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Date: 24 June 2011

Dear Ms Smagadi

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the convention in connection with access to information held by privatized water companies (Ref. ACCC/C/2010/55)

Thank you for your letter of 1 February 2011 regarding the Communication from Fish Legal concerning access to information held by privatized water companies. This letter informs the Committee about recent developments in this matter and seeks to respond to the questions set out in your letter.

We would like to inform the Committee that, since the Committee's letter of 1 February 2011, there have been a number of developments in this case, in particular:

- 17 January 2011 - the European Commission wrote to Fish Legal and suggested that when all domestic channels have been exhausted Fish Legal could ask the final tribunal to refer the matter to the European Court of Justice ("ECJ").
- 7 February 2011 - Fish Legal applied to the First Tier Tribunal ("FTT") for their appeal to be heard in the Upper Tribunal ("UT") in the same way as the Smartsources case .
- 14 February 2011 - the FTT made a ruling dismissing the appeal, considering itself bound by the decision of the UT in Smartsources.
- 4 March 2011 - Fish Legal applied to the FTT for permission to appeal the FTT's ruling of 14 February.
- 14 March 2011 - the FTT gave permission for Fish Legal to appeal to the UT.

- Fish Legal appealed to the UT and asked the UT to refer questions to the ECJ. On 6 May 2011 the UT directed the respondents (i.e. the Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd) to inform the UT of their view on a possible reference to the ECJ.

The subject matter of this communication is therefore currently the subject of an appeal to the Upper Tribunal which is considering making a reference to the Court of Justice of the European Union. As the Committee will be aware, the UK would be bound by any decision of the European Court on the proper interpretation of the provisions of the Environmental Information Directive which implements the relevant provisions of the Convention. In accordance with paragraph 21 of Decision I/7 the Committee should take into account the fact that domestic (and EU) remedies have not been exhausted in this case. Such remedies would provide the communicant with an effective and sufficient means of redress. We therefore request that the Committee delays consideration of this case until such national remedies have been exhausted. We are following this matter with close interest and, subject to the outcome of this case, we will re-examine the coverage of water companies by the Environmental Information Regulations 2004 .

In the meantime, some general background and the answers to the committee's questions are set out below.

Background

By way of background, the Upper Tribunal's decision relates only to water companies in England and Wales. The situation is different in Scotland and Northern Ireland; Northern Ireland Water is subject to the EIRs because it is a statutory trading body wholly owned by central government and Scottish Water is a public body under the Environmental Information (Scotland) Regulations 2004.

The water and sewerage industries were privatised in England and Wales with effect from 1 September 1989. Most of the environmental regulatory functions were transferred to a new public authority, the National Rivers Authority, now the Environment Agency. In addition, regulation of the water and sewerage services (e.g. on matters such as pricing) became vested in another public authority, the office of Water Services (Ofwat).

To assist the committee, extracts from the Water Industry Act 1991 referred to below are provided in an Annex to this letter.

Question 1: In its decision the Upper Tribunal only considered the arguments put forward by the Appellant to the lead case – Smartsources. How would you respond to the arguments presented by Fish Legal in its “Grounds of Appeal”?

Since as indicated above, we are awaiting confirmation as to whether the matter will be referred to the ECJ. We are following this matter with close interest and, subject to the outcome of this case, we will re-examine the coverage of water companies by the Environmental Information Regulations 2004 .

Question 2(a) Examples of public authorities in the United Kingdom that would fall under the scope of article 2, paragraphs 2(b) and (c) of the Convention.

Decisions of the Information Commissioner and the Information Tribunal have classified the following organisations as public authorities under the scope of article 2, paragraphs 2(b) and (c) of the Convention:

- Port of London Authority (PoLA) -a self financing statutory authority. Section 5 of the Port of London Act 1968 places a duty on the PoLA to carry out functions of public administration. Note that although the body is statutory, this did not in itself determine that the PoLA is a public authority. The terms of the statute did, however, assist in defining the nature of the organisation;¹
- Environmental Resources Management (ERM) – a private business providing environmental, health and safety, risk, and social consulting services. The Information Commissioner found it was a public authority for the purposes of producing an environmental assessment for the regional assembly for the North East of England. This report was required under EU Directive 1001/42 on the assessment of the effects of certain plans and programmes on the environment (the ‘SEA directive’). When producing the assessment ERM was under the control of the regional assembly (a public authority) both contractually and statutorily;²
- South Downs Waste Services Ltd – a private business holding an integrated waste management services contract for Brighton and Hove City Council, a public authority. The company is carrying out the responsibilities of the councils but under their control as demonstrated by the performance levels required under the contract, and is thus a public authority.³

