

The Law of the
NATIONAL
RIVERS
AUTHORITY



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by
William Howarth

Centre for Law in Rural Areas U.C.W. Aberystwyth

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THE LAW OF THE NATIONAL RIVERS AUTHORITY

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by

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and the Centre for Law in Rural Areas,
University College of Wales, Aberystwyth

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FOREWORD

The Water Act 1989 brings about a dramatic restructuring of the water industry in England and Wales through an overall separation of the responsibilities for utility and regulatory functions in relation to water. This division of the industry will allow a greater degree of specialism to be developed, and ultimately will prove more effective both in satisfying the needs of water consumers and also in safeguarding in general aquatic environment. At the forefront of the new environment strategy is the National Rivers Authority.

It is a pleasure to welcome Mr. Howarth's commentary upon the 1989 Act, explaining the implications of the new law and the contrasts with the old, and providing a concise guide to the legal status, powers and duties of the Authority. I hope that the work will provide a useful text both for the staff of the Authority and for all those outside the Authority who have an interest in water law. In addition, I would like to note the successful collaborative venture between the Authority and the recently established Centre for Law in Rural Areas, at the University College of Wales, Aberystwyth, that has led up to the joint publication of this volume.

Lord Crickhowell,
Chairman,
National Rivers Authority.

PREFACE

I was pleased to be invited by the National Rivers Authority to prepare a guide to their legal powers and duties under the Water Act 1989 for a number of reasons. First, because I share the general hope many that the new Authority will play a vital part in securing much needed improvements in the state of the aquatic environment in England and Wales. An appreciation of the full effects of the new Act by all concerned with its operation is an essential means towards that end, and it is gratifying to be able to make a small contribution to that understanding. Second, the idea of joint publication of the National Rivers Authority in conjunction with the Centre for Law in Rural Areas of the Department of Law, University College of Wales, Aberystwyth, provides an ideal opportunity to commence a series of publications focusing attention upon areas of law of special relevance to rural areas. Third, a study of this kind provided me with an admirable opportunity to consolidate my own understanding of, and thoughts about, the new water legislation.

In writing this book it has been a continuing challenge to provide an account of the powers and duties of the National Rivers Authority which is clear, concise, reasonably comprehensive, and most important of all accurate. What follows is much shorter than the Water Act 1989 which it seeks to introduce. To some extent this has been achieved by omitting or providing only incidental discussion of those parts of the Act concerning the distinct functions of water supply and sewage companies. Otherwise, brevity and clarity has been sought by summarising or omitting discussion of many of the less significant or more technical provisions of the Act concerning the Authority. It is hoped that this approach will serve as a helpful guide to the key legal features of the Authority provided for under Act, but it is to be stressed that in the last resort an authoritative determination of the law will require reference to the original wording of the Act.

A number of acknowledgements are in order. To begin with I must thank Lord Crickhowell, Chairman of the National Rivers Authority, for the kind words contributed by way of a foreword to this work. In addition I am extremely grateful to Chris Martin, Regional Solicitor with the Welsh Region of the Authority, who

initially conveyed the requirements of the Authority for an introductory book dealing with their legal powers and duties under the Act to me. Chris Martin and Anthony Weare, a Divisional Solicitor with the Welsh Region of the Authority, gave up valuable amounts of their time to read and comment upon a draft of the text, and also provided invaluable administrative assistance and advice in relation to the production of the book. Mary Madden edited the draft and prepared an index with meticulous skill, and made the work ready for equally skillful printing by the staff of Cambrian Printers of Aberystwyth. Amongst all who have an input into the production of the book the greatest thanks of all is due to Ann Cresswell for reading the draft, ironing out innumerable stylistic and typographical shortcomings, and providing constant encouragement for the project and toleration of the moods of the author during its production. Despite the support of all these persons, the mistakes that remain are the fault of the author alone.

The law is stated as at 1st September 1989, the date of establishment of the National Rivers Authority.

William Howarth,
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Aberystwyth.

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CHAPTER 1

INTRODUCTION: THE WATER ACT 1989

1.01 The Background to the Water Act 1989

As the preamble to the Water Act 1989 indicates, a principal purpose of the Act is to provide for the establishment and functions of a National Rivers Authority and of committees to advise that Authority. Pursuant to this, provision is made for the transfer of the property, rights and liabilities of water authorities in England and Wales to the Authority and to companies nominated by the Secretary of State as successor companies. Although initially in Crown ownership, the intention is that these companies will pass into private hands after flotation. In addition to these fundamental changes to the constitution of the water industry in England and Wales, the opportunity is taken to introduce a range of amendments, including modifications to the law concerning pollution of water and water resources, measures relating to flood defence and fisheries and new provisions facilitating the transfer of functions with respect to navigation, conservancy and harbours to the National Rivers Authority. The purpose of this book is to outline the legal status and powers of the National Rivers Authority by contrasting its position with that of the water authorities and indicating the relationship between the Authority and the other parts of a water industry which has been fundamentally restructured by the 1989 Act.

Proposed Retention of Integrated Water Management

The background to the Water Act 1989 lies in the Government's programme for the privatisation of public sector industries and services. Accordingly the reforms introduced under the Act can be traced back through distinct stages in the evolution of the privatisation programme for water services. Initial proposals were set out in the White Paper, *Privatisation of the Water Authorities in England and Wales* in 1986 (Cmnd.9734). This document proposed that privatisation should take place with retention of integrated river basin management of the water cycle, the rationale underlying the Water Act 1973, whereby water authorities were entrusted with comprehensive responsibility for all aspects of water management within their areas. Although integrated management of the water cycle within the public sector had allowed water authorities to undertake full

control over water supply, sewage treatment and the diverse range of other water functions, the model gave rise to disquiet when applied to a entirely privatised water industry.

Objections to Retention of Integrated Water Management

The most powerful objections to the retention of integrated water management within the privatised industry, and those eventually conceded by the Government, concerned the transfer of essentially regulatory functions to private enterprises. Unavoidably a conflict of interests would arise if one private body were to be charged with the duty of regulating the activities of another private concern with potentially competing commercial interests. Similarly it would be difficult to ensure impartiality in matters of law enforcement if a private body were to be responsible for bringing legal proceedings against other private concerns. Additional difficulties arose because of the dubious legitimacy of establishing privatised water companies as "competent authorities" for the purposes of giving effect to European Community legislation on water quality. Overall the Government was swayed by the force of these arguments and came to recognise the necessity for separating the roles of "poacher" and "gamekeeper", in providing for distinct bodies to manage the functions of water supply and sewage treatment on the one hand, and regulatory and law enforcement functions relating to the water environment on the other (*The National Rivers Authority: the Government's Proposals for a Public Regulatory Body in a Privatised Water Industry* (1987)).

The Public Utility Transfers and Water Charges Act 1988

In order to provide public utilities, including water authorities, with adequate powers to prepare for privatisation certain enabling powers were granted under the Public Utility Transfers and Water Charges Act 1988. This enactment provides that where the Secretary of State proposes that any property or functions of a public utility are to be transferred to another body corporate, the functions of the utility are to include the power to do anything appropriate to facilitate the implementation of the transfer and related proposals by the Secretary of State (s.1(1) Public Utility Transfers and Water Charges Act 1988). "Related proposals" are to include matters concerning the utility's property, rights or liabilities, the exercise of any function proposed to be transferred to another body corporate and the establishment or formation, flotation, control, finances or employees of the body corporate

{s.1(2) Public Utility and Water Charges Act 1988}. These powers enabled water authorities to bring about internal reorganisation of their functions to smooth the way for privatisation.

The Private and Public Sectors of the Water Industry

The eventual division of property, rights and liabilities of water authorities brought about under the 1989 Act allows for a clear division between the private and public sectors of the reorganised water industry. In the private sphere are to be the successor companies or Water Service Public Limited Companies, referred to under the Act as "water undertakers" and "sewerage undertakers", along with the pre-existing 29 statutory water companies. The successor companies are to acquire the operational utility functions of water authorities concerned with water supply and sewage treatment and a range of related matters. In the public sector the National Rivers Authority will acquire all the other functions of water authorities concerned with regulation of the aquatic environment, along with a relatively small number of related operational rights and duties.

Within the overall division of private and public interests to be found in the restructured water industry, there are interwoven a number of hybrid mechanisms which recognise either the public interests in water supply and sewage treatment or the need for a public body to be responsive to commercial considerations. The public interest in maintenance of standards in matters of water supply and sewage treatment is represented by final powers in relation to these matters remaining with the Secretary of State and the Director General of Water Services. By contrast, the public body, National Rivers Authority, is granted more extensive powers than previously possessed by water authorities to enable it to charge for certain services provided in relation to the control of pollution and water abstraction.

1.02 The Layout of the Water Act 1989

The Water Act 1989 is subdivided into six Parts, some of which include a number of separate Chapters, followed by 27 Schedules. The subject matters of these are as follows.

Arrangement of Parts

Part I: Preliminary {ss.1 to 10}

Part II: Water Supply and Sewerage Services {ss.11 to 102}

Chapter I: Appointment and Regulation of Water and Sewerage Undertakers {ss.11 to 36}

Chapter II: Water Supply {ss.37 to 66}

Chapter III: Provision of Sewerage Services {ss.67 to 74}

Chapter IV: Charges for Services etc. Provided by Undertakers
{ss.75 to 82}

Chapter V: Ownership and Finances of Successor Companies
etc. {ss.83 to 96} Chapter VI: Statutory Water Companies
{ss.97 to 102}

Part III: The Protection and Management of Rivers and Other
Waters {ss.103 to 150}

Chapter I: Control of Pollution {ss.103 to 124}

Chapter II: Water Resources {ss.125 to 135}

Chapter III: Flood Defence {ss.136 to 140}

Chapter IV: Salmon and Freshwater Fisheries {s.141}

Chapter V: Navigation, Conservancy and Harbour Authority
Functions {s.142}

Chapter VI: Supplemental Provisions of Part III {ss.143 to 150}

Part IV: Powers in Relation to Land and Works Powers etc. {ss.151
to 167}

Part V: Provisions Relating to Scotland {ss.168 and 169}

Part VI: Miscellaneous and Supplemental {ss.170 to 194}

Schedules

Schedule 1: The National Rivers Authority {effective under s.1(6)}

Part I: Organisation and Proceedings etc. of Authority

Part II: Financial Provisions

Schedule 2: Schemes Providing for the Initial Transfers {effective
under s.4}

Schedule 3: The Director General of Water Services {effective under
s.5(5)}

Schedule 4: Customer Services Committees {effective under s.6(8)}

Schedule 5: Transitional Provision on Termination of Appoint-
ments {effective under ss.13(6) and 23(8)}

Schedule 6: Special Administration Orders {effective under s.23(8)}

Part I: Modifications of the 1986 Act

Part II: Supplemental

Schedule 7: Procedure for Certain Orders {effective under s.51(4) and
111(3)}

Schedule 8: Sewerage Functions {effective under s.69}

Schedule 9: Control of Exercise of Trade Effluent Functions in
certain cases {effective under s.74}

Schedule 10: Provisions relating to Meters etc. {effective under
s.78(1)}

Schedule 11: Orders Designating Nitrate Sensitive Areas {effective
under s.112(7)}

- Schedule 12: Consents to Certain Discharges {effective under s.113(1)}
- Schedule 13: Amendments of the Water Resources Act 1963 {effective under s.128}
- Schedule 14: Drought Orders {effective under ss.131(8) and 132(9)}
- Part I: Procedure for Making Orders
- Part II: Compensation Schedule 15: Amendments of the Land Drainage Act 1976 {effective under s.136(2)}
- Schedule 16: Boundaries of Regional Flood Defence Areas {effective under s.137(2)}
- Schedule 17: Transfer of Fisheries Functions to the Authority {effective under s.141(5)}
- Schedule 18: Modification of Compensation Provisions etc. in relation to the Creation of New Rights {effective under s.151(5)}
- Schedule 19: Powers with respect to the Laying and Maintenance of Pipes etc. {effective under s.153(1)}
- Schedule 20: Orders conferring Compulsory Works Powers {effective under s.155(3)}
- Schedule 21: Mineral Rights {effective under s.159}
- Schedule 22: Water Quality in Scotland {effective under s.168}
- Schedule 23: Control of Water Pollution in Scotland {effective under s.169}
- Schedule 24: Procedure relating to Byelaws {effective under s.186}
- Schedule 25: Minor and Consequential Amendments {effective under s.190(1)}
- Schedule 26: Transitional Provisions and Savings {effective under s.190(2)}
- Part I: Water Authorities
- Part II: Water and Sewerage Services
- Part III: Control of Pollution
- Part IV: Water Resources
- Part V: Flood Defence
- Part VI: Fisheries
- Part VII: Compulsory Purchase and Works Powers
- Part VIII: Miscellaneous and General Schedule 27: Repeals {effective under s.190(3)}
- Part I: Repeals Coming into Force on the Transfer Date
- Part II: Other Repeals

Since the object of this work is to provide an account of the law relating to the National Rivers Authority large parts of the Act concerning the water supply and sewage treatment functions entrusted to water and sewerage undertakers are not considered,

or are given only incidental coverage. For that reason discussion of the largest part of the Act, Part II, is omitted (but, as an exception, see the discussion of s.7(6)). As a counterpart of this, detailed coverage is provided of Parts III, IV and VI which are of central importance to the activities of the Authority.

1.03 Delegated Legislation under the Water Act 1989

Various provisions of the Act are given effect through more detailed provisions of delegated legislation. A list of statutory instruments enacted under the Act, as at 1 September 1989, is, in numerical order, as follows.

Water Act 1989 (Commencement No.1) Order 1989 {SI 1989 No.1146}

Water Supply (Water Quality) Regulations 1989 {SI 1989 No.1147}

Surface Water (Classification) Regulations 1989 {SI 1989 No.1148}

Controlled Waters (Lakes and Ponds) Order 1989 {SI 1989 No.1149}

Control of Pollution (Consents for Discharges etc.) (Secretary of State Functions) Regulations 1989 {SI 1989 No.1151}

Water and Sewerage (Conservation, Access and Recreation) (Code of Practice) Order 1989 {SI 1989 No.1152}

Director General of Water Services' Register (Inspection and Charges) Order 1989 {SI 1989 No.1154}

Water Reorganisation (Pensions etc.) (Designated Persons) Order 1989 {SI 1989 No. 1155}

Trade Effluents (Prescribed Processes and Substances) Regulation 1989 {SI 1989 No.1156}

Control of Pollution (Discharges by the National Rivers Authority) Regulations 1989 {SI 1989 No.1157}

Control of Pollution (Radioactive Waste) Regulations 1989 {SI 1989 No.1158}

Water Supply and Sewerage Services (Customer Service Standards) Regulations 1989 {SI 1989 No.1159}

Control of Pollution (Registers) Regulations 1989 {SI 1989 No.1160}

Water Reorganisation (Pensions etc.) Regulations 1989 {SI 1989 No.1161}

Water Appointments (Monopolies and Mergers Commission) Regulations 1989 {SI 1989 No.1162}

Rivers (Prevention of Pollution) Act 1951 (Continuation of Byelaws) Order 1989 {SI 1989 No.1378}

Water and Sewerage (Works) (Advance Payments) Regulations 1989 {SI 1989 No.1379}

Water (Local Statutory Provisions) (Consequential Amendments) Order 1989 {SI 1989 No.1380}

- Water Reorganisation (Pensions etc.) (Amendment) Regulations 1989 {SI 1989 No.1381}
- Water Reorganisation (Pensions etc.) (Designated Persons) (Amendment) Order 1989 {SI 1989 No.1382}
- Water Supply and Sewerage Service (Customer Service Standards) (Amendment) Regulations 1989 {SI 1989 No.1383}
- Water Supply (Water Quality) (Amendment) Regulations 1989 {SI 1989 No.1384}
- Companies Act 1985 (Modification for Statutory Water Companies) Regulations 1989 {SI 1989 No.1461}
- Water Authorities (Successor Companies) Orders 1989 {SI 1989 No.1465}
- Water Authorities (Transfer of Functions) (Appointed Day) Order 1989 {SI 1989 No.1530}
- Water Reorganisation (Holding Companies of Successor Companies) Order 1989 {SI 1989 No.1531}
- Water Reorganisation (Successor Companies) (Transfer of Loans) Order 1989 {SI 1989 No.1532}
- Water Act 1989 (Commencement No.2 and Transitional Provisions) Order 1989 {SI 1989 No.1557}
- Water Act 1989 (Commencement No.3) (Scotland) Order 1989 {SI 1989 No.1561}

1.04 Terminology

A number of points about terminology used in this work are worth making at this stage. First, references to the Water Act 1989 are abbreviated to "the Act" or "the 1989 Act", and references in parenthesis are to provisions of the Act unless another enactment is cited. Second, references to "the Authority" are to be understood as referring to the National Rivers Authority unless the context indicates otherwise.

