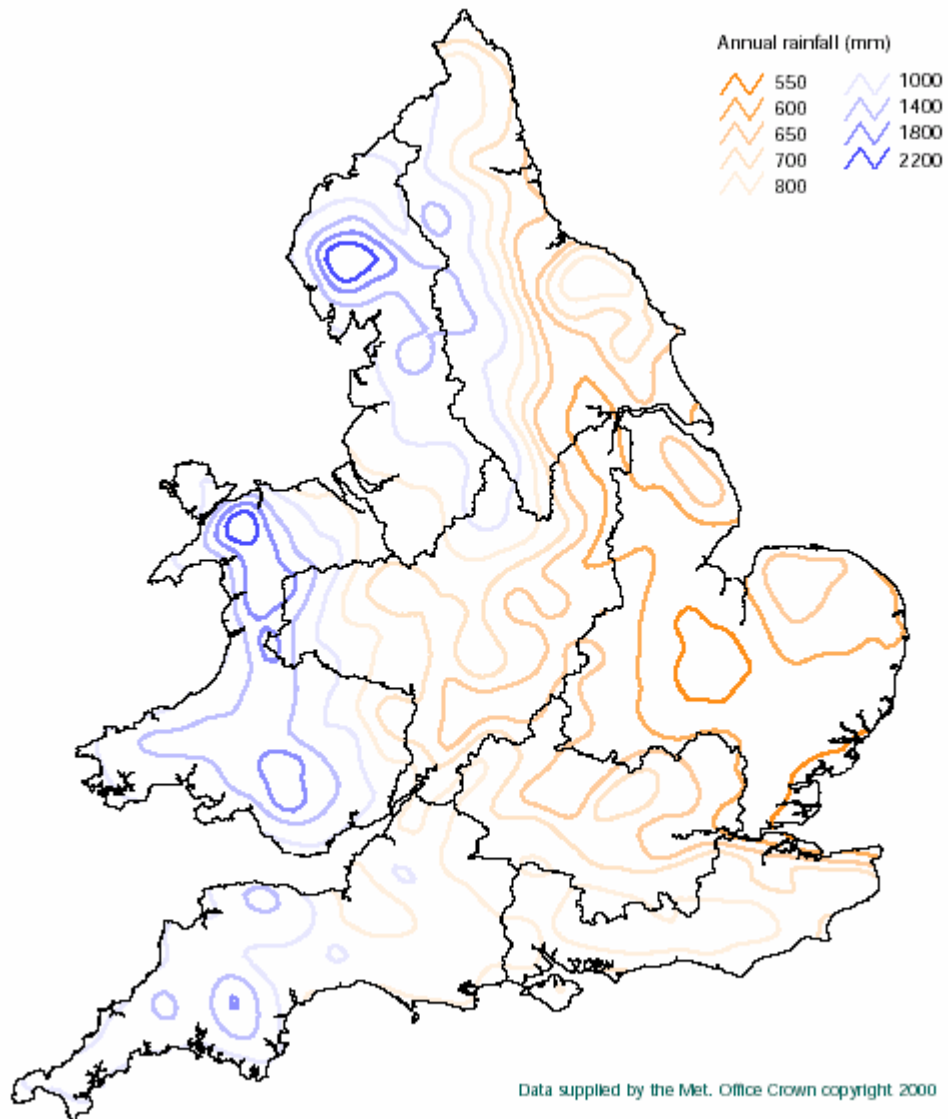
<sup>137</sup> HL Deb 12 June 2003 c444