Question 2(b) why the WASCs and the WOCs would not fit under these provisions

The Upper Tribunal concluded that the WASCs and WOCs are not public authorities because:

- Water companies have few characteristics of a public authority. In particular the Upper Tribunal noted that several of the water companies are foreign-owned and that they can buy each other, or buy parts of each other, subject only to competition legislation;
- WASCs and WOCs may be appointed by statute and licensed under statute but they are not created by statute; they are fundamentally private companies, independent of government, in the business of supplying water and sewerage services to the public for profit;

¹ The Port of London Authority v IC & Mr John Hibbert, EA/2006/0083.

Information Tribunal decision: www.informationtribunal.gov.uk/DBFiles/Decision/i160/PLA.pdf

² Information Commissioner’s Decision Notice FER0090259:

www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50090259.pdf

³ Information Commissioner’s Decision Notice FS50114241:

www.ico.gov.uk/~media/documents/decisionnotices/2008/FS_50114241.ashx

- The existence of a statutory regime does not mean that the water companies are necessarily performing public functions;
- The requirement to provide a universal service reflects the business model for the water industry established under the 1991 Water Industry Act rather than providing that the companies are public authorities;
- Government has a duty to act to ensure continuity of service, in the event that a WASC or WOC were to fail, in order to ensure the failing enterprise in question could be transferred as a going concern to another private sector provider;
- Whilst water companies have some regulatory functions (such as the power to impose hose-pipe bans, power to make bylaws, power to grant consent to trade effluent being discharged into public sewers, compulsory purchase powers), the Upper Tribunal concluded that these are ancillary to their primary commercial purposes and are there to enable them to protect their assets.

The Upper Tribunal considered that the WASCS and WOCs are not under the control of a public authority because:

- The regime under the 1991 Act is a system of regulation and not one of control; and
- The Secretary of State and Ofwat have a statutory duty to have regard to promoting effective competition. The Upper Tribunal drew particular attention to the requirement in the Water Act 2003 that the Secretary of State and Ofwat's regulatory activities should be "targeted only at cases in which action is needed", considering that this underlined one of the fundamental differences between regulation and control.

Question 3: Please provide information about the regulatory framework (including the text of the relevant laws) that governs the relationship between the State and the privatized water and sewage companies. Does the State apply any monitoring/control of the operations of these companies?

The Water Industry Act 1991 (as amended by the Water Act 2003)

1. The Water Industry Act 1991 ("WIA") is the main legislation concerned with the regulation of water supply. The Water Act 2003 ("WA") amends and supplements the WIA and introduces provisions for the better operation and regulation of the industry. The relevant extracts from this Act are set out in the Annex to this letter.
2. Ofwat was established for the purpose of carrying out the functions conferred on or transferred to it by the WIA. Under the WIA the regulatory functions relating to the industry are shared between the Secretary of State, Welsh Ministers (in case of water and sewerage undertakers wholly or mainly in Wales) and Ofwat. The Secretary of State and Welsh Ministers have granted a general authorisation to Ofwat for it to carry out WIA regulatory functions on their behalf

3. Ofwat has duties in respect to the regulation of the water industry, and specific powers and duties with respect to water and sewerage undertakers. In particular, Ofwat has power to appoint a company to be the water undertaker and/or sewerage undertaker for any area of England and Wales. The duties for most of Ofwat's work as an economic regulator are laid down in section 2 of the WIA (as amended by section 39 of the WA). In summary, Ofwat's primary duties are to:
- protect the interests of consumers, wherever appropriate by promoting competition;
 - ensure that the companies properly carry out their functions; and
 - ensure that the companies can finance their functions.
4. Ofwat's secondary duties include:
- promoting economy and efficiency; and
 - contributing to the achievement of sustainable development.
5. A 'water company' may be appointed by Ofwat⁴ to be the water undertaker or sewerage undertaker for any area of England and Wales. Water and sewerage undertakers must be limited companies⁵. A company may not be appointed to be a relevant undertaker if it is a licensed water supplier (see below). Licensed water suppliers are new entrant water companies that are licensed to provide retail water supply services to large non-household customers in England and Wales. The holder of such a licence is able to input water into an undertaker's supply system in order to supply its own customers.
6. The appointment of a company as a relevant undertaker is made by service on the company of an instrument in writing containing the appointment and describing the area for which it is made. A single instrument may contain the appointment of a company to be both the water undertaker for an area and the sewerage undertaker for the whole or any part of that area, or for an area which includes the whole or any part of that area.
7. Without prejudice to the obligation of a company holding any such appointment to comply with the conditions of its appointment, the appointment of a company to be the water undertaker or sewerage undertaker for any area has the effect, while the appointment remains in force:
- (i) of requiring the company to perform any statutory duty imposed by or under any enactment on such an undertaker⁶;
 - (ii) of authorising the company, for the purposes of or in connection with the carrying out of any of the functions of such an undertaker, to exercise any power conferred by or under any enactment on an undertaker of that description⁷;

