



## **The Environment Agency consultation -**

### **Moving the regulation of abstraction and impounding licensing into the Environmental Permitting (England and Wales) Regulations 2016.**

#### **Response from the British Hydropower Association**

##### **Introduction**

The British Hydropower Association [BHA] is the only UK trade body solely representing the interests of the UK hydropower industry, including tidal range energy, and its associated stakeholders at regional and national levels.

The BHA is self-funded, and we encourage anyone involved in, or with an interest in hydropower or tidal energy to be a member of the association.

Our membership is very diverse and includes design and consulting engineers, developers/owners, contractors, operators, all-scale generators, equipment and component manufacturers, supply chain businesses, project managers, financiers and investors, insurers, and environmental specialists.

##### **Disguised risk and burdens**

The Environment Agency [EA] have long insisted that there will be no changes to licences when they move from being licences under the water resources legislation to being permits under the Environmental Permitting Regulations [EPR]. The consultation documents show that this is only the case initially and the proposal is that the move to EPR begins a transition phase, after which there will be highly significant changes.

The transition phase for each licence will end, and the real implications of the move to EPR will begin, when there is an application from a licence holder or the Agency to alter the licence in some way. Licence holders will be forced to apply for a renewal at their existing licence expiry dates and this will also trigger the true change to EPR permits.

The BHA is dismayed to now learn that something that has been portrayed by the EA for a significant period of time as an innocuous and procedural alteration will

have serious consequences for hydropower operators and further undermine the confidence of anyone contemplating funding a new hydropower electricity generation station.

## **Permit review**

Once the transitional phase is ended, a permit will not have an expiry date but instead will be subject to periodic review. Some of these reviews will be on a cycle, linked to wider catchment management (i.e., they will replace the renewal of time limited licences in line with the catchment common end date), others will be initiated at the regulator's behest and will be additional. Any could lead to variations or even revocation, as the Agency determines.

On potential reasons for periodic variations, the consultation states:

"At the time of the review, the EA would expect to vary any unsustainable permits or, for transitional permits with a time limit, renew on different terms. An unsustainable permit would be characterised as one that:

- is related more to site-specific unsustainable abstraction and was not in the Restoring Sustainable Abstraction (RSA) programme (RSA programme closed to new licences since 2011).
- is adversely affecting or could affect the conservation status of a European site (Habitats Regulations site) or a SSSI;
- contributes to a failure to achieve the flow objective, Good Ecological Status, Good Ecological Potential or Good Quantitative Status for groundwater for the related water bodies;
- is causing deterioration against the current river basin management plan baseline;
- risks causing deterioration because of some degree of increased use of the licences above recent actual rates; or
- could compromise the achievement of Biodiversity 2020 objectives (including the salmon five-point action programme)."

This is of grave concern to the BHA as these reasons are very broad and very open to interpretation.

EA officers may not always exercise powers reasonably or proportionately. Some EA officers seem to fundamentally believe that any degree of abstraction has the potential to cause a degree of environmental deficit, and even talk about reduction of flow in a watercourse being an environmental impact.

Taking one of the above examples specifically, *risks causing deterioration because of some degree of increased use of the licences above recent actual rates*, an unreasonable regulator might say that if the UK had a wet year and generators

abstracted more than we had over the previous year (but remained within licence conditions), then they could vary the permit to reduce licensed volumes. This is clearly unacceptable.

This is a dramatic example but makes the point of how insecure permitted abstractions would become. The solution must be to require variations to be based on clear evidence and to consist of measures that are demonstrably proportionate and cost-effective. There does not appear at present to be any mechanism for ensuring this.

The consultation gives the following potential reasons for triggering an extra review out of the normal cycle:

- the risk of, or an actual, environmental incident;
- a significant change in the way the site is operated;
- the appropriateness of the permit conditions.

The first of these might be claimed at any site at any time. The second is also incredibly broad. The third, however, is possibly the most worrying. This appears to be an attempt to bring all licences into line with most recent best practice aspirations.

Until now, older licences have been protected by the Presumption of Renewal protocol for renewal of time limited licences. This is essential because very long-term investment decisions, and borrowing to facilitate such investments, are predicated on the Presumption of Renewal.

## **Compensation**

Permits under EPR, after the transition period, will have no compensation rights. For the reasons outlined above this is an unacceptable position. The BHA recognises that there may be isolated instances where there is a reason for tightening conditions on abstractions, where there is empirical evidence of material environmental harm. But in such cases the Agency must not be able to impose variations without paying compensation to compromised abstractors. To remove compensation rights as part of the 'procedural' move from one area of legislation to another would be heavy-handed and very damaging to the industry's relationship with the regulator.

## **Environmental Management System [EMS]**

The BHA is concerned that adding a requirement for an EMS unnecessarily adds costs to both abstractors and the EA. The Agency already has enforcement powers where licences are breached. Any resources at the disposal of Agency that could be deployed towards monitoring EMS plans would be better directed at improving the permitting service, for example.

## **Enforcement**

The consultation proposes that the EA should be able to take enforcement action or suspend a licence even without risk of pollution. Instead, there will be a new concept of 'harm', proposed as follows:

“Harm to the environment/risk of harm to the environment’ means a result of human activity which may:

- cause harm to the conservation, protection and enhancement of any species and habitats designated under any enactment as having special protection or priority; or
- prevent the achievement of environmental objectives within the meaning of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017; or
- cause pollution; or
- otherwise adversely affect the protection and enhancement of the environment.”

Again, this is a very troublingly broad definition, the last bullet point. This would mean that doing something that may adversely affect the enhancement of the environment would be grounds for enforcement/suspension action against a permit holder.

It is not the responsibility of abstractors to improve the environment, although of course, hydropower does do that by reducing emissions of carbon dioxide and other pollutants.

This definition of harm seems to introduce a risk that any operator could be shut down at any time. To give such power to any regulator would be completely inappropriate.

The EA state they expect to use suspension powers ‘where there are impacts on the environment because of prolonged low flows’, some officers could take this to include typical summer months when many hydro schemes run leaving only the licenced Hands-Off Flow in the river.

The EA also propose to add the possibility of custodial sentences to some offences, which is very heavy-handed and not in line with a procedural alteration.

## **Protection of commercial information**

Under the proposed changes the amount of information freely available to the public (including online) will dramatically increase and would include additional information such as a copy of all applications to grant, vary, transfer, or surrender a permit, every determination or notice of a decision on an application, all information obtained through monitoring and/or that is required by the conditions on the permit

and all documents pertaining to an appeal. Many abstractors may well have legitimate commercial reasons for being deeply concerned by this. Harmonising regulation is self-defeating when it has unwanted and unwarranted additional implications.

### **Benefit to licence holders**

The only real benefit that is mentioned in this consultation is that abstractors will have licences for a single site merged into a single permit. The BHA does not see any tangible benefit at all to any of this proposed plan.

15<sup>th</sup> December 2021