Ministerial Responsibilities

Third, some preliminary points are usefully made concerning the division of Ministerial responsibilities in relation to the Authority. The Ministers responsible for the functions of the Authority are the Secretary of State and the Minister of Agriculture, Fisheries and Food. "The Secretary of State" is to be interpreted in law as one of Her Majesty's Principal Secretaries of State {Sch.1 Interpretation Act 1978}, but as a matter of administrative practice the duties arising in relation to the Authority are divided between the Secretary of State for the Environment in England and the Secretary of State for Wales in Wales. The Minister of

Agriculture, Fisheries and Food possesses a diverse range of powers in relation to the Authority, allowing him to be consulted by, or to act in conjunction with, the Secretary of State, or to act independently of the Secretary of State in certain situations relating specifically to agriculture and fisheries. In this work all references to "The Minister" are to be understood as referring to the Minister of Agriculture, Fisheries and Food unless the context indicates otherwise.

The Transfer Date

Finally, although the expression "the transfer date" is explained in detail in the section of the Act in which it is provided for {s.4}, the frequent use of this key expression throughout the Act calls for general comment. The transfer date is the date at which the functions of water authorities, along with their properties, rights and liabilities, were divided between the Authority and the successor companies concerned with water supply and sewage treatment. The power of determination of the transfer date under the Act rests with the Secretary of State who is empowered to make an order of appointment of the date. An order for this purpose has been made, The Water Authorities (Transfer of Functions) (Appointed Day) Order 1989 {SI 1989 No:1530}, and the effect of this is that 1 September 1989 is appointed as the transfer date, consequently the expression is to be understood as having that meaning in all instances in which it is used in the text.

CHAPTER 2

THE CONSTITUTION AND GENERAL DUTIES OF THE AUTHORITY

Part I Water Act 1989

2.01 The National Rivers Authority {s.1 and Sch.1}

The first words of the Water Act 1989 stipulate that there is to be a body corporate, the National Rivers Authority, for the purpose of carrying out the functions assigned or transferred to it under the Act {s.1(1)}. Implicitly, therefore, any action taken by the Authority which is beyond those provided for by the Act, and not otherwise provided for in law, will be *ultra vires* the Authority and unlawful. Broadly, the functions of the Authority assigned or transferred by the Act are the regulatory functions of water authorities along with certain operational matters. These encompass responsibilities for control of pollution, water resources, flood defence, salmon and freshwater fisheries and navigation, conservancy and harbour authority functions. These primary functions are supplemented by various powers to act and powers in relation to land and works. In addition the Authority is subject to specified environmental and recreational duties. All of these matters are discussed later in this work

Composition

The Authority is to consist of not less than eight nor more than fifteen members, of whom two are to be appointed by the Minister and the others are to be appointed by the Secretary of State {s.1(2)}. The Secretary of State is to designate one of the members he has appointed as the chairman of the Authority, and he may designate any other member as deputy chairman {s.1(3)}. In all appointments to membership of the Authority regard is to be had to the desirability of appointing a person who has experience of, and has shown capacity in, some matter relevant to the functions of the Authority {s.1(4)}.

The initial membership of the Authority was as follows:

Lord Crickhowell {Chairman};

Dr John Bowman {Chief Executive};

Peter Brandt {Chairman of Anglian Regional Advisory Board};

J. Peter Coverdale {Chairman of Yorkshire Regional Advisory Board};

Dione Lady Digby {Chairman of Wessex Regional Advisory Board};

Professor Ronald Edwards {Chairman of the Secretary of State for Wales' Special Committee in Wales and of the Welsh Regional Advisory Board};
 Sir Hugh Fish;
 David Kinnersley;
 Lord Mason;
 Dennis Mitchell {Chairman of the South West Regional Advisory Board};
 Karen Morgan {Chairman of the Southern Regional Advisory Board};
 John H.M. Norris {Chairman of the Thames Regional Advisory Board};
 Wyndham J. Rogers-Coltman {Chairman of the Northumbrian Regional Advisory Board};
 Julian R. Taylor {Chairman of the North West Regional Advisory Board};
 and
 John Wheatley {Chairman of the Severn-Trent Regional Advisory Board}.

Of the fifteen members John Norris and Dennis Mitchell were appointed by the Minister, Professor Ronald Edwards was appointed by the Secretary of State for Wales and the other members were appointed by the Secretary of State for the Environment.

Absence of Crown Immunity

The status of the Authority as a non-departmental government body sets it apart from both the Ministerial departments to which it is responsible, and from the Crown. In the latter respect it is stipulated that the Authority is not to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown. Accordingly, it is not exempt from any tax, duty, rate, levy or other charge whatsoever, whether general or local. Also the Authority's property is not to be regarded as the property of, or property held on behalf of the Crown {s.1(5)}.

Terms of Members Holding Office

A range of detailed constitutional, administrative and financial matters concerning the Authority are set out in Schedule 1 to the Act (effective under s.1(6)). Part I of Schedule 1 concerns the general organisation and proceedings of the Authority. This includes provision for membership of the Authority allowing office to be held and vacated in accordance with the terms of a person's appointment, and for re-appointment of past members. Removal of a member of the Authority by the Minister making the appointment is permissible on grounds of prolonged absence, bankruptcy or unfitness to carry out the functions of a member of the Authority {Sch.1 para.1}. Members of the Authority are to be paid remuneration, travelling and other allowances determined

by the Minister concerned, with the approval of the Treasury, along with pensions, allowances, gratuities or compensation for loss of office similarly determined {Sch.1 para.2}. With the approval of the Secretary of State as to terms and conditions of service, the Authority may appoint officers and employees, and make payments of pensions, allowances or gratuities, as it may determine, though the express consent of the Secretary of State is required for the appointment of a person to act as chief executive {Sch.1 para.3}. Subject to certain operational functions concerning flood defence being carried out exclusively by regional flood defence committees {under s.136(3) and (4)}, anything authorised or required to be done by the Authority may be done by any member, officer or employee who has been authorised to act for that purpose, either generally or specially, by the Authority {Sch.1 para.5}.

Regulation of Proceedings

The Authority is empowered to regulate its own proceedings including determining quorum {Sch.1 para.4}. Members who are in any way directly or indirectly interested in any matter considered at a meeting of the Authority are placed under a duty to disclose the nature of the interest. The disclosure is to be recorded, and the member concerned is not to take part in any subsequent deliberation on the matter {Sch.1 para.6}. The validity of proceedings is not to be affected by a vacancy amongst the members or by a defect in the appointment of a member {Sch.1 para.7}. Minutes are to be kept of the proceedings of the Authority and of its sub-committees and, where signed by a person acting as chairman, constitute evidence of those proceedings {Sch.1 para.8}. Documents issued by the Authority and executed under the seal of the Authority, or signed by a person authorised by the Authority for that purpose, are to be treated as being issued by the Authority unless the contrary is shown {Sch.1 para.10}.

Financial Matters

Amongst the financial matters dealt with in Part II of Schedule 1 is the general provision that relevant Ministers, after consultation with the Authority and with the Treasury's approval, may determine the financial duties of the Authority, and notify the Authority of their determinations. Where the Authority has a surplus in either its capital or revenue account, the Secretary of State, after consultation with the Treasury and the Authority, may direct the Authority to pay him a specified amount {Sch.1 para.15}.

Other than research costs, administrative expenses and contributions towards expenses of the Authority or regional flood defence committees, revenue raised by the Authority in a local flood defence district {under Land Drainage Act 1976}, is to be spent only in the carrying out of the flood defence functions of the Authority in that District {Sch.1 para.16}.

A vitally important financial power is that of the Secretary of State who may, with the approval of the Treasury, make grants to the Authority of money provided by Parliament {Sch.1 para.17}. The Authority is empowered to borrow temporarily sums of money required for meeting its obligations and carrying out its functions with the consent of the Secretary of State and the approval of the Treasury. The Authority can borrow money for capital purposes, otherwise than by temporary loan, in connection with flood defence functions providing the aggregate amount outstanding does not exceed £100 million, or £160 million where the sum is specified in a statutory instrument approved by a resolution of the House of Commons {Sch.1 para.18}. With the approval of the Treasury, the Secretary of State and the Minister may lend money to the Authority for capital purposes in connection with its flood defence function {Sch.1 para.19}. The Ministers, with the consent of the Treasury, may also guarantee the repayment of any sum borrowed by the Authority, and interest upon it, and the discharge of any other financial obligation in connection with a loan to the Authority {Sch.1 para.20}.

Accounts

The Authority is bound to keep proper accounts and records and to prepare a statement of accounts in respect of each accounting year giving a true and fair view of the income and expenditure of the Authority. The statement of accounts is to be prepared in accordance with any requirement imposed by the Ministers, with the consent of the Treasury, concerning the information to be contained in the statement, the manner of presentation and the methods and principles according to which the statement is to be prepared {Sch.1 para.21}. The accounts of the Authority are to be audited by auditors appointed by the Secretary of State. A copy of the audited accounts and the report of the auditors is to be sent to the Secretary of State and the Minister as soon as is reasonably practicable after it has been received by the Authority. The Comptroller and Auditor General is entitled to inspect the contents of all books, papers and other records of the Authority relating to the accounts {Sch.1 para.22}.

2.02 Regional Rivers Advisory Committees {s.2}

Although the Authority is to operate on a national basis, the systems of advisory committees which it is to consult, are based upon the areas of water authorities. In addition to the Advisory Committee for Wales {under s.3}, the Authority is advised by regional rivers advisory committees {under s.2}, and regional fisheries advisory committees {under s.141}.

Regional rivers advisory committees partially succeed the arrangements made for the representation of consumers by water authorities {under s.24A(2) Water Act 1973, repealed}. It is the duty of the Authority to establish and maintain advisory committees, consisting of persons who are not members of the Authority, for the different regions of England and Wales {s.2(1)(a)}. The Authority is to ensure that one region consists wholly or mainly of, or of most of, Wales {s.2(2)}.

Appointment of Members

The Authority is to ensure that the persons appointed to each regional rivers advisory committee are persons who appear to have an interest in matters likely to be affected by the manner in which the Authority carries out any of its functions in the region in question {s.2(2)(b)}. Provision for payment to members of the advisory committees is made, so that the chairman of an advisory committee receives remuneration and travelling and other allowances, and other members of committees receive sums reimbursing them for loss of remuneration, for travelling expenses or for any other out-of-pocket expenses. In each case the amounts to be paid are determined by the Secretary of State with the consent of the Treasury {s.2(3)}.

After establishing regional rivers advisory committees, two other duties are imposed upon the Authority. The first of these is that the advisory committee for any region is to be consulted on any proposals of the Authority relating generally to the manner in which the Authority carries out its functions in that region. The second duty is to consider any representation made to it by the advisory committee for any region, whether in response to consultation or otherwise, as to the manner in which the Authority carries out its functions in that region {s.2(1)}.

2.03 Advisory Committee for Wales {s.3}

Separate provision is made for an advisory committee for Wales, which is to be established and maintained by the Secretary of State. The purpose of this committee is to advise the

Secretary of State with respect to matters affecting or otherwise connected with the carrying out of the Authority's functions under the Act in Wales (s.3(1)). The Advisory Committee for Wales is to consist of persons appointed by the Secretary of State and is to meet at least once a year (s.3(2)). In this case the Secretary of State is to pay the members of the Committee sums reimbursing them for loss of remuneration, for travelling expenses and for other out-of-pocket expenses, determined with the consent of the Treasury (s.3(3)).

2.04 Transfer of Water Authorities' Functions (s.4 and Sch.2)

The Transfer Date

The principal functions of the Authority are those regulatory and operational matters transferred from the water authorities. This transmission of duties is brought about by a stipulation that on the transfer date, appointed by the Secretary of State, the functions of the water authorities are to become functions either of the Authority, or of water or sewerage undertakers. To facilitate this, schemes are to be formulated for the division of the property, rights and liabilities of water authorities, between the successor companies and the Authority, and are to come into force on the appointed transfer date (s.4(1)). The Water Authorities (Transfer of Functions) (Appointed Day) Order 1989 (SI 1989 No.1530) provides that 1 September 1989 is appointed by the Secretary of State as the transfer date for these purposes.

The Successor Companies

Powers given to the Secretary of State allow for the nomination of successor companies to each water authority (s.4(2)), for the dissolution of a water authority when nothing further remains to be done by it (s.4(3) and (5)), and for the continuation in office of a chairman of an authority and such other persons as the Secretary of State may think fit to carry out the residual functions of the authority (s.4(4)).

The Water Authorities (Successor Companies) Order 1989 (SI 1989 No.1465) provides for the appointment by the Secretary of State of successor companies, wholly owned by the Crown, to take over the functions of the water authorities so far as they relate to the supply of water and the provision of sewerage services. Under the Order the successor companies are indicated as follows.

Water Authority

Anglian Water Authority
 Northumbrian Water Authority
 North West Water Authority
 Severn-Trent Water Authority
 Southern Water Authority
 South West Water Authority
 Thames Water Authority
 Welsh Water Authority
 Wessex Water Authority
 Yorkshire Water Authority

Successor Company

Anglian Water Services Limited
 Northumbrian Water Limited
 North West Water Limited
 Severn Trent Water Limited
 Southern Water Services Limited
 South West Water Services Limited
 Thames Water Utilities Limited
 Dwr Cymru Cyfyngedig
 Wessex Water Services Limited
 Yorkshire Water Services Limited

Transfer Schemes

The detailed matters concerning transfer of water authority property, rights and liabilities are provided for under schemes providing for the initial transfer prepared under Schedule 2 {effective under s.4} which come into force on the transfer date. Schedule 2 provides that each of the water authorities is to make a scheme providing for the division of all their property, rights and liabilities between their successor company and the Authority. A transfer scheme is not to take effect unless approved by the Secretary of State, who may modify a scheme before approving it. The Secretary of State may also modify a transfer scheme after it has come into force, with the consent of the successor company, with modifications being deemed to take effect from the time at which the scheme came into force. In exercising these powers the Secretary of State is to ensure that any division of property, rights and liabilities between a successor company and the Authority allocates the interests concerned in appropriate proportions in the context of the different functions which will be carried out by the company and the Authority {Sch.2 para.1}.

Where a transfer scheme for the division of a water authority's property, rights and liabilities comes into force on the transfer date, its effect will be to transfer to the Authority those interests allocated to the Authority and to transfer to the successor companies all remaining property, rights and interests {Sch.2 para.2}. A transfer scheme may contain supplemental, consequential and transitional provisions for the purpose of the division of interests made by the scheme {Sch.2 para.3}. A duty may be imposed upon a water authority under a scheme to secure the vesting in the successor company or the Authority of any foreign property, right or liability, in which case the residual water authority will be required to comply with any directions of the successor company or the Authority to perform this duty {Sch.2 para.4}.

2.05 General Duties with respect to Water Supply and Sewerage Services {s.7}

Incorporated in the section of the Act concerned with the general duties of the Director General of Water Services and the Secretary of State in relation to water supply and sewerage services {s.7} is an important general duty imposed upon the Authority. This is the duty of the Authority, in exercising its powers under any enactment, to have particular regard to the duties imposed on any water or sewerage undertaker which are likely to be affected by the power. More specifically, the duty of the Authority to have regard to the duties imposed upon water and sewerage undertakers in relation to water supply, the provision of sewerage services and related matters {s.7(6)}. It is also the duty of the Secretary of State and the Minister in exercising any power conferred in relation to the Authority, or any power which would fall to be exercised by the Authority, but for a direction of the Secretary of State or the Minister, to take into account the above duty imposed upon the Authority {s.7(7)}.

2.06 General Environmental and Recreational Duties {s.8}

The Water Act 1973 was amended by the Wildlife and Countryside Act 1981 to impose general duties upon water authorities to exercise their functions to further conservation {s.22 Water Act 1973, as amended by s.48 Wildlife and Countryside Act 1981, repealed}. Essentially this duty is imposed upon the Authority and others under the 1989 Act. The enforcement authority in relation to this duty is the Secretary of State {s.20(1) and (8)}.

The Environmental Duty

The general environmental duty of the Authority is stated so that, in formulating or considering any proposals relating to its functions, three distinct obligations are entailed. First, so far as is consistent with its functions, the Authority is to exercise any power conferred on it with respect to proposals so as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest {s.8(1)(a)}. Second, it is to have regard to the desirability of protecting and conserving buildings, sites and objects of archaeological, architectural or historic interest {s.8(1)(b)}. Third, it is 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 flora, fauna, features, buildings, sites or

objects {s.8(1)(c)}. The same threefold environmental duty is imposed upon the Secretary of State, the Minister, the Director General of Water Services and every water undertaker, sewerage undertaker and internal drainage board {s.8(1) and (7)}.

The Recreational Duty

Subject to the requirements of the environmental duty, a distinct recreational duty is imposed upon the Authority. This requires the Authority, in formulating or considering any proposals relating to its statutory functions, or the functions of a water undertaker, sewerage undertaker or internal drainage board, to take cognisance of three matters. First the Authority is 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 {s.8(2)(a)}. Second, it is 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 archeological, architectural or historic interest {s.8(2)(b)}. Third it is to take into account any effect which the proposals would have on public freedom of access or the availability of a facility of this kind {s.8(2)(c)}. The same recreational duty extends to the Secretary of State, the Minister, the Director General of Water Services and every water undertaker, sewerage undertaker and internal drainage board {s.8(2) and (7)}.

