

## Drought Permits and Drought Orders



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After one of the driest summers on record, 11 of the 14 Environment Agency (“EA”) areas in England are now in drought. As the EA has explained on its website, this change in status ‘does not automatically trigger actions itself, but moving to drought status means that the Environment Agency and water companies will step up their actions to manage the impacts and press ahead with implementing the stages of their pre-agreed drought plans.’

After one of the driest summers on record, 11 of the 14 Environment Agency (“EA”) areas in England are now in drought. [1] As the EA has explained on its website, this change in status ‘does not automatically trigger actions itself, but moving to drought status means that the Environment Agency and water companies will step up their actions to manage the impacts and press ahead with implementing the stages of their pre-agreed drought plans.’ [2] Given the extent of the challenges facing the EA and water companies, however, it is possible that more drastic action may be needed at some point. This blog post therefore summarises the legal powers available to water companies and the EA to address drought, as well as the role that other bodies can play in this process.

Under Part 1, Chapter III of the Water Resources Act 1991 (“WRA”), a water company can apply to the EA for a drought permit, and a water company or the EA can apply to the Secretary of State for either an ordinary drought order or an emergency drought order. In summary, the main powers are as follows:

- a) A drought permit allows a water company to take water from any specified source or to modify or suspend conditions on an abstraction licence held by the water company.
- b) An ordinary drought order allows a water company to do the same as a drought permit but can also allow a water company to discharge water to specified places, to modify or suspend discharges or filtering/treating of water held by the water company, to modify or suspend restrictions relating to the taking, discharging, supply or filtering of water held by others (including the EA), to authorise the EA to stop or limit the taking or discharging of water from/to specified sources and to prohibit or limit particular uses of water under the Drought Direction 2011.
- c) An ordinary drought order allows the EA to take water from specified sources, to discharge water to

specified places, to stop or limit the taking of water from specified sources and to modify restrictions on taking, discharging or supplying water held by anyone. For the EA, there is no difference between an ordinary drought order and an emergency drought order.

d) An emergency drought order allows a water company to do anything within an ordinary drought order as well as allowing a water company to limit uses specified by the water company and to supply water by means of stand pipes, rota cuts or water tanks.

The powers that are available to water companies and the EA under the WRA are therefore extensive. The tests for obtaining drought permits and drought orders are as follows:

a) To grant a drought permit, the EA must be satisfied that a serious deficiency of supplies of water in any area exists or is threatened and that the reason for the deficiency is an exceptional shortage of rain.

b) To grant an ordinary drought order, the Secretary of State must be satisfied that either a serious deficiency of supplies of water in any area exists or is threatened or that such a deficiency in the flow or level of water in any inland waterway exists or is threatened which poses a serious threat to any flora or fauna which are dependent on those waters and that the reason for the deficiency is an exceptional shortage of rain.

c) To grant an emergency drought order, the Secretary of State must be satisfied that by reason of an exceptional shortage of rain, a serious deficiency of supplies of water in any area exists or is threatened and that the deficiency is such as to be likely to impair the economic or social well-being of persons in the area.

Guidance issued by DEFRA and the EA includes technical information on what constitutes an exceptional shortage of rain.<sup>[3]</sup> Drought permits and ordinary drought orders last for a maximum of 6 months, with the possibility of a further extension for 6 months. Emergency drought orders last for a maximum of 3 months, with the possibility of a further extension for two months.

Drought permits and drought orders give extensive powers to address issues raised by drought, and as one would expect they have to be fully justified. The guidance issued by DEFRA and the EA emphasises the importance of what are called 'application ready' principles. Under section 39B of the Water Industry Act 1991 ("WIA"), it is a requirement for water companies to prepare, maintain and publish drought plans, and the guidance on drought permits and drought orders states that drought plans should identify all possible drought permits and drought orders as part of any supply-side management actions. In addition, before applying for a drought permit or drought order water companies are expected to implement measures to limit demand on affected sources. These measures could include publicity campaigns, leakage control and temporary restrictions on use under section 76 WIA (such as a hosepipe ban). The guidance also identifies early engagement with stakeholders as key in ensuring that applications are processed efficiently. Although not set out in statute, the aim in the guidance is to reach a decision within 12 days of the date of publication of the last advertisement for a drought permit application and within 28 days of an application for drought orders.

