Water law and regulation: the UK perspective

Eluned Watson, Associate
Pinsent Masons LLP
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
“....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)

  – Nitrate Vulnerable Zones

  – urban waste water treated to certain standards
  – sensitive waters identified and more stringent standards

  – 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 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
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
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

Cave Review
December 2009

→

DEFRA White Paper
“Water for Life”
December 2011

→

Draft Water Bill
July 2012

→

EFRA Committee Report on the Draft Water Bill
April 2013

Government Response to Committee report
June 2013

→

Water Bill introduced to Parliament
27 June 2013

→

Water Act 2014

→

Retail Market Reform
April 2017

→

Opening of Upstream Market
2019

→

Abstraction Reform 2022
(aspiration)
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?