Water or Land for Recreational Purposes

In addition to the general recreational duty it is provided that, subject to the consents of navigation, harbour or conservancy authorities in situations where navigation is obstructed or interfered with, it is the specific duty of the Authority and other bodies, to make water or land available for recreational purposes. This duty requires the Authority, and any water undertaker, sewerage undertaker and internal drainage board, to take reasonably practicable steps consistent with their functions, for securing that rights over water or land are exercised to ensure that water or land is made available for recreational purposes and is made available in the best manner {s.8(3)}.

Promotion of Conservation

Without prejudice to the general environmental and recreational duties imposed upon the authority and other bodies and individuals under the Act, a more specific duty imposed upon the

Authority alone relates to conservational matters. This is the duty of the Authority generally to promote the interest of conservation. The particular matters to be promoted are the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and associated land {s.8(4)(a)}, the conservation of flora and fauna which are dependent on an aquatic environment {s.8(4)(b)} and the use of those waters and land for recreational purposes {s.8(4)(c)}. Notably the promotion of recreation upon inland and coastal waters in the last case does not explicitly exclude those waters under the control of water undertakers for water supply purposes.

In relation to water being made available for recreational purposes it is made the explicit duty of the Authority to take into account the needs of persons who are chronically sick or disabled {s.8(5)}. Although this obligation, and the other general environmental and recreational duties imposed upon the Authority, does not require any recreational facilities to be made available free of charge {s.8(6)}.

2.07 Environmental Duties with respect to Sites of Special Scientific Interest {s.9}

Another particular duty of special relevance to the Authority concerns the environmental duties relating to sites of special scientific interest. Where the Nature Conservancy Council is of the opinion that any area of land is of special interest by reason of its flora, fauna or geological or physiological features, and may be affected by an authorisation given by the Authority, the Council is to notify the Authority of the fact. The Council is also to notify any water undertaker, sewerage undertaker and internal drainage board that the land is of special interest for these reasons. Similarly where the land concerned may be affected by schemes, works, operations or activities of the Authority, water undertakers, sewerage undertakers or internal drainage boards, the relevant body is to be notified by the Council {s.9(1)}. Analogous provisions allow for notification in respect of land in a National Park or in the Broads by a National Park authority or the Broads Authority, under the Norfolk and Suffolk Broads Act 1988, respectively {s.9(2)}.

The Duty of the Authority to Consult

In the event of the Authority being notified that land is of special interest by the Nature Conservancy Council, a National Park authority or the Broads Authority, the Authority must

consult with the notifying body before carrying out or authorising any works, operations or activities which are likely to have adverse environmental consequences. Specifically, the duty to consult arises where the works concerned are likely to destroy or damage any of the flora, fauna, or geological or physiographical features by reason of which the land is of special interest. The same duty to consult arises where the works are likely significantly to prejudice anything the importance of which is a reason why the environmental or recreational duties imposed upon the Authority are of particular importance in relation to the land {s.9(3)}.

An exception to the duty to consult in relation to land which has been notified as being of special interest in relation to the carrying out or authorising of any works arises in the case of anything done in an emergency. This exception is subject to the proviso that the particulars of what is done in the event of an emergency are notified to the Nature Conservancy Council, the National Park authority or the Broads Authority as soon as practicable afterwards {s.9(4)}.

2.08 Codes of Practice on Environmental and Recreational Duties {s.10}

More detailed guidance in relation to the environmental and recreational duties imposed upon the Authority and other bodies is provided by means of codes of practice approved by the relevant Minister for the specified purposes. Codes may be approved to give practical guidance to the Authority or to water or sewerage undertakers with respect to environmental and recreational duties, and for promoting desirable practices by the Authority or undertakers with respect to those matters {s.10(1)}. "The relevant Minister" means, in relation to the Authority, the Secretary of State or the Minister, and in relation to a water or sewerage undertaker the Secretary of State acting alone {s.10(5)}.

In accordance with this Ministerial power, the Water and Sewerage (Conservation, Access and Recreation) (Code of Practice) Order 1989 {SI 1989 No.1152} has been made. This Order provides that a Code of Practice on Conservation, Access and Recreation which was issued by the relevant Ministers and laid before Parliament is formally approved.

The Legal Status of Codes of Practice

Contravention of the codes of practice on environmental and recreational duties will not constitute a breach of the general

environmental or recreational duties or give rise to any criminal or civil liability on the part of the Authority or the other bodies concerned. However, the Secretary of State and the Minister must take into account whether there has been or is likely to be a contravention of a code in determining when and how to exercise powers provided under the Act in relation to the Authority and the other bodies concerned {s.10(2)}.

Creation of an order providing for a code of practice requires the relevant Minister first to consult with a range of interested bodies. The bodies with whom consultation must take place are the Authority, the Countryside Commission, the Nature Conservancy Council, the Historic Buildings and Monuments Commission for England, the Sports Council, the Sports Council for Wales and those water and sewerage undertakers and other persons the Minister considers it appropriate to consult {s.10(5)}.

CHAPTER 3

CONTROL OF POLLUTION

Part III Chapter I Water Act 1989

3.01 Introduction

Amongst the most environmentally significant duties of water authorities which have been transferred to the Authority is the responsibility for control of water pollution, previously provided for under Part II of the Control of Pollution Act 1974. In relation to England and Wales, the Water Act 1989 replaces Part II of the 1974 Act with new provisions governing the protection and management of rivers and other waters. The new provisions, under Chapter I of Part III of the 1989 Act (ss.103 to 124), are significantly different from those previously operative and involve a strengthening of water pollution regulation in several important respects. Most notably, provision is made for the classification of water quality to be placed on a statutory footing (under ss.104 to 106), and for a range of precautionary measures to prevent pollution, including the facility for designation of water protection zones and nitrate sensitive areas (under ss.111 to 113).

Transitional Provisions on Water Pollution

Transitional provisions allow for certain incidental matters relating to water pollution, previously provided for under Part II of the Control of Pollution Act 1974, to continue in force as if provided for under the corresponding sections of the 1989 Act. Accordingly, any subordinate legislation in force, applications made, consents given, certificates issued or other things done under Part II of the 1974 Act, will continue to have effect after the transfer date for the purposes of the corresponding provisions of Chapter I of Part III of the 1989 Act. Similarly, subordinate legislation, applications, consents and other things done by a water authority will, after the transfer date, have effect as if done by the Authority {Sch.26 para.21(1)}.

3.02 Controlled Waters {s.103}

Previously, under Part II of the Control of Pollution Act 1974, controls upon the entry of polluting matter and effluents into water applied in relation to "relevant waters". These were defined to include any "stream", "controlled waters" or "specified underground water" (previously defined under ss.31(1) and 56(1)

Control of Pollution Act 1974). Under the 1989 Act these categories have been replaced by waters which are collectively referred to as "controlled waters", a term encompassing four subcategories of water, "relevant territorial waters", "coastal waters", "inland waters" and "ground waters" (s.103(1)). These expressions are defined in the following manner.

Relevant Territorial Waters

"Relevant territorial waters" means waters which extend seaward for three miles from the baselines from which the breadth of the territorial sea adjacent to England and Wales is measured (s.103(1)(a)). This definition is subject to the power of the Secretary of State to provide by order that any particular area of territorial sea adjacent to England and Wales is to be treated as if it were an area of relevant territorial waters (s.103(5)(a)).

Coastal Waters

"Coastal waters" means waters which are within the area which extends landward from the baselines of the territorial sea as far as the limit of the highest tide or, in the case of the waters of any relevant river or watercourse, as far as the fresh-water limit of the river or watercourse, together with the waters of any enclosed dock which adjoins waters within that area (s.103(1)(b)). Within this definition "watercourse" includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and passages through which water flows except mains and other pipes which belong to the Authority or a water undertaker or are used by a water undertaker or any other person for the purpose only of providing a supply of water to any premises (s.189(1)). "Relevant river or watercourse" means any river or watercourse, including an underground river and an artificial river or watercourse, which is neither a public sewer nor a sewer or drain which drains into a public sewer (s.103(4)). The Secretary of State is empowered to provide by order that a watercourse of a specified description is to be treated for these purposes as if it were not a relevant river or watercourse (s.103(5)(d)).

Inland Waters

"Inland waters" means the waters of any relevant lake or pond or of so much of any relevant river or watercourse as is above the fresh-water limit (s.103(1)(c)). "Lake or pond" is stated to include a reservoir of any description (s.103(4)). "Relevant lake or pond" means any lake or pond which, whether it is natural or artificial or

above or below ground, discharges into a relevant river or watercourse or into another lake or pond which is itself a relevant lake or pond {s.103(4)}.

The Secretary of State is empowered to provide by order that any lake or pond which does not discharge into a relevant river or watercourse or into a relevant lake or pond is to be treated as a relevant lake or pond, or to be treated as if it were not a relevant lake or pond as the case may be {s.103(5)(b) and (c)}. In exercise of this power the Controlled Waters (Lakes and Ponds) Order 1989 {SI 1989 No.1149} has been made. This Order states that reservoirs which do not discharge into a relevant river or watercourse or a relevant lake or pond are to be treated as a relevant lake or pond unless they contain water which had been treated with a view to complying with regulation 23 of the Water Supply (Water Quality) Regulations 1989 {SI 1989 No.1147}.

Ground Waters

"Ground waters" are defined as any waters which are contained in underground strata, or in a well, borehole or similar work sunk into underground strata, including any adit or passage constructed in connection with the well, borehole or work for facilitating the collection of water, or any excavation into underground strata where the level of water in the excavation depends wholly or mainly on water entering it from the strata {s.103(1)(d)}.

The Fresh-water Limit

The key distinction between coastal waters and inland waters is drawn, in the case of relevant rivers or watercourses, at the fresh-water limit of the waters concerned. For the purpose of determining the fresh-water limit of these waters the Secretary of State is to deposit maps with the Authority showing what appear to him to be the fresh-water limits of every relevant river or watercourse {s.103(2)(a)}. He may also, by reason of any change in the fresh-water limit, deposit a map showing a revised limit for the river or watercourse concerned {s.103(2)(b)}. Hence, in each case the "fresh-water limit" means the place shown as that limit in the latest map deposited with the Authority for these purposes {s.103(2)}. In relation to the definitive maps showing fresh-water limits it is the duty of the Authority to keep any maps deposited with it available, at all reasonable times, for inspection by the public free of charge {s.103(3)}.

3.03 Classification of Quality of Waters {s.104}

A significant change in the legal strategy for the maintenance and improvement of water quality introduced under the 1989 Act lies in the enactment of statutory provisions facilitating the classification of quality of waters. It has long been recognised that purposeful management of water resources involves, first, a determination of the objective for which a particular source is to be used and, second, an associated standard of purity acceptable for waters designated for that objective. Accordingly waters designated for potable supply will have to meet a more stringent set of quality parameters than waters intended for industrial purposes, and the strictness of discharge consents into differently designated receiving waters will normally reflect these factors. This general approach to water quality planning was formulated in the report of the National Water Council in 1978, *River Water Quality, the Next Stage. Review of Consent Conditions*, and reaffirmed by adoption in the Department of the Environment's survey *Water Quality in England and Wales 1985* in 1986. The innovation brought about by the Act is to place a relatively well-established administrative practice upon a statutory footing.

Quality Classification Regulations

The new provisions authorise the Secretary of State to make regulations prescribing a system of classifying the quality of controlled waters {s.104(1)}. The criteria specified in these regulations are general requirements as to the purposes for which the waters are to be suitable {s.104(2)(a)}, specific requirements as to the substances that are to be present in or absent from the water and their concentrations {s.104(2)(b)}, and specific requirements as to other characteristics of those waters {s.104(2)(c)}. The question whether prescribed requirements are satisfied is determined by reference to prescribed samples {s.104(2)}.

In accordance with the Secretary of State's power to make regulations prescribing a system of classifying the quality of inland waters the Surface Waters (Classification) Regulations 1989 (SI 1989 No.1148) have been made. These Regulations classify waters according to their suitability for abstraction by water undertakers for supply, after treatment, as drinking water. Specifically the Regulations provide for classifications DW1, DW2 and DW3, reflecting the mandatory values assigned by the European Community Directive concerned with the quality of drinking water {75/440/EEC}. The classifications will also be relevant for the purpose of establishing water quality objectives

for certain controlled waters {under s.105} in the manner described below.

3.04 Water Quality Objectives {s.105}

For the purpose of maintaining and improving the quality of controlled waters the Secretary of State may serve a notice upon the Authority. A notice of this kind may establish the water quality objectives for any particular waters under the water quality classification system. Hence the Secretary of State may specify, for any controlled waters, one or more of the classifications, and a date at which the water quality objective is established {s.105(1)}. The achievement of the water quality objectives specified for any waters amounts to the satisfaction of the corresponding requirements under the water quality classification system {s.105(2)}.

Review of Quality Objectives

Water quality objectives for particular waters may be reviewed by the Secretary of State five years after service of the last notice establishing objectives or specifying that objectives are to remain unchanged. Alternatively the Authority may instigate a review if, after consultation with appropriate water undertakers and other persons, it requests a review. The Secretary of State may only exercise his power to establish objectives by varying the existing objectives as a consequence of a review of this kind {s.105(3)}.

Where the Secretary of State intends to exercise his power to establish or vary the objectives for any waters he is obliged, first, to publish a notice setting out his proposal and specifying a period, of at least three months from the date of publication, during which representations or objections may be made. Second, he must consider any representations or objections which are duly made and not withdrawn. If he decides to establish or vary the objectives he may do so either in accordance with the original proposal or with that proposal modified in a manner he considers appropriate {s.105(4)}. The notice must be published so as to bring it to the attention of persons likely to be affected by it, and a copy of the notice must be served on the Authority {s.105(5)}. If, the Secretary of State decides that the quality objectives for any water should remain unchanged he is to serve notice of that decision on the Authority {s.105(6)}.

3.05 General Duties to Achieve and Maintain Objectives {s.106}

The system of water quality classification and the mechanism

for the specification of water quality objectives is intended to control and remedy pollution of waters. This system of classification, together with other powers and obligations in relation to water pollution, forms the basis of the important general duty of the Secretary of State and the Authority to exercise their water pollution control powers to ensure, so far as it is practicable, that the water quality objectives specified for any waters are achieved at all times {s.106(1)}. Associated with this is the duty imposed upon the Authority, for the purpose of its pollution control functions, to monitor the extent of pollution in controlled waters and to consult, in appropriate cases, with river purification authorities in Scotland {s.106(2)}.

European Community Directives

The combination of powers and duties of the Secretary of State and the Authority provide the legal mechanism for implementation of a range of European Community Directives concerning water quality. The Community has enacted a range of Directives concerned with the water environment, including directives relating to dangerous substances discharged into the aquatic environment {76/464/EEC}, the quality of bathing water {76/160/EEC}, and the quality of fresh waters to support fish life {78/659/EEC}. In each case the Government is placed under an obligation to ensure that specified or designated waters are maintained in accordance with appropriate quality parameters. The effect of the new provisions under the Act is that the obligation to implement Community Directives on water quality can be realised by legal means rather than, as previously, as a matter of administrative direction.

3.06 Offences of Polluting Controlled Waters {s.107}

Previously the main offences relating to the pollution of waters were to be found in two sections of the Control of Pollution Act 1974 dealing with the general control of pollution of rivers and coastal waters, and the control of discharges of trade and sewage effluent into rivers and coastal waters {ss.31 and 32 Control of Pollution Act 1974, repealed}. Under the 1989 Act similarly formulated offences are grouped together under one section containing the main offences of polluting controlled waters {s.107}. Subject to changes brought about as a consequence of this regrouping and redefinition of the waters concerned {under s.103, discussed above}, the offences follow a similar pattern to that previously provided for.

The Key Offences

The key offences concerning pollution of controlled waters are committed where a person causes or knowingly permits the pollution of water in particular circumstances. Specifically it is an offence to cause or knowingly permit, first, any poisonous, noxious or polluting matter or solid waste matter to enter any controlled waters {s.107(1)(a)}; second, matter, other than trade effluent or sewage effluent, to enter controlled waters by being discharged from a drain or sewer in contravention of a relevant prohibition {s.107(1)(b)}; third, trade effluent or sewage effluent to be discharged into controlled waters, or from land in England and Wales, through a pipe, into the sea outside the seaward limits of controlled waters {s.107(1)(c)}; fourth, trade effluent or sewage effluent to be discharged, in contravention of a relevant prohibition, from a building or from fixed plant on to or into land or waters of a lake or pond which are not inland waters {s.107(1)(d)}; and, finally, any matter whatever to enter inland waters so as to tend, (either directly or in combination with other matter which he or another person causes or permits to enter those waters) to impede the proper flow of the waters in a manner leading or likely to lead to a substantial aggravation of pollution due to other causes, or the consequences of such pollution {s.107(1)(e)}. These offences are subject to the various authorisations and defences, considered later, by which an otherwise unlawful emission into the aquatic environment may be permitted.

