

Water law and regulation: the UK perspective

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Introduction

- **The Pinsent Masons Water Group**
- **Water Law – the UK Perspective**
 - European Drivers
 - Key UK water legislation
 - What is on the agenda: Reforms !!
- **Globalisation of Water Law**
 - Trends
 - Case Study



Pinsent Masons Water Group (1)

- Leading specialist water law firm
- We have an industry facing Water Group
- More than 30 lawyers across the firm's network of offices



Our Experience

- **Water**

- **Water Project:** advising one of the consortia bidding upon a privately funded water project in South India
- **Sewer Project:** advising on contract dispute and drafting of an assignment in relation to a sewer project in Bombay
- **Water Supply Project:** advising the lead member of a consortium for a £40 million water supply and distribution project in South Goa
- **Drinking and waste water project:** advising a bidding consortium on its bid for a drinking water and waste water project in Tirupur

- **Ports**

- **Development of Mundra Port:** advising the existing port operator on the development of the port and plans to introduce a strategic investor
- **Port of Cochin, South, West India:** in conjunction with our associated firm in India, Economic Laws Partnership

Water Law – EU Drivers (1)

“...environmental policy is a sphere of **shared competence in the EU**, one of the purposes....is to create **common ownership of shared goals and objectives** and ensure a **level playing field** for businesses and public authorities.....”

7th European Action Plan, “*Living Well, Within the Limits of Our Planet*”, 2012



Water Law – EU Drivers (2)

- **Nitrates Directive** (Directive 1991/676/EEC)
 - Nitrate Vulnerable Zones
- **Urban Waste Water Treatment Directive** (1991/271/EEC)
 - urban waste water treated to certain standards
 - sensitive waters identified and more stringent standards
- **Groundwater Directive 1980/Groundwater Directive 2006**
 - regulation of discharges of hazardous and non-hazardous substances to groundwater
 - improvement to good groundwater status by 2015
- **Bathing Waters Directive** (2006/7/EC)



Sewage pollution dramatically reduced 1990 – 2010

Environment Agency has targeted;

- **£2.2 billion** on improving bathing waters
- **£6 billion** on Urban Waste Water Treatment Directive & Shellfish waters.

Water Company Spend on Bathing Water Improvements and Bathing Water Compliance in England 1990 to 2010



Water Framework Directive (“WFD”): Key Objectives (1)

- integrates the management of **surface water bodies and groundwater** both to protect and enhance the environment;
- recognises that **land and water management should be integrated** and **risk-based** taking into account environmental, social and economic factors
- reduce or eliminate emissions of priority hazardous substances to water, through a **combined approach to environmental quality standards and emissions controls**



Water Framework Directive (“WFD”): Key Objectives (2)

- Prevent further deterioration of aquatic ecosystems
- Ensure both surface and groundwater achieve “good chemical and ecological status” by 2015
- Promote sustainable water consumption
- Mitigate the effects of floods and droughts
- Full environmental cost recovery for water use



The Groundwater Directive 2006

- groundwater to reach “**good status**” for **both quantitative and chemical standards by 2015**
- establishes underground **water quality standards**
- introduces measures to **prevent inputs (discharges) of hazardous substances** and limit inputs of non-hazardous pollutants into groundwater
- implemented in England and Wales by the **Environmental Permitting Regime**.

Implementation of water law in the UK: who regulates what?



But don't forget others including...