The aim is therefore for the application process itself to be as quick and streamlined as possible. If the drought permit or drought order is identified in the drought plan and measures which have already been taken to reduce demand have not proven sufficient, then the hope is that applications can be dealt with swiftly. In practice, however, applications will not always be as straightforward as envisaged by the guidance, especially if there are any objections. The procedural requirements governing any application are set out in schedule 8 WRA, and under schedule 8 certain bodies must be consulted on any application for a drought permit or a drought order. Although there is no absolute requirement, if there are objections to the application then normally a hearing will be held. An Inspector will be appointed by the Secretary of State, with the procedure of the Inquiry governed by the Drought Orders (Inquiries Procedure) Rules 1984. The EA or the Secretary of State will then take the hearing report into account

when reaching a decision on an application. There is no appeal mechanism against a decision made by the EA or the Secretary of State, although if an application for a drought permit is unsuccessful then a water company could apply to the Secretary of State for a drought order instead. If a drought permit or a drought order is granted, then the rules governing possible compensation are found in schedule 9 WRA.

It is notable that despite the extreme weather conditions this summer, there have been relatively few drought permits or drought orders granted so far. The EA successfully applied for an ordinary drought order to prevent Holme Styes reservoir in Holmfirth from running dry. Under the terms of the order, the EA can ask for Yorkshire Water to reduce the flow of water from the reservoir, and it is anticipated that the flow of water from the reservoir will reduce from 2 million litres per day to 1 million litres per day. [4]

On 19 July, Southern Water also applied for a drought permit to allow continuing abstraction from the River Test if the river flow falls below 355,000 cubic metres per day, the current minimum level on the licence condition.[5] Little River Management Ltd and Fish Legal have objected to the application, arguing that by failing to minimise demand or provide adequate mitigation for fish, Southern Water has not met the strict requirements of the Water Framework Directive. [6] A hearing was held on 3 August, and the hearing report is yet to be published.

Given the extensive powers that may be exercised under a drought permit or drought order, it is important for consultees to examine any proposals carefully, especially since a drought permit or drought order could have far-reaching ramifications for bodies other than the applicant. The ambition in the guidance is for applicants to have already minimised demand and to have provided a robust justification of need (with reference to the drought plan), and the River Test application is a good example of how applications are tested against these criteria. The EA declaring that there is a drought in a certain area does not give carte blanche to water companies, and statutory consultees have an important role to play in ensuring that water companies only use the extensive powers granted by drought permits or drought orders when there is appropriate justification.

[1] <https://www.bbc.co.uk/news/science-environment-62298430>

[2] <https://www.gov.uk/government/news/environment-agency-chairs-national-drought-group-as-parts-of-country-move-into-drought>.

[3] [https://consult.environment-agency.gov.uk/environment-and-business/water-company-drought-plan-guideline-update/user\\_uploads/drought-permits-and-drought-orders-guidelines\\_final\\_may2019.pdf](https://consult.environment-agency.gov.uk/environment-and-business/water-company-drought-plan-guideline-update/user_uploads/drought-permits-and-drought-orders-guidelines_final_may2019.pdf), Appendix D

[4] See the order here [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1099045/Holme\\_Styes\\_DO\\_Notice\\_Issued.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099045/Holme_Styes_DO_Notice_Issued.pdf) and EA News Post discussing the order and EA News Post discussing the order: <https://www.gov.uk/government/news/environment-agency-chairs-national-drought-group-as-parts-of-country-move-into-drought>

[5] [https://www.southernwater.co.uk/media/7278/11-description\\_of\\_the\\_proposal-1.pdf](https://www.southernwater.co.uk/media/7278/11-description_of_the_proposal-1.pdf)

[6] See <https://www.southernwater.co.uk/media/7328/3-drought-permit-objection-lrm-260722.pdf> and <https://www.southernwater.co.uk/media/7329/4-fl-to-ea-objection-to-sw-drought-permit-application-27722.pdf>