⁴ Water Industry Act s.6(1)(b).

⁵ Water Industry Act 1991 s6(5).

⁶ Water Industry Act 1991 s.6(2)(a).

⁷ Water Industry Act 1991 s.6(2)(b).

(iii) of requiring enactments and subordinate legislation authorising or requiring anything to be done in relation to an undertaker of the relevant description to be construed as authorising or requiring that thing to be done in relation to that company⁸; and

(iv) of requiring other references in any enactment or subordinate legislation to an undertaker of the relevant description, or to the area of that undertaker, to be construed, so far as necessary for the purposes of, or in connection with, the carrying out by that company of the functions of an undertaker of that description, as references to that company or to that area⁹.

8. Companies are appointed as statutory undertakers under section 6 of the WIA (either as water undertakers or sewerage undertakers). The number of such companies is subject to change as new undertakers are appointed from time to time by Ofwat under the inset appointment arrangements under section 7 (generally to serve new developments).
9. Ofwat lists water and sewerage undertakers, water-only undertakers and other regulated companies on its web pages – the other 5 regulated companies¹⁰ are undertakers appointed under inset arrangements.
10. The WA includes provisions which aim to increase the opportunities for competition in the supply of water services, by setting up a system to license new entrants to supply water to large commercial and industrial customers based on a water consumption threshold. The WIA (as amended by the WA) requires water undertakers to grant licensed water suppliers access to their supply systems under certain conditions and for certain purposes. The WIA enables the Secretary of State to determine standard conditions of water supply licences. Once water supply licences have been granted, the WIA permits standard licence conditions to be modified only in certain circumstances.
11. There are 34 regulated companies in the water and sewerage sectors:
 - 10 regional companies provide both water and sewerage services.
 - 11 regional companies providing water services only.
 - 6 local companies providing either water or sewerage services or both.
 - 7 water supply licensees offering water and sewerage services to large use customers who can access competition¹¹.
12. There are about 27 appointed companies (listed on Ofwat's website). There are about 10 public water & sewerage providers. There are also about 12 water only supplying companies.

⁸ Water Industry Act 1991 s.6(2)(c).

⁹ Water Industry Act 1991 s.6(2)(d).

¹⁰ Albion Water Ltd, Independent Water Networks Ltd, Southern Electric, Peel Utilities and Veolia Water UK plc

¹¹ See <http://www.ofwat.gov.uk/aboutofwat/whatwedo/industry/>

13. Ofwat refers on its website to all appointed companies (both water undertakers and sewerage undertakers) as “water companies”. There are also periodic references in the legislation to “statutory water companies” which were the water-only companies that were not registered as limited companies under the Companies Act 1985. Now all the water-only companies are limited companies so the term is no longer relevant and steps are being taken to remove the statutory water company provisions from legislation.
14. A company holding an appointment must comply with the conditions of its appointment. Following a notice, the water companies can also have their appointment terminated¹² by Ofwat or the relevant minister¹³. The power to impose conditions¹⁴ in relation to an appointment by Ofwat, is set out in section 11 of the WIA, as amended by the WA. The relevant Minister, Ofwat and the Drinking Water Inspectorate (“DWI”) have the power to impose financial penalties of up to 10% of turnover where a company contravenes its appointment conditions or fails to meet required standards in performing its duties¹⁵.

Monitoring/Control of water companies

15. Water and sewage companies are controlled and monitored by a variety of organisations;
- a. Ofwat,
 - b. the Drinking Water Inspectorate (DWI)
 - c. the Environment Agency (EA).
 - d. Consumer interests are also represented by the Consumer Council for Water (CCW).

