



BURGESS
SALMON

Environment and energy briefing from
Burgess Salmon published in the October 2013
issue of *The In-House Lawyer*.

The proposed Water Bill: the key issues

THE
IN-HOUSE
LAWYER

The proposed Water Bill: the key issues



THE WATER BILL (THE BILL) HAS BEEN long awaited. While it is not as ambitious as some may have hoped, the proposals set out in the Bill will have implications for current water and sewerage companies, current and potential licensees and customers. The proposals are at their core intended both to drive efficiency and increase competition, while being mindful of environmental pressures. They will bring the most significant changes to affect the sector since privatisation in the 1980s. While the Bill's predominant focus is on the water industry, the Bill does also cover wider water/environmental issues such as potential changes to the environmental permitting regime which could have implications for a number of organisations and businesses.

The government has described the Bill as:

'... [taking] forward those areas where legislative change is needed, by reforming the water industry to improve resilience, drive growth and give businesses more choice and flexibility – while protecting the environment'.

While this article cannot address all of the changes proposed by the Bill, some of the key proposals set out in the Bill which are likely to be of most interest to readers are discussed below.

BACKGROUND AND TIMINGS

The Bill was released in draft form in July 2012 for pre-legislative scrutiny by the Environment, Food and Rural Affairs Select Committee. The final Bill was published on 27 June 2013. Publication of the Bill follows a number of previous key actions including release of the government's widely anticipated water white paper (*Water for Life*) in December 2011. The white paper itself drew on the conclusions of a number of previous reviews including:

- 1) the Cave review (on competition and innovation in water markets);
- 2) the Walker review (on charging for household water and sewage services); and
- 3) the DEFRA review of OFWAT (the economic regulator for the water and sewerage industry).

APPLICATION AND FORMAT

While the majority of the Bill extends to England and Wales only, there are certain provisions which also apply to Scotland. A key characteristic of the Bill is that, while certain clauses specify the exact legislative changes proposed, other parts of the Bill only set out the 'framework' for change. For example while some clauses of the Bill set out specific changes proposed to sections of the Water Industry Act (WIA) 1991, other clauses provide that detailed regulations may be made in the future. In those areas the extent of the changes will therefore only become clear once the specific regulations, codes, rules etc are drafted.

STRUCTURE AND KEY ISSUES

The Bill is split into four main parts: Part 1 – Water Industry (which itself is split into four separate chapters); Part 2 – Water Resources; Part 3 – Environmental Regulation and Part 4 – Flood Insurance. Some of the key provisions within each of the parts are discussed below.

WATER INDUSTRY: KEY ISSUES

Water supply licences and sewerage licences

Water UK (the body that represents all major UK water and wastewater service suppliers) stated on release of the Bill, that it would be particularly supportive of measures in the Bill to improve resilience and to give businesses, charities and public sector customers a choice of supplier. This statement reflects the key proposals in Chapter 1 of the Bill on expanding and revising the current water supply licensing (WSL) regime and adding a sewerage licensing regime which should help to drive competition in the industry.

Under the current WSL system, if a non-household consumer is eligible they may choose to switch from their current supplier to a water supply licensee. One of the eligibility criteria is that the total quantity of water to be supplied to the relevant premises is not less than 5 million litres (England) or 50 million litres (Wales) per year.

Prospective licensees can currently apply for either:

- a retail licence (which allows a licensee to use a water undertaker's supply system for the purpose of supplying its customers – the licensee will purchase a wholesale supply from an undertaker

and retail it to its own customers and be responsible for billing and customer service); or

- a combined licence (where the licensee has both the retail element and can introduce water into the undertaker's supply system).

Under the current WSL system a licensee can therefore only input water if they also provide the 'retail' element of the service.

Two important changes to this system are proposed in the Bill:

- 1) the power to repeal the current threshold requirements within the WIA 1991 (as above) in England (in Wales thresholds are unaffected at present); and
- 2) the 'un-bundling' of the combined licence.

