

Drought Orders and Drought Permits

Caroline Spelman, Secretary of State for Environment, Food & Rural Affairs, is holding a further drought summit in June 2011. A drought has been declared in parts of East Anglia and restrictions could be extended to other parts unless rainfall increases. Defra notes, for example, that East Anglia and the Midlands had their driest October-April since 1975-76. Between February and April 2011 South West, Central and Eastern England had between 40-45% of normal rainfall.

Defra, the Welsh Assembly Government and the Environment Agency issued in May 2011 revised and updated 'Information' about Drought Permits and Drought Orders. Although primarily aimed at water companies, this is likely to be of direct relevance to many businesses likely to be affected by drought and resulting water restrictions. There have also been recent revisions to applicable water legislation and regulation.

Essentially, there are three relevant forms of order or permit in question, in each case lasting up to six months:

Drought Permits

These are applied for by a water company and issued by the Environment Agency and allow the water company to take water from specified sources or to modify or suspend conditions on a water company's abstraction licence.

Drought Orders

A water company or the Environment Agency can apply for a Drought Order to relevant Ministers. In addition to the actions allowed by Drought Permits, Drought Orders can allow the water company wider powers to control discharges, water treatment and some abstractions, and to prohibit or limit particular uses of water covered by the Drought Direction 2011. The Environment Agency can also be given powers to abstract or discharge water, to stop or limit the taking of water from specified sources and to modify or suspend restrictions or obligations over abstraction, discharge, filtration or treatment.

Emergency Drought Orders

In addition to the powers covered by an ordinary Drought Order, these can allow the water company to prohibit or limit specified uses of water and to set up systems of stand pipes or water tankers. The Environment Agency's powers are the same as for ordinary Drought Orders.

Relevant legislation

Provisions on drought in the Water Resources Act 1991 have been amended by the Water Act 2003 and further revised by powers which are now in force under the Floods and Water Management Act 2010. In addition to the Drought Direction 2011, there is also the Water Use (Temporary Bans) Order 2010, and the revised 'Information', which is in effect non statutory guidance, from government and the Environment Agency.

Procedures and objections

Procedures which are required to be followed when a drought permit or Drought Order is applied for are summarised in the government and Environment Agency 'Information' of May 2011, and set out in more detail in legislation and regulation. It is important to note that although applicants are required to advertise their application in at least one local newspaper, objectors have only 7 days in which to lodge an objection, which is then required to be considered or can lead to a local hearing. This is a very short timescale and water-sensitive businesses would be well advised to have outline objections well prepared and to put in place 'early warning' systems to ensure as much notice as possible of any actions by their water company or the Environment Agency.

Objections which only amount to a claim for compensation can be set aside, as there is a statutory framework for compensation claims (see below). Potential objectors who want other points considered will therefore need to be prepared to distinguish them from matters which can properly be dealt with as part of a compensation claim.

Habitats issues

Water companies and the Environment Agency have to take particular care with applications likely to affect Sites of Special Scientific Interest 'SSSIs' or European protected sites and habitats, and Natural England or the equivalent conservancy authority will be consulted over these. Business near any such site will need to take this into account.

Compensation

Compensation is available to businesses for damage done through entry, occupation or use of land under a Drought Order, but also and more importantly for Drought Orders where loss or

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damage is “sustained by reason of the taking of the water” by either the owner of the source of water or “all other persons interested in the source of water or injuriously affected by the taking of the water”. These are important rights, and businesses likely to be adversely affected by any Drought Order would be well advised to be prepared to quantify their losses, and to be able to show how they resulted from the Drought Order and not other factors.

Forward planning

Businesses vary considerably in their sensitivity to water restrictions, but this is going to be an area of increasing impact, which needs to be seen against wider government policies on climate change adaptation, and the expected impacts of local water shortages.

In all cases, businesses would be well advised to think ahead. They should obtain and keep on file their local Catchment Area Management Strategy ‘CAMS’ document from the Environment Agency. They should obtain from their local water company an up to date copy of its statutory drought plan, and be aware of the restrictions that it might seek through any application for a Drought Permit or Drought Order. In our view, businesses likely to be much affected by such orders would be well advised to identify in advance the relevant contacts at their local water company, the Environment Agency and local authority, making their own position and business sensitivities clear, preferably before rather than after any application.

Where an application for a Drought Permit or Drought Order is made, businesses will need to move very fast to register any substantive objection, and need to be fully prepared to quantify and justify any

resulting claim for compensation. Forward planning and assessment of potential impacts of any restrictions, and investigation of alternative sources or supply, sensible water restrictions that might be offered to regulators or other mitigating measures (with an assessment of likely costs) would certainly help.

Contact

Burges Salmon has in depth experience in advising on water legislation and regulation, and can help businesses with any aspect of drought restrictions covered in this briefing. For further information, please contact:



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