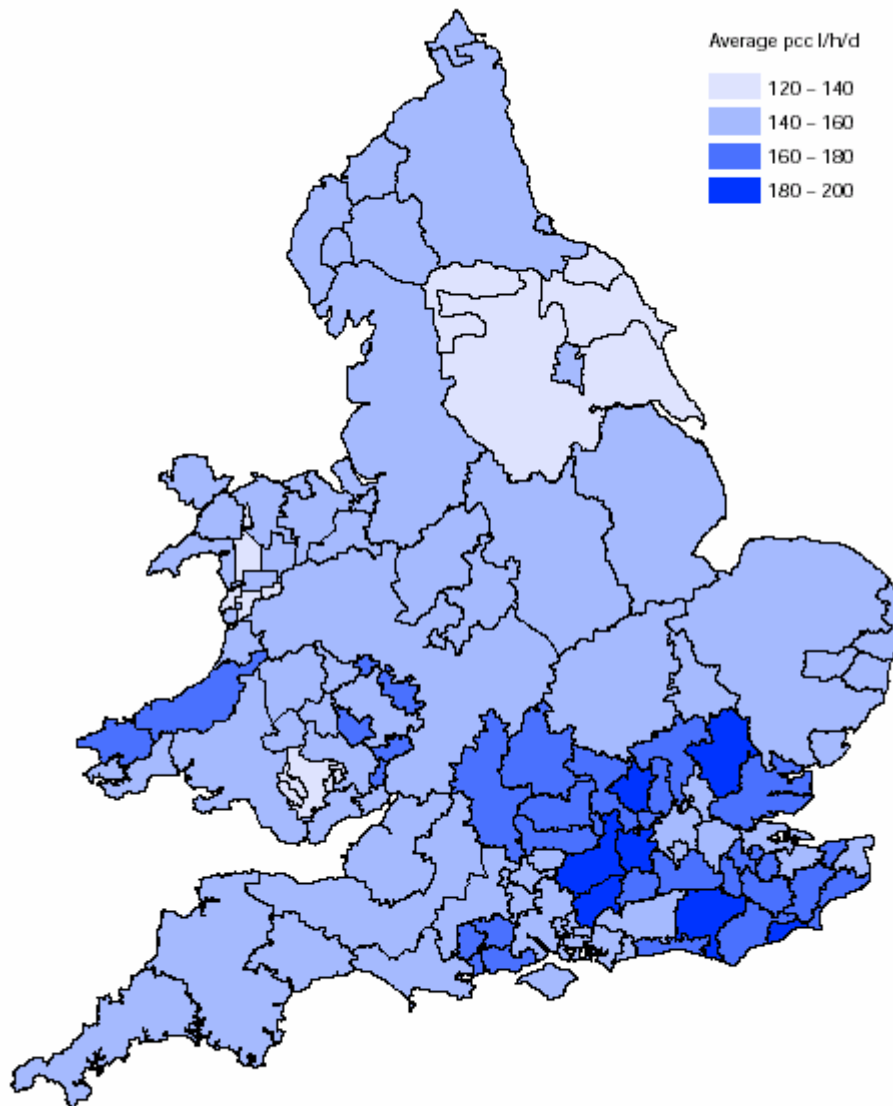
## Appendix 1 – Water Resources Maps<sup>138</sup>