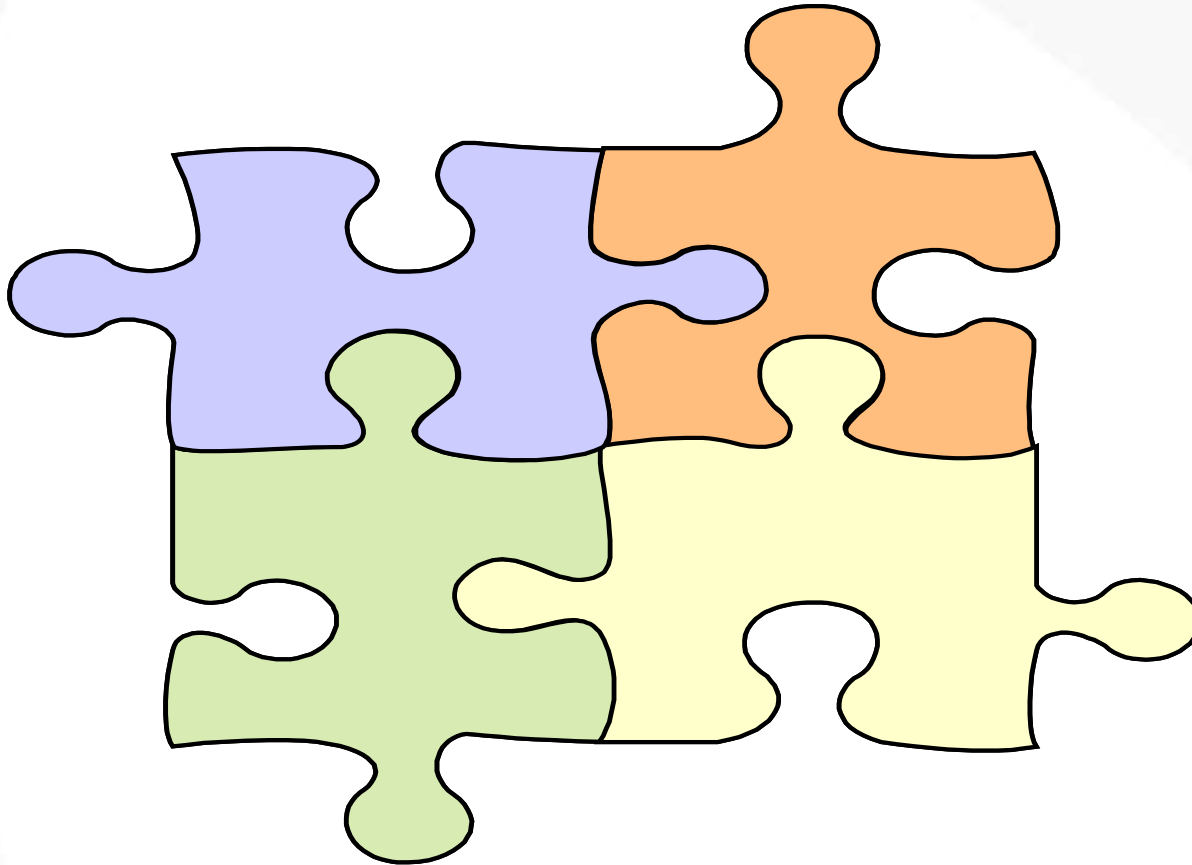
Water (England and Wales)

- Environmental Permitting (England and Wales) Regulations 2010 (as amended)
 - Reg 12 - “a person must not, except under and to the extent authorised by an environmental permit, (a) operate a regulated facility; or (b) *cause or knowingly permit a water discharge activity or groundwater activity*”
 - Reg 38 –
 - **Penalties**
 - Magistrates’ Court – a fine not exceeding **£50,000 or imprisonment for a term not exceeding 12 months**, or to both
 - Crown Court – **unlimited fine or imprisonment not exceeding a term of 5 years**, or both.
- Anti-pollution works notice under the Water Resources Act 1991
- Abstraction licences and engineering works consents under Water Resources Act 1991

Water – Scotland and Northern Ireland

- Water Environment (Controlled Activities) (Scotland) Regulations 2011 – more commonly known as CAR
- Water (NI) Order 1999 & Water Abstraction and Impoundment (Licensing) Regulations (Northern Ireland) 2006
- Differences in what is regulated and operative offences

Approach to Enforcement: Outcome focus



Civil Sanctions: The Penalties

- Fixed Monetary Penalties (**FMPs**)
- Notices
 - Compliance Notices
 - Restoration Notices
 - Stop Notices
- Variable Monetary Penalties (**VMPs**)
- Enforcement Undertakings (**EUs**)
- Third Party Undertakings (**TPUs**)