A licensee will be able to hold any one (or a combination) of a retail authorisation or a wholesale authorisation (in England). The major change is therefore that it will be possible for a licensee to hold a wholesale authorisation without being required to take over responsibility for the retail element (ie billing and customer service etc). In Wales, there will be restricted retail and supplementary licences – which are equivalent to the current system ie the current retail and combined licences.

Removing the threshold requirement will give more organisations the opportunity to choose their supplier. Combining this with unbundling of the regime should increase choice and drive competition (there are currently only eight water supply licensees regulated by OFWAT).

This has advantages for businesses, charities and other non-household users, who will conceivably be able to tender for one supplier across their whole organisation, with advantages in terms of costs and/or administration, especially for multi-site organisations.

The changes could also allow particular organisations to become involved in the commercial sale of water (subject to the limitations set out in the Bill – for example that a wholesale authorisation can only

'Removing the threshold requirement will give more organisations the opportunity to choose their supplier. Combining this with unbundling of the regime should increase choice.'

be granted to a limited company and the wholesale input must be made in relation to a licensed retail authorisation supply (whether by the same licensee or another)).

Another associated key change is that the Bill facilitates a cross-border (England – Wales – Scotland) retail market by allowing OFWAT and its Scottish equivalent – the Water Industry Commission for Scotland – to accept a single application for a water services licence in each other's jurisdiction.

In addition to the proposals on water supply licensing, the Bill also includes provisions in relation to sewerage licensing which should help to create a new market for sewage sludge. The Bill introduces a new sewerage licences regime into the WIA 1991. In England, a sewerage licence may give the holder any one or a combination of:

- 1) a retail authorisation – which will allow the licensee to use the sewerage system of a sewerage undertaker (ie a system of public sewers, facilities for emptying them etc) to provide sewerage services in respect of the non-household premises of the licensee and those associated with the licensee or the licensee's customers.
- 2) a wholesale authorisation – which will allow the licensee to remove matter from the sewerage system of a sewerage undertaker where the system is being used to enable a licensee (whether the same or another) to provide services in accordance with a retail authorisation.
- 3) a disposal authorisation – which allows the licensee to remove matter from the system of a sewerage undertaker. If a licensee (or person associated with them) has a retail authorisation one or both of them must obtain a wholesale authorisation and neither may remove matter in accordance with

the disposal authorisation while matter may be removed in accordance with the wholesale authorisation.

Before a wholesale or disposal authorisation is granted, OFWAT will need to consult with the Environment Agency (and others) so that the suitability of the applicant to use the public sewer system can be assessed.

Current undertakers will be permitted to hold disposal authorisations in order to encourage trading of wastewater and sewage sludge. Undertakers will however be excluded from holding retail and wholesale authorisations and will need to set up a company or partnership to enter these markets. Those with an interest in the sewage sludge market will want to monitor developments in this area carefully for potential opportunities. As with the WSL regime, this parallel system for sewerage licensing may also drive competition and encourage customers to switch suppliers leading to cost and/or administration advantages.

Relationship between water and sewerage undertakers

The Bill also changes the regime in relation to bulk supplies of water. 'Inset' appointments (new appointments and variations (NAVs)) provide the opportunity for a limited company to provide water and sewerage services or water-only services for a specific area in place of the former provider where one of the following criteria are satisfied:

- 1) there is a 'large user';
- 2) the area is 'unserved'; or
- 3) an existing appointed company consents.

The NAV process is often a long and complex one. The Bill introduces new sections into the WIA 1991 which give OFWAT a power to produce or revise one or more codes relating to bulk supply agreements. The intention of these

changes in is to increase transparency and streamline negotiations between undertakers (including NAVs). This should be advantageous to customers, who may benefit from increased competition.

Regulation of the water industry

An interesting change proposed in the Bill is the introduction of a new primary duty on the secretary of state, Welsh ministers and OFWAT to secure long-term resilience against environmental pressures, population growth and changes in consumer behaviour – the ‘resilience objective’. This is outlined in the Bill as:

- ‘a) to secure the long-term resilience of water undertakers’ supply systems and sewerage undertakers’ sewerage systems as against environmental pressures, population growth and changes in consumer behaviour; and
- b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting appropriate long-term planning and investment by relevant undertakers, and the taking by them of a range of measures to manage water resources and reduce demand’.