Sewage and Trade Effluent

For the purposes of general interpretation, "sewage effluent" includes any effluent from the sewage disposal or sewerage works of a sewerage undertaker but does not include surface water {s.124(1)}. "Trade effluent" includes any effluent which is discharged from premises used for carrying on any trade or industry, other than surface water and domestic sewage {s.124(1)}. For the purposes of the latter definition, however, any premises wholly or mainly used, whether for profit or not, for agricultural purposes or for the purposes of fish farming or for scientific research or experiment are deemed to be premises used for carrying on a trade {s.124(3)}.

"Cause or Knowingly Permit"

The use of the phrase "cause or knowingly permit", as an ingredient of the main offences of pollution of controlled waters,

involves the retention of words which were given judicial consideration on a number of occasions under previous legislation {s.2 Rivers Pollution Prevention Act 1876, s.2(1) Rivers (Prevention of Pollution) Act 1951, and s.31(1) Control of Pollution Act 1974, repealed}. Notably the phrase contemplates two distinct things: causing, which involves an active operation which results in pollution, and knowingly permitting, which involves a failure to prevent pollution accompanied by knowledge.

The meaning of "cause" in this context has been considered a number of times in the past. In the leading decision of the House of Lords in *Alphacell Ltd. v Woodward* ([1972] 2 All ER 475), it was held that "cause" does not require an intention to pollute waters or negligence to be shown, and this remains good law. It has been established, however, that an offence will not be committed where the behaviour of the accused is "passive" (*Price v Cromack* [1975] 2 All ER 113). Similarly causation will be lacking where it is shown that there was a distinct and independent cause of the pollution apart from the activities of the accused, as where pollution was caused by the malicious act of a trespasser (*Impress (Worcester) Ltd. v Rees* [1971] 2 All ER 357). In a recent decision the same conclusion was reached in relation to the activities of an independent contractor delivering diesel fuel oil to premises. It was held that the owner of the premises had not caused pollution which arose through a spillage which was due to the act of the delivery driver (*Welsh Water Authority v Williams Motors (Cwmdu) Ltd.* unreported, Queen's Bench Division, 7 November 1988).

Contravention of a Relevant Prohibition

The new provisions incorporate certain departures from the previous formulations of water pollution offences {contrast s.32(1) Control of Pollution Act 1974, repealed} concerned with matter other than trade or sewage effluent being discharged from a drain or sewer {under s.107(1)(b)}, and concerned with discharges of trade or sewage effluent {under s.107(1)(d)}, which are stated to be committed only where there has been "contravention of a relevant prohibition" {see also ss.108(6) and 116(2)}. This is a reference to the power of the Authority to restrict the making of certain discharges by giving notice to the discharger.

Specifically, contravention of a relevant prohibition occurs if the Authority has given notice prohibiting a discharger from making or continuing a discharge {s.107(2)(a)}, or a notice prohibits the making or continuing of the discharge unless specified conditions are observed and those conditions are not observed

{s.107(2)(b)}. Alternatively, contravention of a relevant prohibition may arise where the effluent or matter discharged contains a prescribed substance or a prescribed concentration of a substance, or derives from a prescribed process or from a process involving the use of prescribed substances or the use of substances in quantities which exceed prescribed amounts {s.107(2)(c)}. In no case, however, may notices issued by the Authority imposing relevant prohibitions or regulations concerned with prescribed substances require a discharge from a vessel to be treated as a discharge in contravention of a relevant prohibition {s.107(2)}.

Discharges by Sewerage Undertakers

In relation to the offences of discharging trade or sewage effluent into controlled waters or from land into the sea outside controlled waters {under s.107(1)(c)}, or in contravention of a relevant prohibition {under s.107(1)(d)}, a special stipulation applies to the activities of sewerage undertakers. Where sewage effluent is discharged from any sewer or works vested in a sewerage undertaker, and the undertaker did not cause or knowingly permit the discharge but was bound to receive the matter included in the discharge, the undertaker is deemed to have caused the discharge {s.107(5); contrast s.32(2) Control of Pollution Act 1974, repealed}. In effect, therefore, sewerage undertakers will be strictly liable in relation to pollution caused by discharges of inadequately treated effluent of a kind which they are bound to receive into a sewer or works either unconditionally or subject to conditions which were observed.

Penalties

Apart for a small increase in relation to the offence of allowing solid waste matter to enter waters, the penalties provided for in relation to the offences of polluting controlled waters, or the contravention of any conditions of a discharge consent, discussed below, are retained at the same levels provided for under the 1974 Act {previously, ss.31(7) and 32(7) Control of Pollution Act 1974}. The penalties allow for a person found guilty of an offence to become liable, on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum, presently £2,000, or to both {s.107(6)(a)}. On conviction on indictment, the corresponding penalties are imprisonment for a term not exceeding two years or to a fine of unlimited amount or both {s.107(6)(b)}.

3.07 Authority for Discharges and other Defences {s.108}

As under the Control of Pollution Act 1974, the offences of polluting controlled waters are subject to the defence that no offence will be committed where the entry of matter or discharge is in accordance with any act or omission which conforms with specified provisions permitting the entry or discharge. Five matters serve to authorise what would otherwise amount to an offence. These are, first, a discharge consent provided under the provision of the Water Act 1989 concerned with the control of pollution or under the corresponding provision of Part II of the Control of Pollution Act 1974 {s.108(1)(a)}; second, a disposal licence granted in accordance with Part I of the Control of Pollution Act 1974 in relation to matter other than matter discharged from drains or sewers or trade or sewage effluent {s.108(1)(b)}; third, a licence granted under Part II of the Food and Environment Protection Act 1985 authorising the deposit of waste at sea and related matters {s.108(1)(c)}; fourth, any local statutory provision or statutory order which expressly confers power to discharge effluent into water {s.108(1)(d)}; or, finally, any prescribed enactment {s.108(1)(e)}.

Removal of the Good Agricultural Practice Defence

A notable point of contrast between the new defences and previous provisions arising under the 1974 Act is the removal of the defence that an entry of polluting matter was attributable to an act or omission which was in accordance with *good agricultural practice* (formerly, s.31(2)(c) Control of Pollution Act 1974). This is because separate provision is made under the 1989 Act to revise the legal status of codes of agricultural practice (under s.116). Accordingly it will no longer be a defence for a person to show that the entry of polluting matter was in accordance with good agricultural practice.

The Emergency Exception

A person is not guilty of an offence of polluting controlled waters in respect of an entry of any matter or discharge into waters in respect of certain kinds of emergency. Specifically this exception arises where the entry of matter, or discharge, is caused or permitted in order to avoid danger to life or health {s.108(2)(a)}. Previously the emergency exception was only available in circumstances where there was a "danger to the public" (previously s.31(2)(d) Control of Pollution Act 1974). It is not clear whether a broadening of the scope of an emergency to encompass hazard

to the life or health of non-humans is intended by the new form of words. The emergency exception will only be available where the all reasonably practicable steps are taken for minimising the extent of the entry or discharge and its polluting effects {s.108(2)(b)}, and particulars of the matter are furnished to the Authority as soon as reasonably practicable after it occurs {s.108(2)(c)}.

Other Exceptions

Other exceptions are provided for so that no offence of polluting waters is committed by reason of causing or permitting any discharge of trade or sewage effluent from a vessel {s.108(3), formerly s.32(4)(a) Control of Pollution Act 1974}, or by reason of permitting water from an abandoned mine to enter controlled waters {s.108(4), formerly s.31(2) Control of Pollution Act 1974}. An exception is also provided for in relation to the deposit of solid refuse of a mine or quarry {defined under the Mines and Quarries Act 1954; s.124(1)} on any land so that it falls or is carried into inland waters. This exception arises if the deposit was with the consent of the Authority, no other site for the deposit was reasonably practicable and all reasonably practicable steps were taken to prevent entry {s.108(5), formerly s.31(3) Control of Pollution Act 1974}.

Highway Drains and Discharges by Sewerage Undertakers

Where a highway authority or other person is entitled to keep open a drain {under s.100 of the Highways Act 1980}, no offence of polluting controlled waters will be committed by reason of causing or permitting a discharge to be made from the drain unless the discharge is made in contravention of a "relevant prohibition", as described above {s.108(6), formerly s.32(1)(c) Control of Pollution Act 1974}. No offence of contravening the conditions of discharge consent will be committed by a sewerage undertaker if the contravention is essentially without fault on his part. That is to say that three factors are present, first, the contravention is attributable to a discharge which another person caused or permitted to be made into the sewer or works; second, the undertaker was either not bound to receive the discharge into the sewer or works or was bound to receive it there subject to conditions which were not observed; and, third, the undertaker could not reasonably have been expected to prevent the discharge into the sewer or works {s.108(7), formerly s.32(5) Control of Pollution Act 1974}. The counterpart of this is that a person is not guilty of an offence of polluting waters which he caused or

permitted to be made into a sewer or works vested in a sewerage undertaker if the undertaker was bound to receive the discharge either unconditionally or subject to conditions which were not observed {s.108(8), previously s.32(5) Control of Pollution Act 1974}.

3.08 Deposits and Vegetation in Rivers {s.109}

In addition to the main water pollution offences under the 1989 Act {under s.107}, separate offences are provided for in relation to unauthorised deposits and the disposal of vegetable matter in rivers. An offence is committed if, without the consent of the Authority, a person removes from any part of the bottom, channel or bed of any inland waters a deposit accumulated by reason of any dam, weir or sluice holding back the waters, and does so by causing the deposit to be carried away in suspension in the waters {s.109(1), previously s.49(1)(a) Control of Pollution Act 1974}. Also it is an offence if, without consent, a person causes or permits a substantial amount of vegetation to be cut or uprooted in any inland waters, or to be cut or uprooted so near to those waters that it falls into them, and fails to take all reasonable steps to remove the vegetation {s.109(2), formerly s.49(1)(b) Control of Pollution Act 1974}.

Consent of the Authority

Previously it was provided that consent was not to be "unreasonably withheld" for the purpose of authorising deposits and vegetation in rivers {s.49(1) Control of Pollution Act 1974, repealed}. This has been removed in the new formulation of the offence, and a new stipulation added that in giving a consent the Authority may make the consent subject to such conditions as it considers appropriate {s.109(5)}. The impression conveyed is that a tightening of controls upon pollution arising through deposits and vegetation is envisaged. The Secretary of State may provide by regulations that any reference to inland waters may be construed as including a reference to prescribed coastal waters {s.109(6), formerly s.49(3) Control of Pollution Act 1974}. Exceptions to the offence relating to deposits in rivers are provided for in that the offence is not to apply to anything done in the exercise of any power conferred by or under any enactment relating to land drainage, flood prevention or navigation {s.109(4), previously s.49(2) Control of Pollution Act 1974}. As under the 1974 Act, the maximum penalty for the offences relating to deposits and vegetation in rivers is, on summary conviction, a fine not exceeding level four on the standard scale, presently £1,000 {s.109(3), formerly s.49(1) Control of Pollution Act 1974}.

3.09 Requirements to take Precautions against Pollution {s.110}

Provision existed under the Control of Pollution Act 1974 for regulations to be made as to the precautions to be taken by any person having the custody or control of any poisonous, noxious or polluting matter for the purpose of preventing the matter from entering waters {s.31(4) Control of Pollution Act 1974, repealed}. No use was ever made of this power by the Secretary of State, however, and precautionary regulations were never introduced. A corresponding power to make regulations is incorporated into the 1989 Act, but the indications are that regulations *are* to be made under this provision. It has been suggested that the sorts of restriction which might be introduced might apply to the location, construction and storage facilities of potentially polluting substances. More particularly, an initial suggestion was that "this might include provision for adequate bunding, or an impermeable base, for such substances as fuel, oil, liquid and solid chemicals and biocides" {*The Water Environment: The Next Steps*, DoE consultation paper (1986) para.5.7}. Later indications are that precautionary restrictions will extend to agricultural contexts including the construction of new or extended silage or slurry facilities as well as industrial storage facilities {*Observations by the Government on the Third Report of the (Environment) Committee* (1988) para.3.11 }.

Precautionary Regulations

The enhanced provision for precautionary measures to prevent water pollution under the 1989 Act allows the Secretary of State to make regulations providing for preventative measures in relation to water pollution. Specifically, he is empowered to prohibit a person from having custody or control of any poisonous, noxious or polluting matter unless prescribed works and precautions and other steps have been taken for the purpose of preventing or controlling the entry of the matter into any controlled waters {s.110(1)(a)}. In addition, he may make regulations requiring a person who already has custody or control of, or makes use of, poisonous, noxious or polluting matter to carry out works and take precautions for the same purpose {s.110(1)(b)}.

Certain matters are explicitly provided for in relation to the power of the Secretary of State to make precautionary regulations. Regulations may confer power on the Authority to determine the circumstances in which a person is required to carry out works or take precautions or other steps, and to specify the works, precautions or other steps which are required to be undertaken {s.110(2)(a)}. Another matter which may be provided

for in precautionary regulations is a facility for appeals to the Secretary of State against notices served by the Authority in pursuance of its power to determine preventative measures {s.110(2)(b)}. The regulations may also provide that contravention of precautionary requirements is to be an offence the maximum penalty for which is not to exceed the penalties provided for in relation to the offences of polluting controlled waters described above {s.110(2)(c)}.

3.10 Water Protection Zones {s.111 and Sch.7}

Provision existed under the Control of Pollution Act 1974 for the Secretary of State to make regulations designating an area in which activities likely to result in the pollution of waters could be prohibited or restricted with a view to preventing poisonous, noxious or polluting matter from entering waters {s.31(5) Control of Pollution Act 1974, repealed}. This power to regulate specified activities in designated areas for the purpose of water pollution prevention was recognised to be a useful one, particularly for the protection of sensitive water resources such as underground water used for abstraction (*The Water Environment: The Next Steps*, DoE consultation paper (1986) para.5.7). The power has been preserved under the 1989 Act with modifications to allow for the involvement of the Authority in the operation of water protection zones.

The Designating Minister

Under the Act the designation of a water protection zone is made by the Secretary of State in consultation with the Minister in the case of an area wholly or partly in England. Designation is provided for where it is appropriate, with a view to preventing or controlling the entry of any poisonous, noxious or polluting matter into controlled waters, to prohibit or restrict the carrying on of activities which are likely to result in the pollution of those waters. In those circumstances the effect of designation is to enable the prohibition or restriction in the designated area of activities specified or described in the order {s.111(1)}.

Provisions Under a Designation Order

Without prejudice to the generality of the Secretary of State's power to designate water protection zones, a number of particular matters may be provided for in an order designating a zone. Specifically, a designation order may confer power on the Authority to determine the circumstances in which an activity is prohibited or restricted and to determine the activities to which a

prohibition applies {s.111(2)(a)}. Notably, this contrasts with previous provisions which left the Secretary of State to determine what activities were to be prohibited {s.31(5)(b) Control of Pollution Act 1974, repealed}. Alternatively, an order may apply a prohibition or restriction in respect of any activities which are carried on without the consent of the Authority or in contravention of any conditions subject to which consent is given {s.111(2)(c)}. An order may also provide that contravention of a prohibition or restriction or of a condition of a consent, is to be an offence the maximum penalty for which is not to exceed those provided for in relation to the offences of polluting controlled waters, described above {s.111(2)(c)}.

Determinations by the Authority

Anything falling to be determined by the Authority under a water protection zone designation order may be determined in accordance with a procedure and by reference to matters and the opinion of persons specified in the order {s.111(2)(d)}. This is subject, however, to the power of the the Secretary of State to make separate provision by regulations with respect to applications, conditions, and revocation or variation of consents, and appeals against the determination of any application. Provision may also be made for the exercise by the Secretary of State of any power conferred on the Authority along with administrative matters including the imposition of charges for applications and consents, and the power to require registration of an application or consent {s.111(4)}.

Publicity, Objections and Confirmation

The detailed procedural matters relating to orders designating water protection zones are set out in Schedule 7 to the Act {effective under s.111(3)}. Some differences in procedure are to be discerned in that previously it was envisaged that designation of water protection areas would be made by the Secretary of State {s.31(5) Control of Pollution Act 1974, repealed}. Under Schedule 7 it is apparent that initial application for a water protection zone may be made by the Authority, amongst others. Accordingly the Schedule provides that where the Authority applies for an order designating a water protection zone a copy of the order is to be submitted to the Secretary of State and published in the locality of the proposed zone and in the *London Gazette* {Sch.7 para.2(1)}. Publication in newspapers in the locality is to state the general effect of the order, a place where the draft may be inspected, and

that any person may object to within a twenty-eight-day period {Sch.11 para.2(2)}. The Authority is obliged, at the request of any person, and on payment of a reasonable charge, to furnish a copy of the draft submitted to the Secretary of State {Sch.7 para.3}. The Secretary of State may make an order on the same terms as the draft order, or in those terms modified as he may think fit, or he may refuse to make an order {Sch.7 para.4(1)}. The Secretary of State may hold a public inquiry before making an order designating a water protection zone {Sch.7 para.5}.