Ofwat

16. Ofwat is the economic regulator of the water and sewerage sectors in England and Wales, and is classified as a non-ministerial government department and is therefore a public authority within the meaning of the Aarhus Convention (in accordance with Article 2(2)(a) of the Convention). Its role is to protect consumers, promote value and safeguard the future. It is Ofwat’s function to make sure the water companies provide their customers with a good quality service at a fair price. It does this by: limiting the prices companies can charge; monitoring and comparing the services the companies provide; scrutinising the companies’ costs and investment and encouraging competition where this benefits consumers. If a company falls short of what Ofwat or customers expect, it promises to take the action necessary to protect consumers’ interests, which may include legal steps, such as enforcement action and fines.
17. Every five years, Ofwat sets an annual price limit for each water company which allows the companies to finance their functions. Ofwat does not, however, control the water company’s profits or dividends and it allows them to decide whether they share any benefits with customers by charging less. The water undertakers are also bound by a

¹² Water Industry Act 1991 s7(3)

¹³ Water Industry Act 1991 s7(2)

¹⁴ Water Industry Act 1991 s11 as amended by the Water Act 2003.

¹⁵ Water Industry Act 1991 s.22A as inserted by the Water Act s.48(1).

number of general duties which are set out in section 37 of the WIA. These duties are enforceable under section 18 of the WIA by the relevant Minister or Ofwat.

The Drinking Water Inspectorate

18. The DWI is a term used to describe the Chief Inspector of Drinking Water (and inspectors), appointed under the WIA by the Secretary of State and Welsh Ministers. The DWI checks that the water companies in England and Wales supply safe water to drink and meet the standards set in drinking water quality legislation. The Inspectorate produces an annual report containing detailed information about water quality testing and results, public confidence in drinking water, events and technical audit activity. It also contains a summary of all results of the water companies' regulatory sampling programme and a list of all the cautions and prosecutions carried out by the Inspectorate.

The Environment Agency

19. The EA, a Non-Departmental Public Body ("NDPB") sponsored by Defra and the Welsh Government, has a duty to secure the proper and efficient use of water resources in England and Wales. It regulates environmental water quality, water abstraction, discharges to surface water (for example a river, stream, estuary or the sea), or to groundwater (including via an infiltration system) and pollution.
20. All water companies have a statutory duty to prepare and maintain water resources management plans, which look ahead 25 years to plan for a secure supply and demand balance for their water customers and which are subject to public consultation. The EA is a statutory consultee for these plans, and acts as the technical advisor to the Secretary of State on the quality of the plans.

The Consumer Council for Water

21. The CCW is a NDPB, sponsored by Defra and Welsh Assembly Government, which represents the interests of water consumers across England and Wales.

I hope the information provided in this letter addresses the questions raised by the Committee. However, should you require any further information, please do not hesitate to contact me.

Yours sincerely

JANE BARTON

UK National Focal Point

ANNEX: Extracts from the Water Industry Act 1991 (as amended by the Water Act 2003)

General duties

2 General duties with respect to water industry

(1) This section shall have effect for imposing duties on the Secretary of State and on [the Authority] as to when and how they should exercise and perform the following powers and duties, that is to say—

(a) in the case of the Secretary of State, the powers and duties conferred or imposed on him by virtue of the provisions of this Act relating to the regulation of relevant undertakers [and of licensed water suppliers]; and

(b) in the case of [the Authority], the powers and duties conferred or imposed on [it] by virtue of any of those provisions, by the provisions relating to the financial conditions of requisitions or by the provisions relating to the movement of certain pipes.

[(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated—

(a) to further the consumer objective;

(b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

(c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions; and

(d) to secure that the activities authorised by the licence of a licensed water supplier and any statutory functions imposed on it in consequence of the licence are properly carried out.

(2B) The consumer objective mentioned in subsection (2A)(a) above is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services.

(2C) For the purposes of subsection (2A)(a) above the Secretary of State or, as the case may be, the Authority shall have regard to the interests of—

(a) individuals who are disabled or chronically sick;

(b) individuals of pensionable age;

(c) individuals with low incomes;

- (d) individuals residing in rural areas; and
- (e) customers, of companies holding an appointment under Chapter 1 of Part 2 of this Act, whose premises are not eligible to be supplied by a licensed water supplier,

but that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer.