Sentencing Guidelines – England and Wales

- Consultation March – **4 March to 6 June 2013**
- New Guidelines published **26 February 2014** and came into force on **1 July 2014** (regardless of the date of the offence)
- 12-step sentencing process
- Uses turnover as a starting point in the process of setting a suitable fine
- Requires the court to consider the real economic impact of a fine
- Specifies offence ranges, offence categories, category ranges and starting points
- Relates to Section 33 EPA 1990 waste offences, and Regs 12 and 38 of the EP Regulations (operating without an environmental permit)
- Sets out an indicative list of “other environmental offences”

The Definitive Guideline in Practice

- **Thames Water** fined £250,000 for polluting a nature reserve with raw sewage
 - Very large organisation - £1.9bn turnover + £346m profit for year to March 2014
 - “Category 2” harm and negligence
 - Fine upheld by Court of Appeal, which said it would have had “no hesitation” in imposing a substantially higher one
- **United Utilities** fined £750,000 and ordered to pay £38,000 in costs for a “reckless failure” of procedural responsibility

Water Quality: the good news story....

Water Industry environmental investment 2010 – 2015 (PR09)

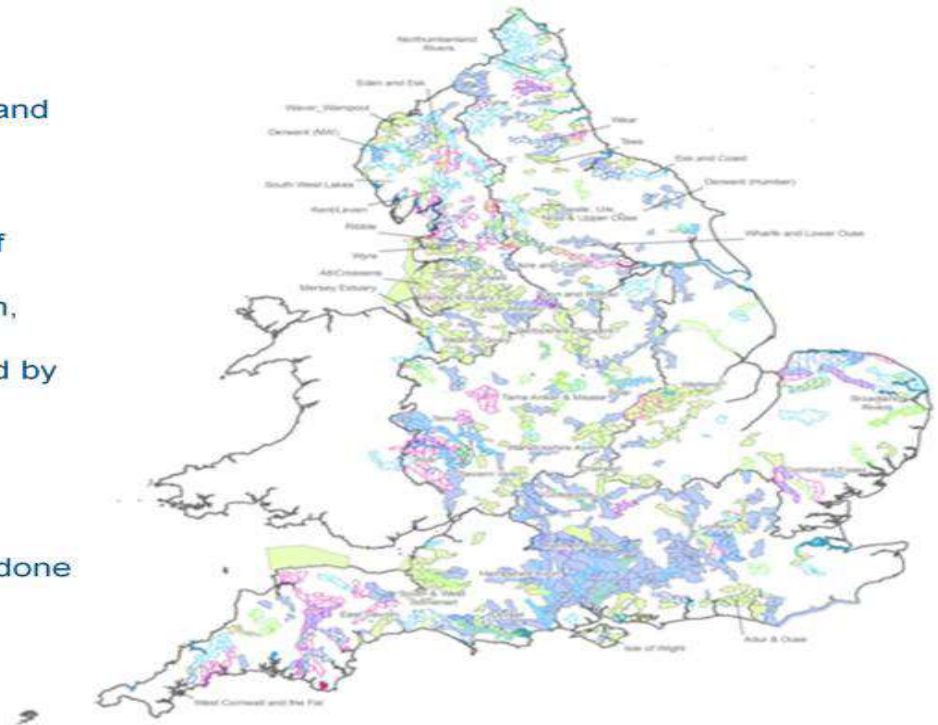
- The overall figures for potential environmental outcomes in England and Wales are:
- River Length: Improved or prevent deterioration = 3097 km
- Lakes area: Improved or prevent deterioration = 21 km²
- Transitional and Coastal Waters: Improved or prevent deterioration = 3953 km²
- Number of Wetlands improved or protected = 25
- Number of Bathing Waters improved = 52
- Number of Shellfish Waters improved = 23
- Number of Groundwater bodies improved or maintained = 41



Water Quality: the good news story...

Understanding and improving catchments

- Additional £90m invested to improve 15,000km of rivers (at locations on map).
- Massive programme of enhanced engagement and partnership – the catchment based approach
- A major data sharing initiative to open up tens of thousands of records of monitoring, investigation, objective setting and action planning results held by the Environment Agency
- Probably the most comprehensive economic appraisal of water quality objective setting ever done
- 16,000 investigations



...but there is still work to be done...