3.11 Nitrate Sensitive Areas {s.112 and Sch.11}

In theory it may have been possible to have used the legal device of the water protection zone as a means of tackling the serious problem of nitrate contamination of drinking water supplies as a consequence of application of nitrate fertilisers to land {under s.31(5) Control of Pollution Act 1974, repealed}. Nonetheless the problem of nitrate pollution is such a distinctive and formidable one {see DoE *Nitrate in Water* (1986); and DoE *The Nitrate Issue* (1988)} that it has been provided for under a separate provisions of the 1989 Act. For this reason it is explicitly provided that the kinds of entry of poisonous, noxious or polluting matter into controlled waters which may justify the designation of a water protection zone do not include the entry of nitrate into waters as a result of the use of any land for agricultural purposes {s.111(5)}. Nitrate pollution is separately provided for by a facility for the designation of nitrate sensitive areas.

Designation of Areas

A nitrate sensitive area may be designated, in order to prevent or control the entry of nitrate into controlled waters as a result of, or of anything done in connection with, the use of any land for agricultural purposes. Designation for these purposes is brought about where it is considered appropriate to do so by the relevant Minister {s.112(1)}. "The relevant Minister" for the purposes of an order of this kind is the Secretary of State in relation to an area which is wholly in Wales {s.112(9)(a)}, and in relation to land which is wholly in England, or partly in England and partly in Wales, the expression means the Minister and the Secretary of State acting jointly {s.112(9)(b)}.

Compensation Agreements

Clearly the creation of a nitrate sensitive area may have far-reaching consequences upon persons making use of the

designated land for agricultural purposes. Consequently provision is made for compensatory agreements to be entered into between the relevant Minister and the owner of the freehold interest in the land, or any person having an interest in the land where the consent of the freeholder has been given. The substance of agreements of this kind is that, in consideration of payments to be made by the relevant Minister, the other party accepts obligations with respect to the management of the land imposed under the agreement {s.112(2)}. Beyond the original parties to an agreement, the effect of the agreement will be to bind all persons deriving title from the person originally entering into the agreement with the relevant Minister to the extent of the agreement {s.112(3)}.

Ministerial Orders

In addition to compensation agreements, the relevant Minister may make an order in respect of a designated area for the imposition of requirements, prohibitions or restrictions to prevent the entry of nitrate into controlled waters in relation to the carrying on, on agricultural land, of specified activities {s.112(4)(a)}. The order may provide for specified or determined amounts of compensation to be paid, if any, in respect of the obligations imposed under the order {s.112(4)(b)}.

Alongside the general power to impose restrictions and make payments under an order relating to a nitrate sensitive area more particular powers are specified in relation to orders of this kind. Hence the appropriate Minister may determine the circumstances in which the carrying on of any activity is required, prohibited or restricted and determine the kinds of activity concerned {s.112(5)(a)}. Similarly, the Minister may give consent for a requirement not to apply, or to apply only subject to conditions {s.112(5)(b)}, or to apply prohibitions or restrictions only where consent is not granted, or where the conditions imposed in a consent are not complied with {s.112(5)(c)}. Penalties may be imposed for contravention of restrictions, or breaches of consent conditions, subject to the maximum levels provided for in relation to the offences of polluting controlled waters, described above {s.112(5)(d)}.

Procedure for Designation

The detailed procedural provisions relating to the designation of nitrate sensitive areas are set out in Schedule 11 to the Act {effective under s.112(7)}. Schedule 11 provides for the relevant

Minister to make an order designating an area on application by the Authority. During an initial period of six months after the transfer date, however, no application by the Authority is required {Sch.11 para.1}. An application by the Authority for an order designating a nitrate sensitive area is not to be made unless pollution is likely to be caused by the entry of nitrate into controlled waters as a result of anything done in connection with the use of the land for agricultural purposes, and existing provisions are not sufficient to prevent or control the entry of nitrate into those waters {Sch.11 para.2(1)}. Before making the order, the relevant Minister is to publish a notice with respect to the order in local newspapers and in the *London Gazette*. The notice published in the local newspapers is to state the general effect of the proposed order, a place where the order can be inspected and that any person may object to the order within a period of forty-two days {Sch.11 para.3}. A copy of the order is to be furnished to any person on payment of a reasonable charge {Sch.11 para.4}. After expiry of the period for objections, the relevant Minister may make the order on the terms proposed, or in a modified form, or he may decide not to make any order {Sch.11 para.5(1)}. A public inquiry may be held before deciding whether to make the order or to make it with modifications {Sch.11 para.6}.

3.12 Consents and Application to the Authority {s.113}

In practical terms the most important exception to the offences under the 1989 Act concerning the pollution of controlled waters arises where a discharge consent is granted by the Authority {under s.108(1)(a)}. In relation to industrial discharges alone there are in the order of 30,000 consented discharges made in England and Wales {Third Report, House of Commons Environment Committee, *Pollution of Rivers and Estuaries* (1987) para.96}. Previously consents were granted under the 1974 Act {ss.34 to 39 Control of Pollution Act 1974, repealed}, which continue to serve as a defence to the offences under the 1989 Act {s.108(1)(a)}. The present measures concerning the grant of discharge consents are contained in Schedule 12 to the 1989 Act {effective under s.113(1)}. This is considered in the following sections of this work.

Regulations on Discharges by the Authority

The Secretary of State is empowered to make regulations modifying the provisions of the Act where discharge consents are required by the Authority {s.113(2)}. In particular he may

provide for discharge consents required by the Authority to be given, or deemed to be given, by the Secretary of State rather than the Authority itself {s.113(3)}.

The power of the Secretary of State to make Regulations has been exercised in the creation of the Control of Pollution (Discharges by the National Rivers Authority) Regulations 1989 {SI 1989 No.1157}. These Regulations set out the procedure in relation to applications for consents required by the Authority in respect of discharges of effluent or any other matter. The Regulations modify Schedule 12 to allow for consents to discharges by the Authority to be granted by the Secretary of State rather than the Authority.

Discharge Consents and Other Offences

A discharge consent also serves as an exception to water pollution offences arising under legislation other than the 1989 Act. Specifically, no offence will be committed under s.4 of the Salmon and Freshwater Fisheries Act 1975 or s.68 of the Public Health Act 1875 in respect of entry of matter into controlled waters where this is the subject of a discharge consent {s.113(4)}. Section 4 of the Salmon and Freshwater Fisheries Act 1975 provides for an offence of causing or knowingly permitting liquid or solid matter to enter waters containing fish so as to cause the waters to be poisonous or injurious to fish or the spawning grounds, spawn or food of fish. Section 68 of the Public Health Act 1875 provides for the offence of polluting water by matter produced by persons engaged in the manufacture of gas.

3.13 Discharge Consent Procedures {Sch.12}

Under the Control of Pollution Act 1974 the details of procedures relating to the granting of discharge consents, the conditions to which they may be subject and related matters were set out in the main body of the Act {under ss.34 to 40 Control of Pollution Act 1974, repealed}. Under the 1989 Act the corresponding provisions have been grouped together in a separate schedule, Schedule 12 {effective under s.113(1)}, along with new provisions providing a mechanism for charges to be imposed in relation to discharge consents.

Regulations on the Functions of the Secretary of State

It may be noted at this point that although applications for discharge consents are normally made to the Authority, various powers are given to the Secretary of State to direct applications

to be referred to him, to provide exemptions from publicity requirements and to hear appeals from determinations of the Authority. Ancillary provisions governing these matters are set out in the Control of Pollution (Consents for Discharges etc.) (Secretary of State Functions) Regulations 1989 (SI 1989 No.1151).

3.14 Applications for Certain Consents {Sch.12 para.1}

Following the provisions of the 1974 Act (ss.34 and 36 Control of Pollution Act 1974, repealed), Schedule 12 provides that applications for discharge consents are to be made to the Authority and are to be accompanied or supplemented by all reasonably required information {Sch.12 para.1(1)}. Where an application is made to the Authority it is to publish notice of the application in successive weeks in a newspaper circulating in the locality of the proposed discharge and in the localities of controlled waters likely to be affected by the discharge {Sch.12 para.1(3)(a)}. In addition a copy of the notice is to be published in the *London Gazette* no earlier than the later publication in the local newspapers {Sch.12 para.1(3)(b)}. The Authority is entitled to recover the expenses of publication from the applicant {Sch.12 para.1(6)}. A copy of the application is to be sent by the Authority to every local authority or water undertaker within whose area the proposed discharge is to occur {Sch.12 para.1(3)(c)}. In the case of an application which relates to a discharge into coastal waters outside the seaward limits of relevant territorial waters, a copy is to be served on the Secretary of State and the Minister {Sch.12 para.1(3)(d)}. It is the duty of the Authority to consider any written representations or objections which are made during a period of six weeks beginning on the date of publication of the notice in the *London Gazette* and not withdrawn {Sch.12 para.1(5)}.

Discharges having "No Appreciable Effect"

The provisions relating to publicity and notification which are imposed upon the Authority on receipt of an application for discharge consent may be disregarded where the Authority proposes to give the consent applied for and considers that the discharge will have "no appreciable effect" on the waters into which it is to be made {Sch.12 para.1(4)}. The meaning of the phrase "no appreciable effect", as it arose under the corresponding provision of the 1974 Act (s.36(4) Control of Pollution Act 1974, repealed), was considered in a Department of the Environment Circular where it was suggested that the exemption from publicity on this ground would be available where three criteria are met: first, the

discharge should not affect an area of amenity or environmental significance (a beach, marine nature reserve, shell fishery, fish spawning area, or site of special scientific interest); second, the discharge should not result in a major change in the flow of receiving waters; and, third, taken together with previously consented discharges, the discharge should not result in such a change to water quality as to damage existing or future uses of the waters (whether or not resulting in a change of water quality classification), or alter by 10% or more the concentration in the receiving waters of any substance which is of importance for the quality of the water and the well being of its flora and fauna, e.g. dissolved oxygen, biochemical oxygen demand, suspended solids, ammonia, nitrates, phosphates and dissolved metals (DoE, Departmental Circular No.17/84, *Water and the Environment* (1984) Annex 3 para.3). It is likely that the same factors will continue to be of importance in allowing exemptions of applications from publicity on grounds of "no appreciable effect" under the 1989 Act.

Exemption from Publicity

A person proposing to make an application for discharge consent, or who has made an application, may apply to the Secretary of State for a certificate that the provisions relating to publicity and notification are not to apply in relation to the application. A certificate of this kind may also exclude provisions of the Act requiring information relating to the consent given, samples of effluent taken or information taken from those samples, to be included in public registers kept by the Authority (Sch.12 para.1(7)(a); registers are kept under s.117). Exemption of a discharge application from publicity and the other matters will only be granted where the Secretary of State is satisfied that it would be contrary to the public interest, or would prejudice some private interest to an unreasonable degree by disclosing information about a trade secret (Sch.12 para.1(7)).

3.15 Consents on Applications to the Authority (Sch.12 para.2)

Where an application is made to the Authority for a discharge consent in accordance with the previous provisions the Authority is under a duty to consider whether to give the consent applied for, either unconditionally or subject to conditions, or to refuse it (Sch.12 para.2(1)). A consent will be deemed to have been refused if it is not given within the period of four months beginning with the day on which the application is received or within a longer period agreed in writing between the Authority and the applicant

{Sch.12 para.2(2)}. This represents a lengthening of the period after which a consent will be deemed to have been refused which was previously a period of three months {under s.34(2) Control of Pollution Act 1974, repealed}.

Conditions in Discharge Consents

The conditions subject to which a consent may be given are stated to be "such conditions as the Authority may think fit" and, in particular, it is explicitly stated that conditions may be included as to the following matters. Conditions may be included, first, as to the places at which the discharges may be made and as to the design and construction of any outlets {Sch.12 para.2(3)(a)}; second, as to the nature, origin, composition, temperature, volume and rate of the discharges and as to the periods during which the discharges may be made {Sch.12 para.2(3)(b)}; third, as to the steps to be taken, in relation to the discharges or by way of subjecting any substances to treatment or any other process, for minimising the polluting effects of the discharges on any controlled waters {Sch.12 para.2(3)(c)}; fourth, as to the provision of facilities for taking samples of the matter discharged and as to the provision, maintenance and use of manholes, inspection chambers, observation wells and boreholes in connection with the discharges {Sch.12 para.2(3)(d)}; fifth, as to the provision, maintenance and testing of meters for measuring or recording the volume and rate of the discharges and apparatus for determining the nature, composition and temperature of the discharges {Sch.12 para.2(3)(e)}; sixth, as to the keeping of records of the nature, origin, composition, temperature, volume and rate of the discharges and records of readings of meters and other recording apparatus provided in accordance with the consent {Sch.12 para.2(3)(f)}; and, finally, as to the making of returns and the giving of other information to the Authority about the nature, origin, composition, temperature, volume and rate of the discharges {Sch.12 para.2(3)(g)}. A consent may be given subject to different conditions in respect of different periods {Sch.12 para.2(3)}, and is not limited to discharges by a particular person and, accordingly, extends to discharges which are made by any person {Sch.12 para.2(4)}.

3.16 Notification of Proposal to give Consent {Sch.12 para.3}

Specific provisions apply where the Authority proposes to give a consent in relation to which representations or objections have been made {Sch.12 para.3(1)}. In that case it is the duty of the

Authority to serve notice of the proposal to grant consent on every person who made a representation or objection {Sch.12 para.3(2)}. These notices are to inform persons who have made representations or objections that they may, within a twenty-one-day period, request the Secretary of State to give a direction that the application is to be transmitted to him for determination {Sch.12 para.3(3)}. The Authority is not to give its consent within the twenty-one-day period. If a request is made to the Secretary of State within the period, and notice of the request is served upon the Authority by the person making it, the Authority is not to give its consent unless the Secretary of State has served a notice on the Authority stating that he declines to comply with the request {Sch.12 para.3(4)}.

3.17 Reference to the Secretary of State of certain Applications for Consent {Sch.12 para.4}

Following previous provisions {s.35 Control of Pollution Act 1974, repealed}, provision is made for certain applications to be referred to the Secretary of State. Hence, either in consequence of representations or objections made to him or otherwise, the Secretary of State may direct the Authority to transmit to him for determination specified kinds of applications for discharge consent {Sch.12 para.4(1)}. Where a direction is given to the Authority referring an application for consent to the Secretary of State, the Authority is bound to comply with the direction and inform the applicant of the transmission of the application to the Secretary of State {Sch.12 para.4(2)}. In the event of an application being transmitted to the Secretary of State for determination the general provisions relating to publicity and notification in relation to applications {under Sch.12 para.1(3) to (6)} will have effect subject to prescribed modifications {Sch.12 para.4(3)}.

Local Inquiries

Where an application is transmitted to the Secretary of State for determination he may cause a local inquiry to be held with respect to the application or afford the applicant and the Authority an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for that purpose {Sch.12 para.4(4)}. This power is to be exercised by the Secretary of State in any case where a request to be heard is made in the prescribed manner by the applicant or the Authority {Sch.12 para.4(5)}. In that case an opportunity of being heard is to be afforded to any person who has made representations or

objections to the Secretary of State with respect to the application {Sch.12 para.4(6)}. It is then for the Secretary of State to determine the application by directing the Authority to refuse its consent or to grant consent either unconditionally or subject to conditions. The Authority is then bound to comply with any direction given by the Secretary of State {Sch.12 para.4(7)}.

3.18 Consents without Applications {Sch.12 para.5}

Again following the 1974 Act {s.34(3) Control of Pollution Act 1974, repealed}, the 1989 Act makes provision for discharge consents to be granted without the need for an application to be made. Consents without application may be granted if a person has caused or permitted effluent or other matter to be discharged in contravention of any relevant prohibition prohibiting the discharge {under s.107}, or in contravention of obligations in relation to the discharge of trade or sewage effluent into controlled waters or from land into the sea outside the seaward limits of controlled waters {under s.107(1)(c)}. Where contraventions of these kinds arise, and a similar contravention is likely, the Authority may serve on the discharger an instrument in writing giving its consent, subject to any specified conditions, ~~for the discharge~~ {Sch.12 para.5(1)}. ~~In a case of this kind, however, a consent granted without application is not to relate to any discharge which occurred before the consent was served {Sch.12 para.5(2)}. The conditions to which a consent may be subject, {under Sch.12 para.2(3), discussed previously}, are to have effect in relation to a consent granted without application in the same way as for consent granted after an application has been made {Sch.12 para.5(3)}. Analogous provisions also apply in relation to publicity, so that the fact of the consent having been granted is to be published in local newspapers and the *London Gazette*, and notification of the consent is to be sent to local authorities and, where relevant, the Secretary of State and the Minister, as would an application for consent {Sch.12 para.5(4), contrast publicity of applications under para.1(3)}.~~

3.19 Revocation of Consents and Alteration and Imposition of Conditions {Sch.12 para.6}

The Authority is placed under a duty, analogous to the former duty of water authorities {s.37 Control of Pollution Act 1974, repealed}, to review the consents which are granted as a result of applications {under Sch.12 para.2} and consents granted without applications {under Sch.12 para.5} and the conditions to which they are subject

{Sch.12 para.6(1)}. Subject to certain restrictions upon the power of the Authority to review consents it may, as a result of review, revoke a consent, or modify the conditions of a consent or make an unconditional consent subject to conditions {Sch.12 para.6(2)}. If on review it appears that no discharge has been made in pursuance of a consent during the preceding twelve months the Authority may revoke the consent by a notice served on the owner or occupier of the land from which the discharge would be made in pursuance of the consent {Sch.12 para.6(3)}.