It is evident in terms of the government’s response to climate change and population growth etc that the idea of building resilience into the system is seen as an important one. The resilience objective has also been welcomed by Water UK who state that it recognises the work that water companies have been doing and will continue to have to do to meet future challenges. What remains to be seen however is how placing ‘resilience’ as a primary duty works in practice and how it will sit alongside, for example, other duties, such as the current secondary duty relating to ‘contributing to the achievement of sustainable development’ (under s2(3)(e) WIA 1991) and the implications for industry procedure and practice.

WATER RESOURCES: KEY ISSUES

Moving away from the issues which have more of a water sector focus, the Bill also contains key provisions on water resources. The Bill provides for the removal

of compensation provisions for water undertakers in relation to loss of and modification to abstraction licences (this will instead be dealt with as part of the price review process).

The withdrawal of compensation for undertakers when an abstraction licence or an impoundment licence is varied or revoked in certain circumstances can be linked to the government’s support for sustainable abstraction (which stretches back to the water white paper and beyond) and the Environment Agency’s programme of restoring sustainable abstraction to address the environmental problems caused by unsustainable licensed water abstractions.

The Bill also proposes administrative changes in relation to the responsibility for certain maps. It transfers responsibility for maintenance of river maps in England and Wales to the Environment Agency and Natural Resources Wales and removes the duty on the Environment Agency to maintain a public register of maps showing the pipes and waterworks it holds.

ENVIRONMENTAL REGULATION: KEY ISSUES

This part of the Bill will be of interest to a broad spectrum of organisations as it focuses on the potential consolidation and extension of the environmental permitting regime.

The Bill enables regulations to be made about water abstraction licences; water impounding licences; flood defence consents; and requirements for fish passes and screens. This could mean that the current system of environmental permitting is extended to apply to these licences and consents to create a common system of environmental regulation.

The proposals aim to simplify the current regimes and allow more activities to be covered under one single permit. While the advantages of this are that one common process and compliance framework being in place should make the permitting process easier to understand and manage (and also potentially therefore reduce costs), for those businesses and organisations affected, there are likely to be potential issues of concern, for example relating to transitional provisions.

Before any such changes are made, consultation will take place. Those

organisations that could be affected by these changes should monitor the development of the consultation proposals accordingly.

FLOOD INSURANCE: KEY ISSUES

Another environmental issue of interest covered in the Bill is flood risk. In relation to household premises subject to high flood risk, the Bill allows for regulations to be made about the provision of insurance cover for that flood risk. This is subject to further formal consultation with a range of interested parties about the government’s proposed approach. This provision does not apply to commercial premises.

CONCLUSIONS

While the Bill’s predominant focus is on changes to the WIA 1991 and water and sewerage industry structure and practice, it does also cover wider environmental issues. The changes proposed in the Bill will therefore have implications for a spectrum of organisations.

Some commentators have described the Bill as ‘lacking ambition’, for example in relation to the omission of smart metering (which some commentators think has the potential to transform the relationship between water companies and customers) and detailed abstraction licence changes from the proposals.

A date has not yet been set for the second reading of the Bill and it is too early to confirm when the Water Act 2013 itself may be passed. There are indications the Bill may be used by MPs to raise wider issues associated with the industry, for example MPs who have concerns about the level of corporation tax paid by water and sewerage companies have recently noted that Bill provides a ‘real opportunity’ to review and improve legislation. The Bill could therefore enable and lead to wider discussion in Parliament on issues affecting the sector.

Progress of the Bill should be monitored closely by those interested in the implications of changes to the water sector.

*By Michael Barlow, partner, and
Joanne Attwood, associate,
Burges Salmon LLP.
E-mail: michael.barlow@burges-salmon.com;
joanne.attwood@burges-salmon.com.*