- “*England’s waters to remain illegally polluted beyond 2021*” ENDS Report, 14 January 2016
- **Why?** European Commission has introduced more stringent requirements e.g. more comprehensive assessments, tougher standards and a “one-out-all-out rule”
- **Main pressures affecting water bodies** are:-
 - physical modification
 - chemical and nitrate pollution from agriculture
 - phosphate pollution from the water sector



Water Law: UK Developments



Flood and Water Management Act 2010

- Flood and coastal erosion risk management
- Risk management
- Sustainable drainage
- Improving reservoir safety
- Provision of infrastructure
- Water use: temporary bans



Marine and Coastal Access Act 2009

Provides for the creation of **a new regulator**, the Marine Management Organisation to provide a consistent and unified approach to all aspects of marine management.

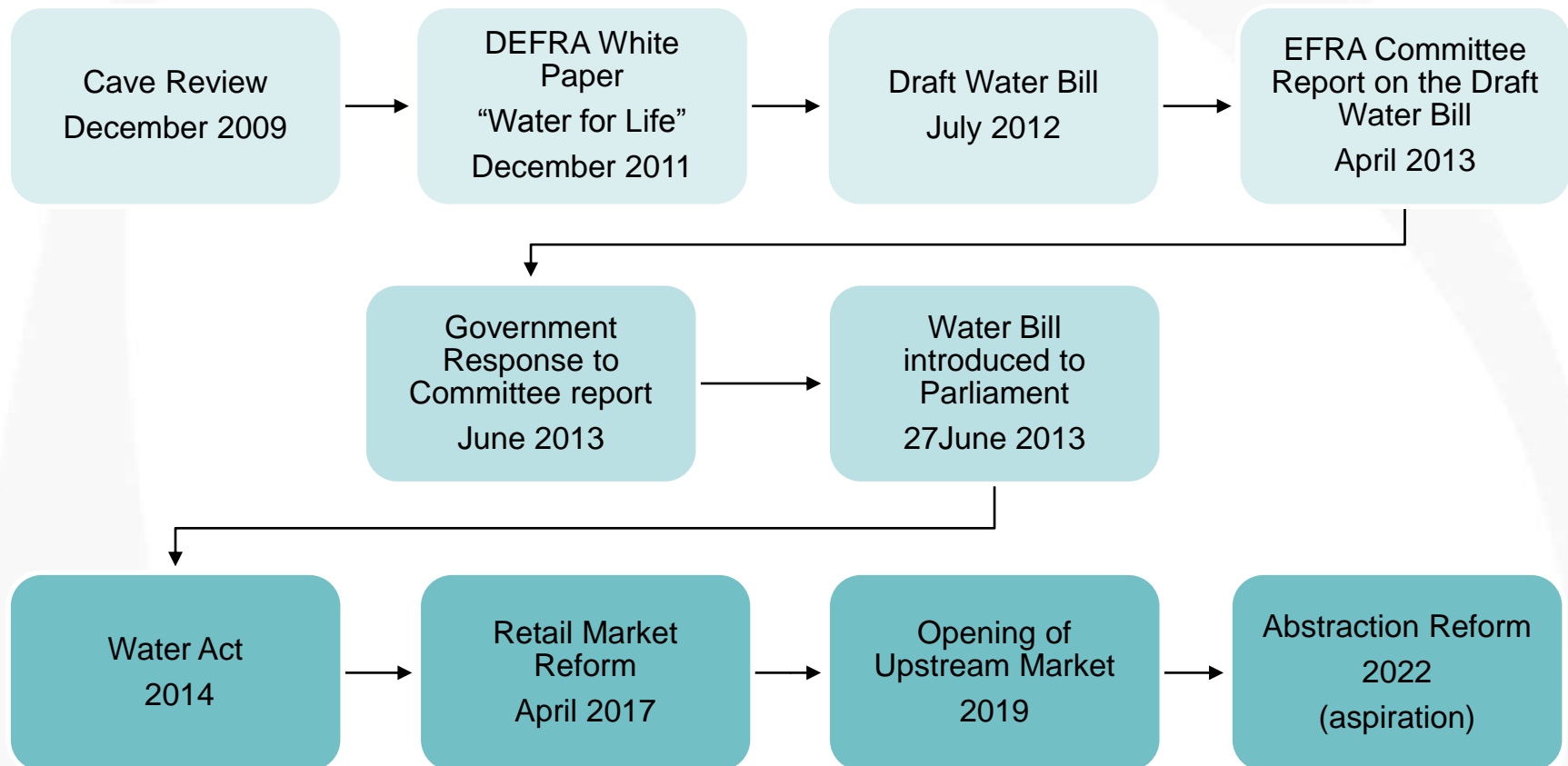


The Water Act 2014

- **Sustainable:** Climate Change/water quality
- **Resilient:** reliable in the face of environmental pressures, population growth and consumer behaviour
- **Customer focused:** producing price efficiency and affordability. £2bn benefits over 30 years
- **Resource efficient:** treating water as the valuable resource that it is, tackling unsustainable abstraction and inefficient use
- **Innovative**



Water Act 2014 – the journey



Water Act 2014 - Key Measures

- Enabling all business, charity and public sector customers in England to **switch their water and sewerage supplier**
- Establishing a **cross-border arrangement** with Scotland
- Enabling businesses to provide **new sources of water or sewerage treatment services**
- Developing a **national water supply network** by making it easier for water companies to buy and sell water from each other
- Enabling owners of **small-scale water storage to sell excess water** into the public water supply
- Enabling ministers to set the level to which a water company needs to plan to cope with **droughts**
- Enabling developers and new water or sewerage companies **to connect new building developments** to the water mains and sewerage system
- Providing Ofwat with a new **overarching resilience duty**

Restructuring the water industry

- Introduction of non-household competition and unbundling
- Experience to date: only 8 water supply licensees – only 1 customer switched suppliers in 6 years
- The Scottish experience: reduced water use saving £10m and 5000T CO2
- Therefore removal of threshold, addition of sewerage and unbundling, giving bigger market, specialisation, single suppliers and thus better competition



Abstraction reform (1)