Directions from the Secretary of State

The Secretary of State is empowered to direct the Authority to serve a notice revoking the consent or modifying the conditions of the consent, or imposing conditions in the case of an unconditional consent, if it appears appropriate to do so for certain purposes. The purposes are those of enabling the Government to give effect to any Community obligation or international agreement to which the United Kingdom is a party; for the protection of public health or of flora and fauna dependent on an aquatic environment; or in consequence of any representations or objections made to the Secretary of State or otherwise {Sch.12 para.6(3)}.

Compensation

In certain circumstances the Authority will be liable to pay compensation in respect of any loss or damage sustained as a result of the Authority's compliance with a direction given by the Secretary of State in relation to the protection of public health or of flora and fauna dependent on an aquatic environment. The liability to pay compensation arises where the Authority, in complying with the direction, does anything which, apart from the direction, would be precluded under restrictions upon powers of variation and revocation of consents {under Sch.12 para.7(1)}. In addition, the Authority is liable to pay compensation where it is unable to show that a direction was given in consequence of a change of circumstances which could not reasonably have been foreseen at the beginning of the period to which the restriction relates. Alternatively the liability to pay compensation will arise where the Authority is unable to show the direction to have been given after consideration by the Secretary of State of material information which was not reasonably available to the Authority at the beginning of the period {Sch.12 para.6(5)}. For the purposes of the Authority's

liability to pay compensation, information is material in relation to a consent if it relates to any discharge made or to be made by virtue of the consent, to the interaction of any such discharge with any other discharge, or to the combined effect of the matter discharged and any other matter {Sch.12 para.6(6)}.

3.20 Restriction on Variation and Revocation of Consent and Previous Variation {Sch.12 para.7}

Following previous provisions {s.38 Control of Pollution Act 1974, repealed}, where consent is given by the Authority for a discharge, either on application or without application, the instrument signifying the consent of the Authority is to specify a period during which no notice of revocation or modification {under Sch.12 para.6(2) or 6(4)(c)} will be served in respect of the consent {Sch.12 para.7(1)}. Notices modifying a consent are also to specify a period during which a subsequent notice altering the terms of the consent is not to be served {Sch.12 para.7(2)}. The period during which revocation or variation of a consent is precluded, without the consent of the person making the discharge, is stated to be not less than a two-year period beginning with the day on which a consent takes effect or the day on which the notice specifying the period is served {Sch.12 para.7(3)}.

The restrictions upon variation and revocation of consent by the Authority do not prevent the Authority serving a notice revoking or modifying a consent which has been given without application {under Sch.12 para.5} in certain circumstances. Variation or revocation of a consent which has been granted without application is permitted if the notice is served in consequence of any representations or objections made to the consent {under Sch.12 para.5(5)}, and not more than three months after the beginning of the period during which representations and objections may be made concerning the consent {Sch.12 para.7(4)}.

3.21 Appeals {Sch.12 para.8}

Provision is retained for an appeal to the Secretary of State {previously s.39 Control of Pollution Act 1974} where the Authority has made certain kinds of adverse determination in relation to discharge consents other than in pursuance of a direction of the Secretary of State. These are, where the Authority has refused a consent application; given a consent subject to conditions; revoked or modified a consent or made an unconditional consent subject to conditions; specified a period during which variation or revocation of a consent is not to take place; refused a consent

for any deposit of solid refuse of a mine or quarry {under s.108(5)}; or refused a consent {under s.109} in relation to deposits and vegetation in rivers {Sch.12 para.8(1)}. In any of these cases the person applying for the consent, or whose conduct would be authorised by the consent, may appeal against the decision of the Authority to the Secretary of State {Sch.12 para.8(2)}.

On appeal the Secretary of State may give the direction requiring the Authority to give consent, either unconditionally or conditionally, to modify the conditions of a consent or to make an unconditional consent conditional, or to modify the period during which variation or revocation of a consent is not to take place. In the event of the Secretary of State giving a direction that the determination of the Authority should be modified or reversed, the Authority is bound to comply with the direction {Sch.12 para.8(4)}.

3.22 Charges in respect of Applications and Consents {Sch.12 para.9}

In line with European Community environmental policy, the Government is committed to the *Polluter Pays* principle, whereby those whose activities make protective or remedial environmental measures necessary should bear the resulting costs. The implementation of this principle is presented as a fair approach which gives actual or potential polluters the incentive to find ways to minimise the harm or damage they cause and to promote responsible practice {DoE consultation paper *The Water Environment: The Next Steps* (1986) para.6.1}. Within the sphere of water pollution the implementation of the principle is to be achieved by the introduction of charging, wherever practicable, in relation to the main areas of pollution control.

Previous Powers to Impose Charges

In the past a legal means existed for the imposition of charges by the Authority upon persons causing pollution of controlled waters. Under the Water Act 1973 there were provisions for water authorities to devise charging schemes for services performed, facilities provided and rights made available (ss.30 and 31 Water Act 1973, as amended by s.2(1) Water Charges Act 1976, repealed). Under the Control of Pollution Act 1974 direct provisions was made for the imposition of charges in respect of discharges of trade or sewage effluent (s.52 Control of Pollution Act 1974, repealed). This measure was never implemented, however, and no charging schemes were ever introduced in relation to discharges of effluent into water-

courses, though analogous charges are imposed in relation to discharges into sewers. The new power under the 1989 Act providing for the imposition of charges in relation to direct discharges provides for a range of distinct charges to be imposed in relation to discharge consents.

Charges in Relation to Consents

Where an application is made to the Authority for a consent {under ss.108(1)(a), 5(a) or 109}, or the Authority gives a consent {under ss.108(1)(a), 5(a) or 109 or Sch.12 para.5}, or a consent is for the time being in force, the Authority may require the payment to it of such charges as may be specified in, or determined under, a charging scheme {Sch.12 para.9(1)}. Charges are liable to be paid by the person making the application, or the person authorised to do anything by virtue of the consent and on whom the consent is served, or in the case of consents presently in force, the person who makes a discharge in pursuance of the consent {Sch.12 para.9(2)}.

Procedure for Making Charging Schemes

~~The Authority is not to make a scheme for charging for applications and consents unless its provisions have been approved by the Secretary of State and the consent of the Treasury has been given for approval {Sch.12 para.9(3)}. Before submission to the Secretary of State for approval the Authority is to publish a proposed charging scheme, in a manner appropriate to bring it to the attention of persons likely to be affected, specifying a period within which representations or objections may be made to the Secretary of State {Sch.12 para.9(4)}. It is then the duty of the Secretary of State, in determining whether or not to approve the scheme or to approve it subject to modifications, to consider any representations or objections made to him and not withdrawn and to have regard to specified matters {Sch.12 para.9(4)}. The matters to which he is to have regard are the desirability of ensuring that the amount recovered by the Authority by way of charges under the scheme does not exceed an amount reasonably attributable to the expenses incurred by the Authority in carrying out its functions in relation to consents and discharges into controlled waters {Sch.12 para.9(6)(a)}. In addition he is to have regard to the need to ensure that no undue preference is shown, and that there is no undue discrimination, in the fixing of charges by or under the scheme {Sch.12 para.9(6)(b)}. It is for the Authority to take appropriate steps to bring a scheme~~

which is in force to the attention of persons likely to be affected by it {Sch.12 para.9(8)}.

3.23 Byelaws for Preventing Pollution of Controlled Waters {s.114}

Two previous powers of water authorities to create byelaws to prevent pollution arising under the Control of Pollution Act 1974 are retained by the Authority under the 1989 Act. These are the power to make byelaws to prohibit or regulate the washing or cleaning of specified things in certain waters (formerly, s.31(6) Control of Pollution Act 1974), and to prohibit and regulate the keeping of vessels provided with sanitary appliances on certain waters (previously, s.33(1) Control of Pollution Act 1974). Although provided for under the 1974 Act, the latter power was one of a number of provisions concerned with the regulation of pollution originating from vessels which were never implemented (ss.33, 47 and 48 Control of Pollution Act 1974, repealed). With the retention of a byelaw-creating power concerning sanitary appliances on vessels, these provisions have been repealed.

Provision is made for the continuation of byelaws concerned with the keeping on streams and other waters of vessels provided with sanitary appliances made under earlier legislation (s.5(1)(c) Rivers (Prevention of Pollution) Act 1951). Accordingly the Rivers (Prevention of Pollution) (Continuation of Byelaws) Order 1989 (SI 1989 No.1378) provides that certain local byelaws on this matter are to continue in operation from the transfer date as if made by the Authority under s.114.

Under the 1989 Act the Authority is empowered to make byelaws to prohibit or regulate the washing or cleaning in any controlled waters of things of a description specified in the byelaws (s.114(1)(a)). In addition byelaws may be made to prohibit or regulate the keeping or use on any controlled waters of vessels of a specified description which are provided with water closets or other prescribed sanitary appliances which permit polluting matter to pass into the water where the vessel is situated (s.114(1)(b) and (3)). In either case a person who contravenes a byelaw is guilty of an offence and liable, on summary conviction, to a fine not exceeding level four on the standard scale, presently £1,000, or a smaller sum specified in the byelaw (s.114(2)).

3.24 Anti-pollution Works and Operations {s.115}

Although there existed under the Control of Pollution Act 1974 certain powers of water authorities to remedy pollution by

variation of discharge consents to protect flora and fauna {s.46(1) to (3) Control of Pollution Act 1974, repealed}, these provisions were never implemented. Other provisions which allow the Authority to take direct preventative and remedial action in relation to pollution have been re-enacted into the 1989 Act with slight modification {formerly, s.46(4) to (7) Control of Pollution Act 1974}. Notably the 1974 Act permitted water authorities to conduct "operations" to prevent and remedy pollution, whilst the 1989 Act has employed the phrase "works or operations" in the same contexts suggesting some extension of the activities which may be undertaken by the Authority in this respect.

Works and Operations

The present position is that where it appears to the Authority that any poisonous, noxious or polluting matter or any solid waste matter is likely to enter, or to be or to have been present in, any controlled waters, the Authority is entitled to carry out certain works and operations {s.115(1)}. In a case where the matter appears likely to enter any controlled waters, works and operations may be carried out for the purpose of preventing it from doing so {s.115(1)(a)}. In a case where the matter appears to be, or to have been, present in any controlled waters, works and operations may be conducted for the purpose of removing or disposing of the matter, or remedying or mitigating any pollution caused by its presence in the waters. In so far as reasonably practicable to do so the Authority may also carry out works or operations for the purpose of restoring the waters, including flora and fauna dependent on the aquatic environment, to their state immediately before the matter became present in the waters {s.115(1)(b)}. In no case, however, will the Authority be entitled to impede or prevent the making of any discharge in pursuance of a discharge consent {s.115(2)}.

Recovery of Expenses

Where works or operations of the kinds provided for are carried out by the Authority it is entitled to recover the expenses reasonably incurred in doing so from any person who caused or knowingly permitted the matter in question to be present at the place from which it was likely to enter the controlled waters, or caused or knowingly permitted the matter to be present in the waters {s.115(3)}. By way of exception to this general power to recover expenses, the Authority is not able to recover in respect of waters from an abandoned mine which are permitted to be

present at a place from which they are likely to enter controlled waters, or where they enter controlled waters {s.115(4)}.

3.25 Codes of Good Agricultural Practice {s.116}

Amongst the most forcefully criticised provisions under the Control of Pollution Act 1974 was the defence to the offence of causing pollution of water which was available where it was shown that the entry of polluting matter was in accordance with "good agricultural practice" {formerly, s.31(2)(c) Control of Pollution Act 1974}. As the objection was put by the House of Commons Environment Committee, "We cannot think of circumstances where pollution of a stream or a river by a farmer could be justifiably excused on the grounds that it accorded with 'good agricultural practice'. The two are mutually exclusive." {House of Commons Environment Committee, Third Report, *Pollution of Rivers and Estuaries* (1987) para.64} Although it was observed that the good agricultural practice defence was rarely pleaded in practice, the Government accepted that a special defence for farmers was not justified and consequently the defence has been repealed under the 1989 Act {see, *Observations of the Government on the Third Report of the (Environment) Committee* (1988) para.3.6}.

Promotion of Desirable Practices

Despite the removal of the good agricultural practice defence to water pollution, codes of good agricultural practice are to be retained under the 1989 Act, albeit with a different legal status. The Secretary of State and the Minister, acting jointly, are empowered to make a statutory instrument approving any code of practice for the purpose of giving practical guidance to persons engaged in agriculture with respect to activities that may affect controlled waters, and promoting what appear to them to be desirable practices for avoiding or minimising the pollution of controlled waters {s.116(1)}. The Secretary of State and the Minister are not to make an order creating a code of agricultural practice unless they have first consulted the Authority {s.116(3)}.

Contravention of a code of agricultural practice is not of itself to give rise to any criminal or civil liability, but the Authority is to take into account whether there has been, or is likely to be, any contravention of this kind in determining when and how it should exercise its powers. Specifically, a contravention of this kind is to be taken into account in relation to the exercise of the Authority's power to impose a "relevant prohibition" prohibiting certain kinds of discharge {under s.107(2)(a) or (b), discussed above}, or any

powers conferred on the Authority by regulations (under s.110, discussed above) requiring precautions to be taken against pollution {s.116(2)}.

3.26 Registers {s.117}

The degree of public access to information about the aquatic environment and specifically the records kept by water authorities was, in the past, a matter of some contention. Fortunately, however, it was accepted that the guiding principle formulated by the Royal Commission on Environmental Pollution should apply: "there should be a presumption in favour of unrestricted access for the public to information which the pollution control authorities obtain or receive by virtue of their statutory powers, with the provision for secrecy only in those circumstances where a genuine case for it can be substantiated." {Royal Commission on Environmental Pollution, Tenth Report, *Tackling Pollution—Experiences and Prospects* (1984) para.2.77 } As the Government conceded, "secrecy benefits nobody. It cannot be in industry's interests to hide information which does not need to be hidden. The public are bound to think the worst." {DoE, *Public Access to Environmental Information* (1986) para.1.5}

Information to be Kept on Registers

Under the 1974 Act the mechanism by which information about the state of the aquatic environment was made available lay in a duty of water authorities to maintain registers of information which were to be kept open for public inspection {s.41 Control of Pollution Act 1974, repealed}. Some changes in the information to be kept in registers has been made as a consequence of the 1989 Act. For example, previously records had to be kept of notices to abstain from certain agricultural practices {under s.51(3)(b) Control of Pollution Act 1974, repealed}, and this has become unnecessary as a result of the removal of the good agricultural practice defence {discussed above}. Also the introduction of the new powers of the Secretary of State to serve notices specifying the water quality objectives {under s.105(1)} has introduced a new category of information to be retained in the registers. Otherwise the new provisions follow the strategy provided for under the 1974 Act.

Under the 1989 Act it is the duty of the Authority to maintain, in accordance with regulations made by the Secretary of State, registers containing prescribed particulars of certain information relating to water quality and related matters. The Secretary of State has exercised his power to make regulations by creating

the Control of Pollution (Registers) Regulations 1989 (SI 1989 No.1160) prescribing the particulars to be contained in Authority registers.

Specifically the registers are to contain particulars of the following information: any notices concerning water quality objectives and related matters {under s.105, s.117(1)(a)}; applications for discharge consents {s.117(1)(b)}; discharge consents and the conditions to which they are subject {s.117(1)(c)}; certificates granted by the Secretary of State to certify that information relating to certain applications and related matters are not to be disclosed {under Sch.12 para.1(7), s.117(1)(d)}; particulars of samples of water or effluent taken by the Authority and information produced by analyses of those samples; information with respect to water samples, and analyses of those samples, taken by any other person and acquired by the Authority; and the steps taken in consequence of information about water samples {s.117(1)(e)}.

Availability of Registers

It is the duty of the Authority to secure that the contents of registers are available at all reasonable times for inspection by the public free of charge {s.117(2)(a)}. The Authority is also bound to afford members of the public reasonable facilities for obtaining from the Authority, on payment of reasonable charges, copies of entries in any of the registers {s.117(2)(b)}.

3.27 Information and Assistance {s.118}

A legal duty is placed upon the Authority to provide advice to the Secretary of State and the Minister. Accordingly, it is for the Authority, if and so far as it is requested to do so, to give advice and assistance where appropriate to facilitate the carrying out by the Secretary of State or the Minister of functions relating to water pollution under the Act {s.118(1)}.

Notices Requiring Information to be Provided

A broadly formulated provision in relation to the acquisition of information allows the Secretary of State, the Minister or the Authority to serve on any person a notice requiring that person to furnish the Secretary of State, the Minister or the Authority information which is reasonably required for the purpose of performing control of pollution functions under the Act. In circumstances of this kind the notice may require the information to be provided within a period or at times specified in the notice and in a specified form and manner {s.118(2)}. The breadth of the

duty to provide information may be limited, however, in that the Secretary of State or the Minister may make regulations restricting the information which may be required and determining the form in which the information is required (s.118(3)). A person who fails, without reasonable excuse, to comply with the requirements of a notice of this kind is guilty of an offence and liable on summary conviction to a fine not exceeding level five on the standard scale, presently £2,000 (s.118(4)).