(2D) For the purposes of subsection (2C) above, premises are not eligible to be supplied by a licensed water supplier if—

- (a) they are household premises (as defined in section 17C below); or
- (b) the total quantity of water estimated to be supplied to the premises annually for the purposes of subsection (2) of section 17D below is less than the quantity specified in that subsection.

(2E) The Secretary of State and the Authority may, in exercising any of the powers and performing any of the duties mentioned in subsection (1) above, have regard to—

- (a) any interests of consumers in relation to electricity conveyed by distribution systems (within the meaning of the Electricity Act 1989);
- (b) any interests of consumers in relation to gas conveyed through pipes (within the meaning of the Gas Act 1986);
- (c) any interests of consumers in relation to communications services and electronic communications apparatus (within the meaning of the Communications Act 2003),

which are affected by the exercise of that power or the performance of that duty.]

[(3) Subject to subsection (2A) above, the Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated—

- (a) to promote economy and efficiency on the part of companies holding an appointment under Chapter 1 of Part 2 of this Act in the carrying out of the functions of a relevant undertaker;
- (b) to secure that no undue preference is shown, and that there is no undue discrimination in the fixing by such companies of water and drainage charges;
- (c) to secure that consumers are protected as respects benefits that could be secured for them by the application in a particular manner of any of the proceeds of any disposal (whenever made) of any of such a company's protected land or of an interest or right in or over any of that land;
- (d) to ensure that consumers are also protected as respects any activities of such a company which are not attributable to the exercise of functions of a

relevant undertaker, or as respects any activities of any person appearing to the Secretary of State or (as the case may be) the Authority to be connected with the company, and in particular by ensuring—

- (i) that any transactions are carried out at arm's length;
- (ii) that the company, in relation to the exercise of its functions as a relevant undertaker, maintains and presents accounts in a suitable form and manner;
- (iii) that, if the person is a licensed water supplier, its licence does not authorise it to carry on any activities in the area of the company;

(e) to contribute to the achievement of sustainable development.

(4) In exercising any of the powers or performing any of the duties mentioned in subsection (1) above in accordance with the preceding provisions of this section, the Secretary of State and the Authority shall have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed).]

(5) In this section the references to water and drainage charges are references to—

- (a) any charges in respect of any services provided in the course of the carrying out of the functions of a relevant undertaker; and
- (b) amounts of any other description which such an undertaker is authorised by or under any enactment to require any of its customers or potential customers to pay.

[(5A) In this section—

“consumers” includes both existing and future consumers; and

“the interests of consumers” means the interests of consumers in relation to—

- (a) the supply of water by means of a water undertaker's supply system to premises either by water undertakers or by licensed water suppliers acting in their capacity as such; and
- (b) the provision of sewerage services by sewerage undertakers.]

(6) For the purposes of this section—

[(a) subject to subsection (6A) below, the reference in subsection (1) above to the provisions of this Act relating to the regulation of relevant undertakers and of licensed water suppliers is a reference to the provisions contained in Part 2 of this Act (except section 27A, and Schedule 3A), or in any of sections 37A to 38, 39, 39B, 39C, 66B, 66D, 66F to 66H, 66K, 66L, 95, 96, 153, 181, 182, 192A, 192B, 195, 195A and 201 to 203 below;

(b) the reference in that subsection to the provisions relating to the financial conditions of requisitions is a reference to the provisions contained in sections 42, 43, 43A, 48, 51C, 99, 100 and 100A below; and]

(c) the reference in that subsection to the provisions relating to the movement of certain pipes is a reference to the provisions of section 185 below.

[(6A) [Subsections (2A) to (4) above and section 2A below] do not apply in relation to anything done by [the Authority] in the exercise of functions assigned to [it] by section 31(3) below (“Competition Act functions”).

(6B) [The Authority] may nevertheless, when exercising any Competition Act function, have regard to any matter in respect of which a duty is imposed by any of [subsections (2A) to (4) above and section 2A below], if it is a matter to which [the Office of Fair Trading (in this Act referred to as “the OFT”)] could have regard when exercising that function.]

[(7) The duties imposed by subsections (2A) to (4) above and section 2A below do not affect the obligation of the Authority or, as the case may be, the Secretary of State to perform or comply with any other duty or requirement (whether arising under this Act or another enactment, by virtue of any Community obligation or otherwise).]