### Annual Average Precipitation

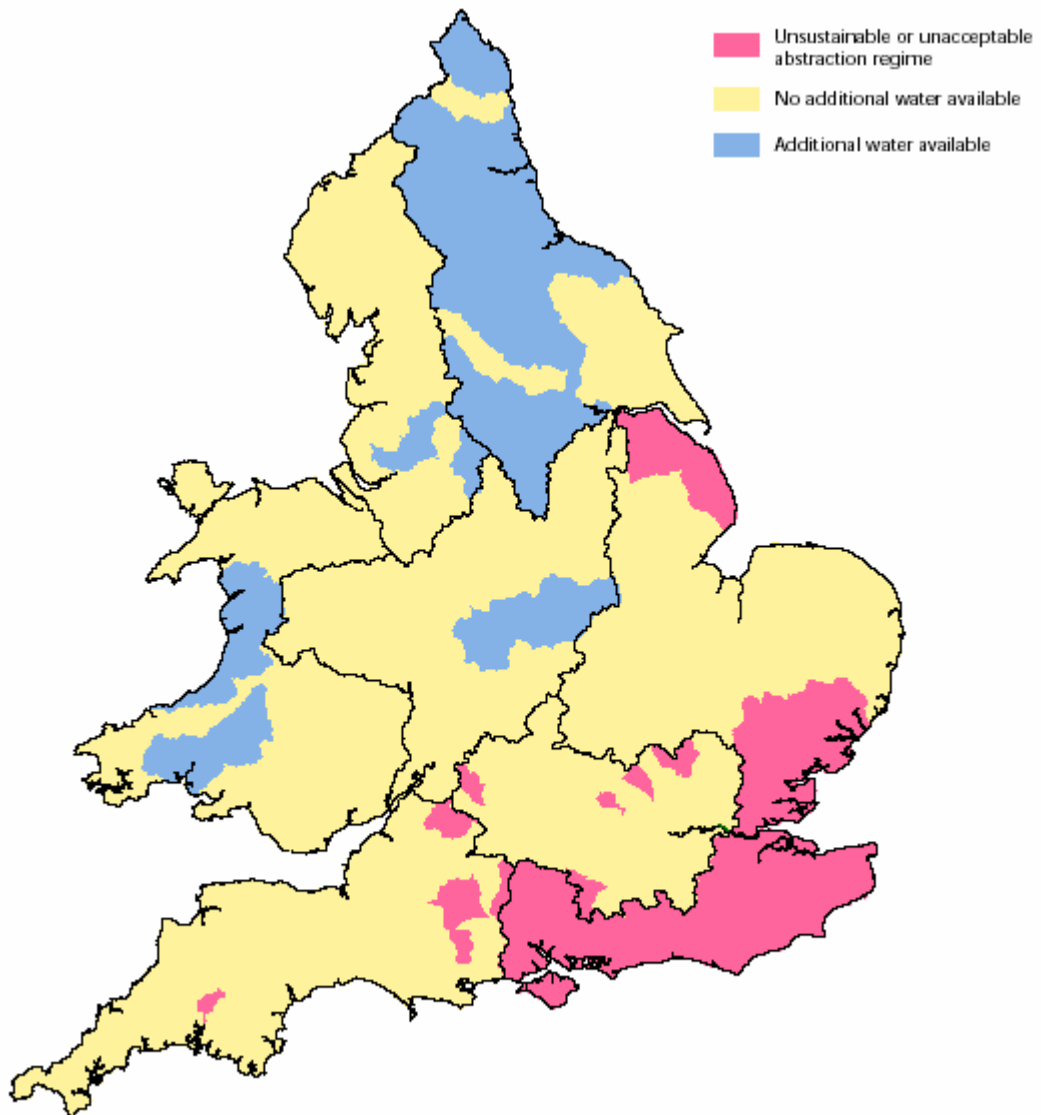


<sup>138</sup> Environment Agency, *Water resources for the future: A strategy for England and Wales*, March 2001  
[http://www.environment-agency.gov.uk/commondata/105385/national\\_report\\_english.pdf](http://www.environment-agency.gov.uk/commondata/105385/national_report_english.pdf)