3.28 Exchange of Information with respect to Pollution Incidents (s.119)

The Authority is placed under a duty to provide a water undertaker with any information in its possession which is reasonably requested by the undertaker for purposes connected with the carrying out of its functions. Information provided by the Authority in this way is to be furnished in a form and at times reasonably required by the undertaker (s.119(1)). The converse duty requires every water undertaker to provide the Authority with any information in its possession reasonably requested by the Authority for purposes connected with the carrying out of any of its functions. Information furnished to the Authority in this manner is to be provided in a form and in such a manner as it may reasonably require (s.119(2)). In either case, the information provided to a water undertaker or to the Authority is to be given free of charge (s.119(3)).

A limitation upon the provisions made for exchange of information between the parties mentioned concerns the nature of the information at issue. In this respect it is stipulated that the duties relating to exchange of information apply only in relation to information about the quality of any controlled waters or any other waters or about any incident in which any poisonous, noxious or polluting matter or any solid waste matter has entered any controlled waters or other waters (s.119(5)).

3.29 Local Inquiries (s.120)

Formerly provision was made for the Secretary of State to hold a local inquiry in connection with any of the provisions concerning water pollution or with a view to preventing or dealing with pollution (s.98(1) Control of Pollution Act 1974, repealed). Although differently worded, the new formulation of his powers in this respect is similarly extensive. Hence, the Secretary of State may cause a local inquiry to be held for the purposes of the establishment or review of any water quality objectives and other

matters concerned with the control of pollution {s.120(a)}, or with a view to preventing or dealing with pollution of any controlled waters {s.120(b)}, or in relation to any other matter relevant to the quality of controlled waters {s.120(c)}.

3.30 Offences Concerning the Control of Pollution {s.121}

Offences by Corporate Bodies

Two procedural matters are provided for in relation to criminal proceedings brought for water pollution offences in the same manner as under previous legislation {s.87(2) and (3) Control of Pollution Act 1974}. The first is the stipulation that, without prejudice to special provision made for offences committed by bodies corporate {unders.177}, where the commission of a water pollution offence by a person is due to the act or default of some other person, that other person may be charged and convicted of the offence whether or not proceedings for the offence are taken against the first-mentioned person {s.121(1)}. That is to say, for example, where one person causes the pollution of controlled waters as a consequence of an instruction given by another, it is possible to bring proceedings against the person giving the instruction without proceedings being instigated against the person actually causing the pollution.

Time Limit for Summary Proceedings

The second procedural stipulation is that a magistrates' court may try any summary offence concerning water pollution under the Act, or subordinate legislation, if the information is laid not more than twelve months after the commission of the offence {s.121(2)}. This power applies notwithstanding other general provisions concerning the time limit for summary proceedings to be brought {under s.127 Magistrates' Courts Act 1980}. It may be noted, however, that this provision will be of limited application since most of the offences provided for in relation to the control of pollution are hybrid offences to which the time limit for summary proceedings would not apply {see *R v Dacorum Magistrates' Court, ex parte Michael Gardiner Ltd.* (1985) 149 JP 677}.

3.31 Civil Liability and Savings {s.122}

. As under the previous legislation {s.105(2) Control of Pollution Act 1974}, nothing in the 1989 Act concerned with the control of pollution confers a right of action in any civil proceedings, other than proceedings for the recovery of a fine, in respect of any

contravention of the Act or subordinate legislation concerned with the control of pollution, unless expressly provided for within the control of pollution provisions of the Act {s.122(a)}. The exception to this general principle is that recovery will be allowed of expenses incurred by the Authority in relation to anti-pollution works and operations {under s.115}. Nothing in the Act concerned with the control of pollution derogates from any right of action or other remedy, whether civil or criminal, in proceedings instituted otherwise than under the provisions of the Act concerned with the control of pollution {s.122(b)}. In the same fashion nothing in the pollution control provisions of the Act affects any restriction imposed by or under any other enactment, whether public, local or private {s.122(c)}.

3.32 Application to Radioactive Substances {s.123}

The water pollution provisions of the 1974 Act applied subject to the requirement that they were not to apply to radioactive waste within the Radioactive Substances Act 1960 {ss.56(6) and 30(5) Control of Pollution Act 1974, repealed}. The same principle has been retained under the 1989 Act, and except as provided for by regulations made by the Secretary of State, nothing amongst the control of pollution provisions of the Act is to apply to radioactive waste within the meaning of the 1960 Act {s.123(1)}. As a counterpart to this, however, the Secretary of State is empowered to make regulations to provide for prescribed provisions to have effect with such modifications as he considers appropriate for dealing with radioactive waste {s.123(2)(a)}. In the same vein regulations may modify the 1960 Act, or any other Act in relation to radioactive waste, in consequence of the control of pollution provisions of the Water Act 1989 {s.123(2)(b)}.

Regulations on Radioactive Waste

The Secretary of State has exercised his power to make regulations in this respect by creating the Control of Pollution (Radioactive Waste) Regulations 1989 {SI 1989 No.1158}. These Regulations have the effect of bringing radioactive waste within the scope of the control of pollution provisions of the Act, but in such a manner that no account will be taken of the radioactive properties of the substance concerned. Consequently radioactive waste will remain subject to control under the Radioactive Substances Act. 1960.

CHAPTER 4

WATER RESOURCES

Part III Chapter II Water Act 1989

4.01 General Functions in relation to Water Resources {s.125}

The Water Resources Act 1963 is substantially amended by the Water Act 1989 but remains the principal enactment governing water resources. As originally enacted, the 1963 Act established river authorities and imposed upon them a general duty to take action for the purpose of conserving, redistributing and augmenting water resources, and of securing the proper use of water resources {s.4 Water Resources Act 1963, repealed}. The 1963 Act also made the abstraction of water an offence subject to exceptions allowing for abstractions to be made in accordance with a licence granted by the appropriate river authority {Part IV Water Resources Act 1963}. The Water Act 1973 established water authorities and transferred to them the functions previously performed by river authorities {s.9 Water Act 1973, repealed}. In particular, this required water authorities to take action under the Water Resources Act 1963 to conserve, redistribute and augment water resources and operate the system of licensing water abstraction provided for under the 1963 Act. The key organisational change brought about by the Water Act 1989 is that references to water authorities under the 1963 Act are to be construed as references to the National Rivers Authority {Sch.13 para.1(1)}, and consequently the Authority assumes responsibility for all duties in relation to water resources previously discharged by the water authorities subject to amendments brought about under the 1989 Act.

The Principal Water Resources Duty

The principal duty of the Authority in relation to water resources is to take such actions as are necessary or expedient in relation to water resources in accordance with directions of the Secretary of State. Specifically this duty is reaffirmed to entail conserving, redistributing or otherwise augmenting water resources, and securing the proper use of water resources in England and Wales {s.125(1)}. The general duty of the Authority in relation to water resources is subject to the qualification that it is not to be construed as relieving a water undertaker of the

obligation to develop water resources for the purpose of performing a duty of the undertaker with respect to water supply {s.125(2)}.

4.02 Water Resources Management Schemes {s.126}

Provision is made under the 1989 Act for the proper use and management of water resources by means of agreements entered into between the Authority and water undertakers, termed water resource management schemes. Hence it is the duty of the Authority, so far as reasonably practicable, to enter and maintain arrangements with water undertakers for securing the management or operation of water resource management schemes. Particular schemes of this kind involve the management of waters which are available to be used by water undertakers for the purposes of, or in connection with, the carrying out of their functions {s.126(1)(a)}. Similarly management schemes may involve the management of any reservoirs, apparatus or other works which belong to, are operated by or are otherwise under the control of water undertakers for the purposes of, or in connection with, the carrying out of their functions {s.126(1)(b)}. In either case appropriate arrangements are to be made for the purpose of the Authority carrying out its general functions in relation to water resources.

Water resource management schemes entered into between the Authority and water undertakers may include provision for the construction or installation of any reservoirs, apparatus or other works which will be used by the undertaker in the carrying out of its functions {s.126(2)(a)}. Management schemes may also contain provisions requiring payments to be made by the Authority to the undertakers {s.126(2)(b)}, and require reference to, and determination by, the Secretary of State or the Director General of Water Services of questions arising under these arrangements {s.126(2)(c)}.

The Authority is to send a copy of a water resource management scheme entered into under the above provisions to the Secretary of State. The obligations of a water undertaker by virtue of these arrangements are to be enforceable by the Secretary of State {s.126(3), and see s.20 on enforcement by the Secretary of State}.

4.03 Minimum Acceptable River Flows {s.127}

A central idea in the strategy for management of water resources under the Water Resources Act 1963 was that of

maintaining minimum acceptable flows for inland waters {original s.19 Water Resources Act 1963}. The original obligation was that river authorities, and later water authorities, were as soon as practicable to consider for which inland waters in their area minimum acceptable flows ought to be determined {original s.19(1)(a) Water Resources Act 1963, amended}. In practice, however, the water authorities encountered difficulties in applying the concept of minimum acceptable flow. As the Department of the Environment commented in a 1986 consultation paper, "Although the concept of formal minimum acceptable flow seems useful in principle, it is flawed in practice. Authorities claim that they do not have reliable long-term river flow data to determine flows accurately, and the question of what constitutes a minimum acceptable flow has never been satisfactorily resolved. the fact that resources have been managed satisfactorily for 23 years since the 1963 Act without formal determinations suggests that they are not essential for effective river management." {DoE, *Water and Sewerage Law* (1986) para.3.18 }

In recognition of the practical difficulties surrounding the concept of minimum acceptable flows, s.19 of the Water Resources Act, providing for them, has been substantially amended by the 1989 Act. The previous *obligation* to "consider" minimum acceptable flows has been replaced by a *power* that the Authority may, "if it thinks it appropriate to do so", submit a draft statement to the Secretary of State containing provision for determining the minimum acceptable flow for any inland water other than waters which do not constitute a source of supply for water resource purposes {under s.2(3) Water Resources Act 1963}. Alternatively, where any provision for determining minimum acceptable flow is for the time being in force in relation to a water, provision is made for amending or replacing that provision with a different provision for determining the minimum acceptable flow for that water {s.127(1) and (2) and s.19(1) Water Resources Act 1963, as amended}.

Direction by the Secretary of State

If the Authority is directed by the Secretary of State to consider whether a minimum acceptable flow for any particular inland water ought to be determined or reviewed, the Authority is to consider the matter as soon as reasonably practicable. After doing so the Authority is to submit to the Secretary of State either a draft statement in relation to the determination of the minimum acceptable flow or a draft statement that no minimum acceptable

flow ought to be determined for the water, or that an existing minimum acceptable flow does not need to be changed {s.127(2) and s.19(2) Water Resources Act 1963, as amended}. The provision contained in any statement for determining the minimum acceptable flow for any inland water is to set out the control points at which the flow in the water is to be measured and the method of measurement to be used at each control point. In addition the statement is to set out the flow which is to be the minimum acceptable flow at each control point, or points, for the different times or periods specified in the statement {s.127(2) and s.19(3) Water Resources Act 1963, as amended}.

Matters to be taken into Account

In relation to the determination of the minimum acceptable flow for any inland water the matters to be taken into account have been amended. The Authority is to have regard to the flow of water in the light of the general environmental duties of the Authority (under ss.8 and 9), to the character of the inland water and its surroundings, and to any water quality objectives established in relation to the water {under s.105} or any other inland water which may be affected {s.127(4) and s.19(5) Water Resources Act 1963, as amended}. In addition to these considerations a number of other matters remain as provided for under the 1963 Act. Accordingly the Authority is also to have regard to the need to safeguard public health and for meeting the requirements of existing lawful uses of the water, for agriculture, industry, water supply or other purposes, and the requirements of land drainage, navigation and fisheries. These matters are to be taken into account both in relation to the water for which a minimum acceptable flow is to be determined and other inland waters whose flow may be affected {s.19(5) Water Resources Act 1963, as amended}.

4.04 Modifications of the Water Resources Act 1963 {s.128 and Sch.13}

The transfer of responsibilities for water resources from water authorities to the Authority has necessitated a large number of amendments of the Water Resources Act 1963. Other than the amendments relating to minimum acceptable flows, discussed above, these modifications are provided for by Schedule 13 of the 1989 Act. Most fundamentally this stipulates that all references under the 1963 Act to water authorities are to be construed as a reference to the Authority {Sch.13 para.1(1)}. A number of other amendments change references to water authorities to water or

sewerage undertakers as appropriate to reflect the new organisation of the water industry. In addition the Schedule provides for a range of particular amendments, some of which are worthy of note.

Exceptions to Abstraction Licensing Requirements

Under the 1963 Act the abstraction of water from a source of supply is prohibited other than in pursuance of a licence issued by the Authority or under certain exceptions {s.23(1) Water Resources Act 1963}. The exceptions to this prohibition have been amended in a number of significant respects. For example, previously the licensing requirement did not apply to abstractions for domestic and agricultural purpose. This has been amended so that the domestic and agricultural exception will not apply to abstractions exceeding twenty cubic metres in any period of twenty-four hours {Sch.13 para.6(3)}. Notably, as a consequence of this agricultural water users, such as many fish farmers, will be brought within the licensing requirement from which they were previously exempt (*Observations by the Government on the Third Report of the (Environment) Committee* (1988) para.3.28). As a transitional measure, however, licences will be made available under the 1963 Act for abstractions made within a five-year period before the transfer date and requiring to be licensed by reason of the amendment. Applications for licenses within this provision must be made before the amendment comes into effect, one year after the transfer date {Sch.26 para.30(1) and Sch.13 para.6(5)}.

In relation to the imposition of charges for water abstraction {discussed below}, a new exemption is introduced in relation to the use of water for small-scale electricity generation. This is that no charges other than administrative expenses are to be levied by the Authority in respect of water authorised to be abstracted for use in the production of electricity, or any other form of power, by a generating station or apparatus of a capacity of not more than five megawatts {Sch.13 para.18(2) and s.60(5A) Water Resources Act 1963, as amended}.

Revocation of Licences for Non-payment of Charges

Also in relation to the imposition of charges for water abstraction, changes to the provisions governing revocation of an abstraction licence for non-payment of charges have been made. Previously it was possible for the operation of an abstraction licence to be suspended if unpaid abstraction charges were not paid within fourteen days of a written notice demanding

payment {original s.64(2) Water Resources Act 1963}. In place of this, new provisions allow for twenty-eight days to expire after the service of a notice of demand before the Authority may serve a notice revoking the abstraction licence {Sch.13 para.19 and s.64(1) Water Resources Act 1963, as amended}. However actual revocation of the abstraction licence is not to take effect until twenty-eight days after service of the notice of revocation, and if the charges are not paid within that time {Sch.13 para.19 and new s.64(3) Water Resources Act 1963, as amended}.

Redefinition of Terms

Amongst the definitions of terms used in the 1963 Act a number of changes are made to remove references to water authority areas. These include a redefinition of "abstraction" in relation to water contained in any source of supply, to mean the doing of anything whereby any of that water is removed from that source of supply, whether temporarily or permanently, including where it is so removed for the purpose of being transferred to another source of supply {Sch.13 para.31(1)(a) and s.135(1) Water Resources Act 1963, as amended}. "Inland water" is stated to mean any of the following, (a) any river, stream or other water course, whether natural or artificial and whether tidal or not; (b) any lake or pond, whether natural or artificial, or any reservoir or dock, in so far it does not fall within (a); and (c) so much of any channel, creek, bay, estuary or arm of the sea as does not fall within (a) or (b) {Sch.13 para.31(1)(b) and s.135(1) Water Resources Act 1963, as amended}.

4.05 Charges in respect of Functions under the 1963 Act {s.129}

In parallel with the charging systems for discharge consents {see Sch.12 para.9}, the Authority may also recoup certain administrative costs in relation to abstraction licences. Original provisions dealing with charges in respect of abstraction licensing in the Water Resources Act 1963 {Part V Water Resources Act 1963} were repealed under the Water Act 1973 {s.40(3) and Sch.9 Water Act 1973}. In their place were put general provisions for charging formulated under the 1973 Act. That is, that water authorities were empowered to charge for services performed, facilities provided and rights made available {s.30(1)(a) Water Act 1973, as amended by s.2(1) Water Charges Act 1976}.

Charging Schemes

The 1989 Act makes more specific provision for the imposition

of charges in relation to various duties of the Authority under the Water Resources Act 1963. Payment may be required by the Authority, in accordance with a scheme of charges, where an application is made for any licence to abstract water under the 1963 Act, or for the variation of any conditions of a licence, or where a licence is granted or there is a variation of a licence or the conditions of a licence, or where a licence is for the time being in force {s.129(1)}. Charges imposed in this manner are to be paid by the person making the application, or by the person to whom the licence is granted, or by the person holding the licence as appropriate. The amount payable in relation to current abstraction licences is to be in accordance with a charging scheme which may involve the imposition of a single charge or periodic charges, or a combination of single and periodic payments {s.129(2)}.