3 General environmental and recreational duties

(1) It shall be the duty of each of the following, that is to say—

- (a) the Secretary of State;
- (b) . . .
- (c) [the Authority]; and
- (d) every company holding an appointment as a relevant undertaker,

in formulating or considering any proposals relating to any functions of a relevant undertaker (including, in the case of such a company, any functions which, by virtue of that appointment, are functions of the company itself) to comply with the requirements imposed in relation to the proposals by subsections (2) and (3) below.

(2) The requirements imposed by this subsection in relation to any such proposals as are mentioned in subsection (1) above are—

- (a) a requirement, so far as may be consistent—
 - (i) with the purposes of any enactment relating to the functions of the undertaker; and
 - (ii) in the case of the Secretary of State and [the Authority], with their duties under section 2 above,

so to exercise any power conferred with respect to the proposals on the person subject to the requirement as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest [and, in the case of the exercise of such a power by a company holding an appointment as a relevant undertaker, as to further water conservation];

(b) a requirement to have regard to the desirability of protecting and conserving buildings, sites and objects of archaeological, architectural or historic interest; and

(c) a requirement to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects.

(3) The requirements imposed by this subsection in relation to any such proposals as are mentioned in subsection (1) above are, subject to the requirements imposed by subsection (2) above—

(a) a requirement to have regard to the desirability of preserving for the public any freedom of access to areas of woodland, mountains, moor, heath, down, cliff or foreshore and other places of natural beauty;

(b) a requirement to have regard to the desirability of maintaining the availability to the public of any facility for visiting or inspecting any building, site or object of archaeological, architectural or historic interest; and

(c) a requirement to take into account any effect which the proposals would have on any such freedom of access or on the availability of any such facility.

(4) Subsections (1) to (3) above shall apply so as to impose duties on [the Authority] and any company holding an appointment as a relevant undertaker in relation to any proposal relating to—

(a) the functions of [the Environment Agency]; or

(b) the functions of an internal drainage board,

as they apply in relation to any proposals relating to the functions of such an undertaker; and for the purposes of this subsection the reference in subsection (2)(a) above to the functions of the undertaker shall have effect as a reference to the functions of [the Environment Agency] or, as the case may be, of the internal drainage board in question.

(5) Subject to obtaining the consent of any navigation authority, harbour authority or conservancy authority before doing anything which causes navigation which is subject to the control of that authority to be obstructed or otherwise interfered with, it shall be the duty of every company holding an appointment as a relevant undertaker to take such steps as are—

(a) reasonably practicable; and

(b) consistent with the purposes of the enactments relating to the functions of the undertaker in question,

for securing, so long as that company has rights to the use of water or land associated with water, that those rights are exercised so as to ensure that the water or land is made available for recreational purposes and is so made available in the best manner.

(6) It shall be the duty of a company holding an appointment as a relevant undertaker, in determining what steps to take in performance of any duty imposed by virtue of subsection (5) above, to take into account the needs of persons who are chronically sick or disabled.

(7) The obligations under this section of a company holding an appointment as a relevant undertaker shall be enforceable under section 18 below by the Secretary of State.

(8) Nothing in this section or the following provisions of this Act shall require recreational facilities made available by a relevant undertaker to be made available free of charge.

(9) References in this section to the functions of a relevant undertaker shall be construed, without prejudice to section 156(7) below, as if those functions included the management, by a company holding an appointment as such an undertaker, of any land for the time being held by that company for any purpose whatever (whether or not connected with the carrying out of the functions of a relevant undertaker).

(10) In this section “building” includes structure.

6 Appointment of relevant undertakers.

(1) Subject to the following provisions of this Chapter, a company may be appointed—

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Director,

to be the water undertaker or sewerage undertaker for any area of England and Wales.

(2) Without prejudice to the obligation of a company holding an appointment under this Chapter to comply with the conditions of its appointment, the appointment of a company to be the water undertaker or sewerage undertaker for any area shall have the effect, while the appointment remains in force—

(a) of requiring the company to perform any duty imposed by or under any enactment on an undertaker of the relevant description (that is to say, a water undertaker or, as the case may be, sewerage undertaker);

(b)of authorising the company, for the purposes of, or in connection with, the carrying out of any of the functions of an undertaker of the relevant description, to exercise any power conferred by or under any enactment on an undertaker of that description;

(c)of requiring enactments and subordinate legislation authorising or requiring anything to be done in relation to an undertaker of the relevant description to be construed as authorising or requiring that thing to be done in relation to that company; and

(d)of requiring other references in any enactment or subordinate legislation to an undertaker of the relevant description, or to the area of that undertaker, to be construed, so far as necessary for the purposes of, or in connection with, the carrying out by that company of the functions of an undertaker of that description, as references to that company or, as the case may be, to that area.