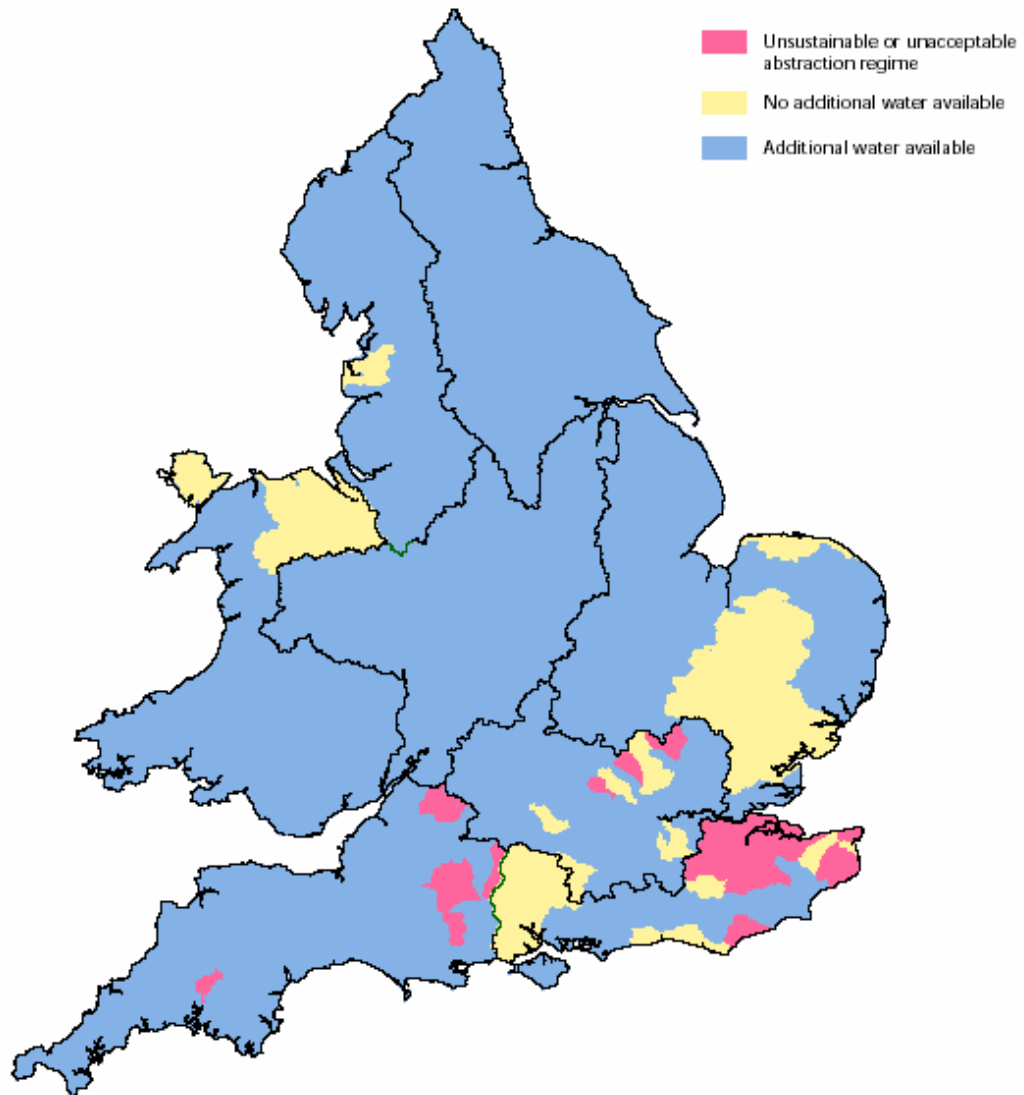
1997/98 per capita consumption of water



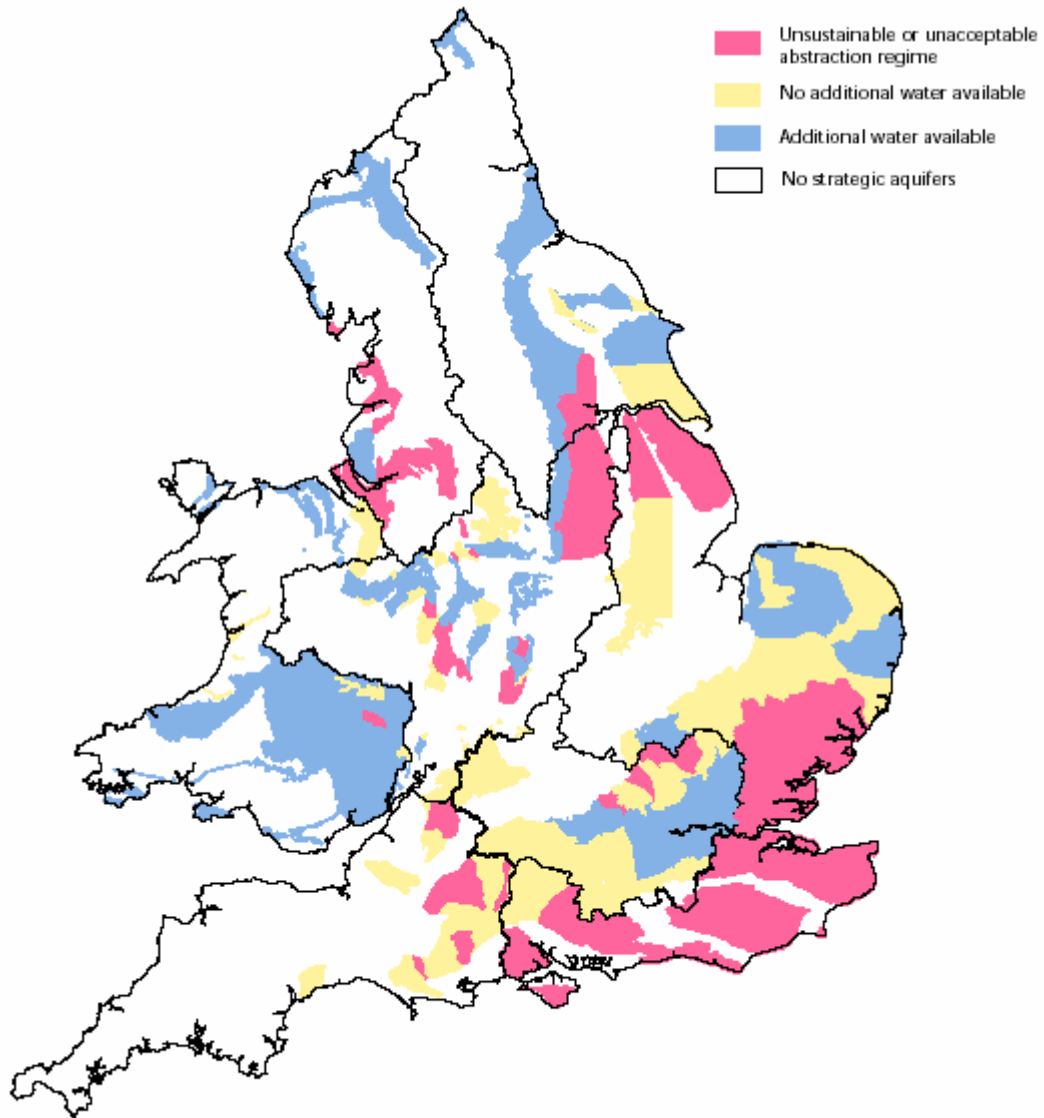
Current indicative availability: summer surface water



Current indicative availability: winter surface water



Current indicative availability: groundwater





## Appendix 2 – Water Abstractions by Region (2000)

Total abstractions from all sources by purpose and Environment Agency region, 2000