- Restoring Sustainable Abstraction
- Don't hold your breath: 2013 Defra Consultation “Making the Most of Every Drop” but 2020 regime?
- Investor certainty paramount



Abstraction Reform (2)

- **15 January 2016 – Defra 's response to abstraction reform consultation**
 - Replacing abstraction permits with ones that have permitted volumes based on past use, starting in 2020. Volumes that have not been used will be removed if they pose a risk to the environment
 - Allowing abstractors to take and store water when flows are high
 - All abstractors using surface water will have conditions on their permits that will enable flow-based controls to protect the environment
 - Pre-approved water trades for permit holders when the availability of water is low
 - No permits will be time limited
 - No compensation for changes to permits
 - Defra will designate “enhanced catchments”

Water Law Development: Trends (1)

- Integrated versus the Holistic Approach
- Increased legislative consolidation
- A move beyond end of pipe emission regulation to deal with environmental problems at root and to address “diffuse pollution”
- Uniform, centralised and streamlined environmental permitting



Water Law Development: Trends (2)

- Moves towards administrative integration
- The development of an effective sanctioning system
- Increased monitoring and uniform environmental quality standards – benchmarking
- Increased transparency, sharing of data and public involvement



Global Application – Case Study

- Oil and gas rich state
- rapid urbanisation, development and population growth and great wealth BUT
 - acute **water scarcity/water security issues**
 - **threats to marine environment** from pumping water into the sea
 - **increasing salinity in groundwater** sources for agriculture
 - low rainfall and **reliance on desalination**, groundwater and recycled water
 - high consumption and **network leakages**



Global Application – Case Study

- Lack of consistent and effective enforcement
- No administrative integration
- No integrated, uniform and “one-stop shop” permitting and planning regime
- Lack of data/statistics/uniform environmental standards

Global Application – Case Study

- **Solution:-**

- a new **national water act** was introduced
 - to improve the approach to water management and to replace the current system of fragmented laws and regulations in place
 - robust policy, planning and regulatory frameworks
- drafting new legislation to set up a new **integrated environmental regulator** (based on EU guiding principles)



Any Questions?





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