(5) A company shall not be appointed to be a water undertaker unless it is a limited company or a statutory water company and shall not be appointed to be a sewerage undertaker unless it is a limited company.

(5A) A company shall not be appointed to be a relevant undertaker if it is a licensed water supplier.

7 Continuity of appointments, replacement appointments etc

(2) Subject to the following provisions of this section—

(a)the Secretary of State; and

(b)with the consent of or in accordance with a general authorisation given by the Secretary of State, the Director,

shall have power, by notice to a company holding an appointment under this Chapter, to terminate the appointment or to vary the area to which it relates.

(3) The appointment of a company to be a water undertaker or sewerage undertaker shall not be terminated or otherwise cease to relate to or to any part of any area except with effect from the coming into force of such appointments and variations replacing that company as a relevant undertaker as secure either—

(a) that another company becomes the water undertaker or, as the case may be, sewerage undertaker for that area or part or for an area that includes that area or part; or

(b) that two or more companies each become the water undertaker or, as the case may be, sewerage undertaker for one of a number of different areas that together constitute or include that area or part.

Conditions of appointments

11 Power to impose conditions

- (1) An appointment under this Chapter may include—
 - (a) such conditions as appear to the Secretary of State or, as the case may be, [the Authority] to be requisite or expedient having regard to the duties imposed on [him or it] by Part I of this Act;
 - (b) conditions for the purposes of section 7(4)(c) above; and
 - (c) conditions requiring the rendering to the Secretary of State of a payment on the making of an appointment, or payments while such an appointment is in force, or both, of such amount or amounts as may be determined by or under the conditions.
- (2) Conditions may be included by virtue of subsection (1)(a) above in an appointment under this Chapter whether or not they are connected with the supply of water, the provision of sewerage services or the exercise or performance of any power or duty conferred or imposed by or under any enactment on water undertakers or sewerage undertakers.
- (3) Conditions included in an appointment under this Chapter may contain provision for the conditions to cease to have effect or be modified at such times, in such manner and in such circumstances as may be specified in or determined by or under the conditions.
- (4) Any provision included by virtue of subsection (3) above in an appointment under this Chapter shall have effect in addition to the provision made by this Chapter with respect to the modification of the conditions of an appointment.
- (5) For the purposes of this Act where the same instrument contains an appointment of the same company to be both a water undertaker and a sewerage undertaker (whether or not for the same area), all the conditions included in that instrument by virtue of this section shall have effect, irrespective of their subject-matter, as conditions of both appointments.
- (6) Where an instrument of appointment has been served under subsection (3) of section 6 above on any company, the coming into force of the appointment for the purposes specified in subsection (2) of that section shall not be affected by any contravention of the requirements of this Act with respect to the provision contained by way of conditions of appointment in that instrument.
- (7) If the Secretary of State considers it appropriate to do so in consequence of any legal proceedings with respect to any such provision as is mentioned in subsection (6) above, he may by order made by statutory instrument direct that such conditions as may be specified in the order are to be treated as included in the appointment in question until there is an opportunity for the provision to which the proceedings relate to be replaced by virtue of any of the other provisions of this Chapter.
- (8) Any sums received by the Secretary of State in consequence of the provisions of any condition of an appointment under this Chapter shall be paid into the Consolidated Fund.

Modification of appointment conditions

13 Modification by agreement

(1) Subject to the following provisions of this section, [the Authority] may modify the conditions of a company's appointment under this Chapter if the company consents to the modifications.

(2) Before making modifications under this section, [the Authority] shall give notice—

- (a) stating that [it] proposes to make the modifications and setting out their effect;
- (b) stating the reasons why [it] proposes to make the modifications; and
- (c) specifying the period (not being less than twenty-eight days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(3) A notice under subsection (2) above shall be given—

- (a) by publishing the notice in such manner as [the Authority] considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications; and
- (b) by serving a copy of the notice on the company and on the Secretary of State.

(4) [The Authority] shall not under this section make any modifications which the Secretary of State has, within the time specified in the notice under subsection (2) above, directed [the Authority] not to make.