	Anglian	Midlands	North West	North East	South West	Southern	Thames	Wales	Total
<i>Total number of abstraction licences</i>	9,693	8,112	3,893	4,652	11,684	2,592	3,223	4,350	48,199
<b>Use Category</b>									<i>million litres/annum</i>
Public water supply									
Actual	757,374	964,254	529,671	800,521	443,739	505,131	1,502,811	720,497	6,223,998
Licensed	1,194,245	1,994,443	1,024,554	2,080,232	892,706	821,151	1,965,838	1,130,482	11,103,651
Private water supply									
Actual	1,464	9,611	48	2,035	11,135	948	4,714	7,349	37,304
Licensed	3,998	11,667	4,196	7,631	25,591	3,391	9,717	19,270	85,461
Spray Irrigation									
Actual	68,117	18,416	1,625	6,287	1,563	4,380	4,155	1,599	106,142
Licensed	159,859	85,126	15,063	30,672	9,998	18,095	17,696	9,088	345,597
Agriculture other than spray irrigation									
Actual	9,744	4,114	2,115	10,084	16,482	6,503	2,760	3,492	55,294
Licensed	20,269	12,481	16,933	18,265	62,571	4,833	8,925	8,079	152,356
Electricity									
Actual	753,030	1,004,415	2,708,548	1,083,137	1,592,207	1,158,914	499,531	2,713,746	11,513,528
Licensed	1,675,006	3,402,836	4,178,592	3,401,263	2,137,468	5,861,038	861,013	5,455,293	26,972,509
Other Industry									
Actual	181,152	477,076	392,125	263,242	26,501	265,858	92,379	267,361	1,965,694
Licensed	795,226	2,054,290	1,165,812	788,454	108,209	751,669	182,649	579,334	6,425,643
Fish farming, cress growing and amenity ponds									
Actual	57,771	8,914	24,608	132,230	962,396	421,025	129,768	53,442	1,790,154
Licensed	57,089	33,207	71,338	267,053	942,691	408,172	186,214	151,828	2,117,592
Other									
Actual	233	10,973	6,646	437	14,067	17,006	2,117	152,693	204,172
Licensed	4,194	134,920	98,929	1,540	61,383	46,865	7,647	751,372	1,106,850
<b>Total quantity abstracted</b>	<b>1,829,775</b>	<b>2,497,773</b>	<b>3,665,386</b>	<b>2,297,973</b>	<b>3,068,090</b>	<b>2,379,765</b>	<b>2,238,235</b>	<b>5,220,777</b>	<b>21,896,286</b>
<b>Licensed</b>	<b>3,909,886</b>	<b>7,747,716</b>	<b>6,575,417</b>	<b>6,595,110</b>	<b>4,240,617</b>	<b>7,915,214</b>	<b>3,239,699</b>	<b>8,700,063</b>	<b>48,309,659</b>

Source: DEFRA; Environment Agency





## Appendix 3 – Trickle Irrigation

### Total area irrigated (ha) and percentage irrigated by trickle irrigation method, 1975-2001

	1975	1978	1982	1984	1987	1990	1992	1995	2001
Irrigated area (ha)	81,890	130,260	103,490	140,630	76,500	164,470	107,940	155,660	147,270
Trickle area (ha)	810	1,410	2,040	1,550	1,330	1,420	1,970	4,120	7,040
Trickle area (%)	1.0	1.1	2.0	1.1	1.7	0.9	1.8	2.6	4.8

Note: Data for England and Wales (except for 1995 and 2001, England only)

\*Up to 1995 data refers to holdings and area equipped for trickle; for 2001 data refers to trickle systems used.

Source: Environment Agency *Trickle Irrigation in England and Wales* (2003)

### Estimated irrigated areas (ha) and split between irrigation method (%), by country

Country	Area irrigated (ha)	Survey year	Irrigation method (%)		
			Surface flow (furrow, border)	Spray (sprinklers, hose-reels, centre pivot)	Trickle
Spain	3,453,000	1993	60.0	24.0	17.0
Italy	2,710,000	1993	55.0	33.0	10.0
France	1,468,000	1993	10.0	85.0	5.0
Greece	1,195,000	1993	<i>Unknown</i>	<i>Dominant</i>	<i>Increasing</i>
Portugal	791,000	1993	76.0	19.0	5.0
Netherlands	560,000	1993	...	...	...
Germany	531,000	1994	0.0	95.0	5.0
Denmark	476,000	1997	0.0	95.0	5.0
Sweden	115,000	1993	0.0	99.0	<1.0
UK	150,000	2001	0.0	95.0	5.0
Bulgaria	50,000	1997	50.0	49.0	1.0
Czech Republic	14,000	1999	0.5	99.0	0.5
Hungary	100,000	1999	3.0	95.0	2.0
Poland	138,000	1997	97.0	3.0	0.0
Romania	319,000	1999	10.0	90.0	0.0
Slovak Republic	323,000	1999	0.0	100.0	0.0

Source: Environment Agency *Trickle Irrigation in England and Wales* (2003)