(5) The Secretary of State shall not give a direction under subsection (4) above in relation to any modification unless—

- (a) the modification is a modification of provision contained in the appointment for the purposes of section 7(4)(c) above;
- (b) the modification is a modification of a provision of the appointment which relates to the disposal of, or of interests or rights in or over, a company's protected land and is stated in the appointment to be a provision which cannot be modified; or
- (c) it appears to the Secretary of State that the modification should be made, if at all, under section 16 below.

Financial penalties

22A Penalties

(1) Where the Authority is satisfied—

(a) in the case of any company holding an appointment under Chapter 1 of this Part, that the company—

(i) has contravened or is contravening any condition of the appointment;

(ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding a licence under Chapter 1A of this Part of any condition of the licence; or

(iii) has failed or is failing to achieve any standard of performance prescribed under section 38(2) or 95(2) below; or

(b) in the case of any company holding a licence under Chapter 1A of this Part, that the company—

(i) has contravened or is contravening any condition of the licence; or

(ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding an appointment under Chapter 1 of this Part of any condition of the appointment,

the Authority may, subject to section 22C below, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

(2) Where the Authority, the Secretary of State or the Assembly is satisfied—

(a) in the case of any company holding an appointment under Chapter 1 of this Part, that the company—

(i) has contravened or is contravening any statutory or other requirement which is enforceable under section 18 above and in relation to which he or it is the enforcement authority; or

(ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding a licence under Chapter 1A of this Part of any such requirement; or

(b) in the case of any company holding a licence under Chapter 1A of this Part, that the company—

(i) has contravened or is contravening any statutory or other requirement which is enforceable under section 18 above and in relation to which he or it is the enforcement authority; or

(ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding an appointment under Chapter 1 of this Part of any such requirement,

he or it may, subject to section 22C below, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

(3) In a case in which—

(a) subsection (1) above applies by virtue of paragraph (a)(ii) or (b)(ii) of that subsection, or

(b) subsection (2) above applies by virtue of paragraph (a)(ii) or (b)(ii) of that subsection,

references in the following provisions of this section and sections 22B and 22C below to a contravention include references to causing or contributing to a contravention.

(4) Before imposing a penalty on a company under subsection (1) or (2) above the Authority, the Secretary of State or the Assembly (the “enforcement authority”) shall give notice—

(a) stating that it proposes to impose a penalty and the amount of the penalty proposed to be imposed;

(b) setting out the condition, requirement or standard of performance in question;

(c) specifying the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of a penalty and the amount of the penalty proposed; and

(d) specifying the period (not being less than twenty-one days from the date of publication of the notice) within which representations or objections with respect to the proposed penalty may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(5) Before varying any proposal stated in a notice under subsection (4)(a) above the enforcement authority shall give notice—

(a) setting out the proposed variation and the reasons for it; and

(b) specifying the period (not being less than twenty-one days from the date of publication of the notice) within which representations or objections with respect to the proposed variation may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(6) As soon as practicable after imposing a penalty, the enforcement authority shall give notice—

(a) stating that he or it has imposed a penalty on the company and its amount;

(b) setting out the condition, requirement or standard of performance in question;

(c) specifying the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of the penalty and its amount; and

(d) specifying a date, no earlier than the end of the period of forty-two days from the date of service of the notice on the company, by which the penalty is required to be paid.

(7) The company may, within twenty-one days of the date of service on it of a notice under subsection (6) above, make an application to the enforcement authority for him or it to specify different dates by which different portions of the penalty are to be paid.

(8) Any notice required to be given under this section shall be given—

(a) by publishing the notice in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them;

(b) by serving a copy of the notice on the company;

(c) by serving a copy of the notice on the Council; and

(d) where the notice is given by the Secretary of State or the Assembly, by serving a copy of the notice on the Authority.

(9) Any sums received by the enforcement authority by way of penalty under this section shall be paid into the Consolidated Fund.

(10) The power of the enforcement authority to impose a penalty under this section is not exercisable in respect of any contravention or failure before the commencement of this section.

(11) No penalty imposed by an enforcement authority under this section may exceed 10% of the turnover of the company (determined in accordance with provisions specified in an order made, after consulting the Assembly, by the Secretary of State).

(12) The power of the Secretary of State to make an order under subsection (11) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(13) An enforcement authority shall not impose a penalty under this section where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998.