Publicity, Representations and Approval

After a two year period from the transfer date subsequent schemes for charges in respect of functions under the 1963 Act require the approval of the Secretary of State with the consent of the Treasury {s.129(3)}. Before submission of a scheme to the Secretary of State for approval, the Authority is to publish a notice setting out its proposals, in a manner which is appropriate for bringing it to the attention of persons likely to be affected, and specifying the period within which representations or objections may be made to the Secretary of State {s.129(4)}. It is then the duty of the Secretary of State to determine whether or not to approve the proposed scheme or to approve it subject to modifications. In doing this he is to consider any representations or objections made in relation to the proposed scheme and not withdrawn {s.129(5)(a)}. In addition he is to have regard to the desirability of ensuring that the amounts recovered by the Authority are appropriate to attribute to the expenses incurred by the Authority in carrying out its water resource functions {s.129(5)(b)}, and also to the need to ensure that no undue preference or discrimination is shown in the fixing of charges {s.129(5)(c)}.

Charging schemes in relation to water resource functions may make provision with respect to the times and methods of payment of charges, may make different provision for different cases, circumstances and localities, and may contain supplemental, consequential and transitional provisions {s.129(7)}. It is the duty of the Authority to take appropriate steps for bringing the provisions of a scheme to the attention of person likely to be affected {s.129(8)}.

Supplementary Provisions on Charging Schemes

Finally in relation to charging schemes for water abstraction licenses, it is provided that these schemes are to have effect subject to certain supplementary provisions in relation to charging under the Water Resources Act 1963 {s.129(9)}. The supplementary provisions referred to concern, first, the power of the Authority to exempt a person from charges, or reduce charges, having regard to, amongst other things, "material considerations" {s.60(1) and (2)(c) Water Resources Act 1963}. A second consideration is the provision of special charges which may be imposed in respect of spray irrigation {s.63 Water Resources Act 1963}. The third factor is the provision for enforcement of charges by revocation of an abstraction licence, discussed previously {s.64 Water Resources Act 1963, as replaced under Sch.13 para.19 Water Act 1989}.

4.06 Provision of Information about Water Flow {s.130}

The Authority is bound to keep registers containing information with respect to applications for the grant, revocation or variation of water abstraction licences and other prescribed information-{s.53 Water Resources Act 1963, as amended Sch.13 para.17(1)}. The contents of these registers are to be available for public inspection at a prescribed place {s.53(3) Water Resources Act 1963, as amended by Sch.13 para.17(3)}.

Provision of Information by the Authority

In addition to the provision of information to the public, it is also the duty of the Authority to provide water undertakers with specified information concerning the flow, level or volume of any inland water or any water contained in any underground strata, along with information about rainfall or any fall of snow, hail or sleet or about the evaporation of any water {s.130(1) and (7)}. This information is to be provided by the Authority when it is reasonably requested by a water undertaker for purposes connected with the carrying out of its functions {s.130(1)(a)}. In addition the Authority is to provide reasonable facilities to all persons for the inspection and copying of any records kept by the Authority {s.130(1)(b)}, though where information is provided to members of the public reasonable charges may be imposed {s.130(5)}. Similarly, the duty upon the Authority to provide information concerning water flow extends to information obtained by the Authority from water undertakers and other persons keeping records of water flow and related matters {s.130(4)}.

Provision of Information to the Authority

A reciprocal duty exists in relation to the provision of information to water undertakers in that undertakers are to provide the Authority with information reasonably requested for purposes connected with the carrying out of any of the Authority's functions and in a form and manner reasonably required {s.130(2)}. Where records of the flow, level or volume of any inland water constituting a source of supply for water resource purposes {under s.2(3) Water Resources Act 1963} are kept by a person other than a water undertaker, the Authority may inspect and take copies of the records at all reasonable times. Any person who, without reasonable excuse, refuses or fails to permit the Authority to exercise this right is guilty of an offence and liable on summary conviction to a fine not exceeding level one on the standard scale, presently £50 {s.130(3)}.

4.07 General Drought Orders {s.131 and Sch.14}

Drought orders were previously provided for under the Drought Act 1976 which conferred powers upon the Secretary of State and water authorities to meet deficiencies in the supply of water due to exceptional shortages of rain. The 1976 Act is repealed by the 1989 Act which contains corresponding provisions dealing with drought orders {ss.131 to 135}.

Orders by the Secretary of State

If the Secretary of State is satisfied that, by reason of an exceptional shortage of rain, a serious deficiency of supplies of water in any area exists or is threatened, he may make whatever provision is expedient with a view to meeting the deficiency {s.131(1)}. Normally the power to make an order of this kind, termed a "general drought order", may not be exercised unless an application is made to the Secretary of State either by the Authority or by a water undertaker which supplies water to premises in the area concerned {s.131(2)}. General drought orders may contain different provisions depending on whether they are made on application of the Authority or a water undertaker {contrast ss.131(3) and 131(4)}.

Where made on the application of the Authority, a general drought order may contain provisions including authorisation for the Authority to take water from any specified source {s.131(3)(a)}, or to discharge water to any specified place {s.131(3)(b)}, or to prohibit or limit the taking of water from a specified source where this would seriously affect the supplies available to the Authority,

a water undertaker or any other person {s.131(3)(c)}. In addition an order may make provision suspending or modifying any restriction or obligation of the Authority, any water or sewerage undertaker or any other person in respect of the taking, discharge, supply or treatment of water {s.131(3)(d)}. Finally, provision may be made for the Authority to suspend or vary any consent specified in the order for the discharge of any effluent by any person including a sewerage or water undertaker {s.131(3)(e)}.

Ordinarily a general drought order is to expire before the end of a period of six months beginning with the day on which the order comes into operation. The Secretary of State may, however, extend the period, but in any case the order must expire before the end of one year beginning with the date of the original order {s.131(9)}.

Publicity and Compensation

The detailed procedures relating to applications for a general drought order are set out in Schedule 14 of the Act (effective under ss.131 and 132). Schedule 14 provides that an applicant for a drought order is to serve notice of the application on a range of persons, and the application is to be publicised in local newspapers and the *London Gazette* {Sch.14 para.1(1)}. A period of seven days from the date of notification is allowed for objections to be raised to the application {Sch.14 para.1(3)}. If objections are made within this period the Secretary of State may cause a local inquiry to be held or afford the objector an opportunity of being heard by a person appointed by the Secretary of State {Sch.14 para.2(1)}.

Schedule 14 of the Act also provides for compensation to be made payable to certain persons who suffer loss as a consequence of a drought order. For example, where a drought order has been made, compensation in respect of the entry, occupation or use of land is to be paid by the applicant to certain persons. The persons to whom compensation is payable are the owners and occupiers of the land concerned and all other persons interested in the land or injuriously affected by the entry, occupation or use of the land {Sch.14 para.5}.

4.08 Emergency Drought Orders {s.132 and Sch.14}

"Emergency Drought Orders" are provided for in more extreme circumstances where the Secretary of State is satisfied that, by reason of an exceptional shortage of rain, a serious deficiency of supplies of water exists or is threatened in any area, and the deficiency is such as to be likely to impair the economic

or social well-being of persons in the area {s.132(1), previously see s.2 Drought Act 1976, repealed}. The power to make an emergency drought order is not to be exercisable except where an application is made by the Authority or a water undertaker supplying water to the area {s.132(2)}. An order of this kind may contain any of the provisions that could be included in a general drought order where application is made by the Authority {s.132(3)}, but where application is made by a water undertaker additional provision may be made prohibiting or limiting of use of water for specified purposes {s.132(4)(b)} and authorising the water undertaker to supply water by means of stand-pipes or water tanks {s.132(4)(c)}.

Ordinarily an emergency drought order is to expire before the end of a period of three months beginning with the day on which the order comes into operation. The Secretary of State may, however, extend the period, but in any case the order must expire before the end of five months beginning with the date of the original order {s.132(10)}.

As for general drought orders, the detailed procedures relating to applications for orders, publicity, objections to the Secretary of State and compensation is provided for in Schedule 14 to the Act. The general effect of this Schedule was considered in the previous section.

4.09 Provisions Supplemental to Drought Orders {s.133}

Amongst the supplemental provisions concerning drought orders {previously see s.3 Drought Act 1976, repealed} made on the application of a water undertaker, a qualification limits the power of the Authority to prohibit the taking of water from any source or to suspend or vary, or attach conditions to, any consent for the discharge of effluent. The qualification imposed is that the powers are to be exercised in a manner which will ensure, as far as reasonably practicable, that the supplies of water available to the water undertaker are not seriously affected {s.133(3)}.

Effect of Variation of a Sewerage Undertaker's Consent

Where the Authority exercises a power under a drought order to suspend or vary a consent for the discharge of effluent from a sewerage undertaker, the undertaker is empowered to modify consents or agreements from discharges which it receives from other persons. In particular, the sewerage undertaker is permitted to modify any consents relating to discharges by other persons of trade effluent so as to enable it to comply with the

drought order with respect to discharges from its sewers or works {s.133(4)}.

Execution of Works and Entry upon Land

A drought order may authorise the Authority or a water undertaker to execute any works required for the performance of any duty or the exercise of any power which is imposed or conferred by the order. In addition, an order may authorise the Authority, or the undertaker, in performing a duty or exercising a power under the order, to enter upon any specified land, and to occupy and use the land for the execution and maintenance of the works {s.133(5)(a)}. An order may also apply in relation to the execution of the works those provisions of the Act concerned with powers in relation to land and works (see Part IV, ss.151 to 167) which the Secretary of State considers appropriate {s.133(5)(b)}. The Secretary of State is to include in any drought order authorising the Authority or a water undertaker to enter any land provisions requiring the occupier of the land to be given not less than twenty-four hours' notice of any intended entry {s.133(6)}. In a provision which is without direct parallel in the previous legislation, it is provided that nothing in any drought order is to affect the right of the Authority, or a water or sewerage undertaker, in the event of an interruption or diminution of the supply of water, to recover any fixed or minimum charge which might have been recovered if there had been no interruption or diminution {s.133(8)}.

4.10 Offences against Drought Orders {s.134}

It is an offence for any person to take or use water in contravention of a drought order, or to discharge water otherwise than in accordance with any condition or restriction imposed under an order {s.134(1)}. For the purpose of this offence the "taking" of water is defined to encompass the collection, impounding, diversion or appropriation of water {s.135(2)}.

In addition to the offence of taking or using water in contravention of a drought order, it is an offence if any person fails to construct or maintain in good order a gauge, weir or other apparatus for measuring the flow of water, as required by a drought order, or fails to allow an authorised person to inspect that apparatus or records made for the purposes of the order {s.134(2)}. In either case, however, it is a defence to show that the person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence {s.134(3)}. The

penalty for the offences is, on summary conviction, a fine not exceeding the statutory maximum, presently £2,000, and on conviction on indictment, to a fine {s.134(4)}.

CHAPTER 5

FLOOD DEFENCE, FISHERIES AND NAVIGATION AUTHORITY FUNCTIONS

Part III Chapter III Water Act 1989

5.01 Flood Defence Functions of the Authority {s.136 and Sch.15}

The overall duty of the Authority in relation to flood defence is to exercise general supervision over all matters relating to flood defence and to carry out surveys of the areas in which it carries out this function {s.136(1), replacing s.1 Land Drainage Act 1976}. In general the legal power allowing for this function continues to be the Land Drainage Act 1976, though a large number of changes are made to the 1976 Act by Schedule 15 of the 1989 Act {effective under s.136(2)}. In particular, references to water authorities in the 1976 Act are to be replaced by reference to the Authority. Another terminological change is the systematic replacement of the expression "land drainage" by "flood defence" indicating a new emphasis in the function. As a consequence of this change of emphasis references to a regional land drainage committee are replaced by references to a regional flood defence committee; references to a local land drainage scheme are replaced by references to a local flood defence scheme; references to a local land drainage committee are replaced by references to a local flood defence committee; and references to a local land drainage district are replaced by references to a local flood defence district {Sch.15 para.1(1)}. Despite these terminological changes, however, the overall administrative structure of land drainage is retained under the new name of "flood defence" in that the duties of the new committees correspond directly with those that existed previously. Moreover it is made explicit that any function which was a function of a water authority immediately before the transfer date, by virtue of any scheme or order made under the 1976 Act, will become a function of the Authority on that date {Sch.15 para.1(3)}.

Regional Flood Defence Committees

The Authority is to arrange for all its functions under the Land Drainage Act 1976 relating to flood defence to be carried out by regional flood defence committees in their respective areas. Where particular cases involve the areas of more than one

regional flood defence committee, functions may be carried out by one committee, or jointly by the committees involved, as may be determined by the Authority {s.136(3)}. This is subject to the reservation that the Authority is not to make arrangements for the issuing of levies {under the Local Government Finance Act 1988}, or the making of drainage charges, by any other body or committee {under the Land Drainage Act 1976}. The Authority is not empowered to authorise any other body or committee to borrow money for purposes connected with the Authority's functions relating to flood defence {s.136(4)}. It is for the Authority to maintain a principal office for the area of each regional flood defence committee {s.136(6)}.

Directions to Regional Flood Defence Committees

Although the Authority's flood defence functions are carried out by regional flood defence committees, it may give these committees directions of a general or specific character. This power to give directions does not extend to any of the internal drainage functions of the Authority if the direction is likely to affect the Authority's management of water for purposes other than flood defence. Where a direction of this kind is given by the Authority the regional flood defence committee is to comply with the direction {s.136(5)}.

Extent of Flood Defence Functions

The functions of the Authority in relation to flood defence extend to the territorial sea adjacent to England and Wales so far as the area of a regional flood defence committee includes any area of the territorial sea, or where the 1976 Act {s.17(2) or (3) Land Drainage Act 1976} provides for the exercise of any power in the territorial sea in relation to works in the sea and in estuaries. Where a function is to be carried out beyond the seaward boundary of any regional flood defence committee, the place will be assumed to be within the area of the committee adjacent to the sea where the place is situated {s.136(7)}.

Where, before the transfer date, the functions of any water authority included, by virtue of any local statutory provision, any functions relating to flood defence those functions will become functions of the Authority. Subject to any amendments by the Secretary of State {under s.191}, local statutory provisions relating to the functions transferred will have effect as if references to a water authority are a reference to the Authority {s.136(8)}. It may be reiterated, however, that regional flood defence committees

retain responsibilities for all matters relating to flood defence {s.136(3)} as discussed above.

5.02 Establishment of Regional Flood Defence Committees {s.137 and Sch.16}

Regional flood defence committees will carry out the functions of regional land drainage committees, under the Land Drainage Act 1976, existing immediately before the transfer date {s.137(1), replacing s.2 Land Drainage Act 1976}. Each area which had a regional land drainage committee will have a regional flood defence committee subject to provisions for the alteration of boundaries and amalgamation of regional flood defence committees, provided for under Schedule 16 {effective under s.137(2)}. These areas correspond to the areas of water authorities for land drainage purposes before the transfer date {s.137(2)}.

Compensation

A regional flood defence committee is to consist of a chairman and a number of other members appointed by the appropriate Minister, two members appointed by the authority, and a number of other members appointed by or on behalf of the constituent councils. No member is to be a member of the Authority-{s.137(3)}.. For an initial period the chairman and certain members of the former regional land drainage committees may comprise the regional flood defence committee for an area {s.137(4)}.

5.03 Composition of Regional Flood Defence Committees {s.138}

The number of members of a regional flood defence committee is to be the same as the former regional land drainage committee under the Land Drainage Act 1976 subject to amalgamations of areas of flood defence committees {s.138(1), replacing s.3 Land Drainage Act 1976}. Thereafter the Authority may vary the total number of members of a regional flood defence committee between eleven and, except where a Ministerial order has been issued {under s.138(4)}, seventeen {s.138(2)}.

5.04 Local Flood Defence Schemes and Committees {s.139}

The provisions under the Land Drainage Act 1976 for local land drainage schemes and local land drainage committees are to continue in force subject to their being retitled local flood defence schemes and local flood defence committees. Accordingly a local flood defence scheme, may be made {under s.4 Land Drainage Act

1976} for the creation of one or more local flood defence districts in the area of a regional flood defence committee. A scheme of this kind may also provide for the constitution, membership, functions and procedure of a committee for each district, to be known as the local flood defence committee for that district {s.139(1)}. Existing local land drainage schemes (under s.4 Land Drainage Act 1976) in force before the transfer date are to have effect as if they are local flood defence schemes, and local land drainage districts and local land drainage committees are to be treated as if they are local flood defence districts and local flood defence committees {s.139(2)}.

5.05 Internal Drainage Districts and Boards {s.140}

For the purposes of land drainage, the internal drainage districts within the areas of the water authorities (under s.6 Land Drainage Act 1976) are to continue in existence as internal drainage districts within the areas of the regional flood defence committees. For each such district there is to continue to be a board, known as an internal drainage board {s.140}.

Part III Chapter IV Water Act 1989

5.06 Functions of the Authority in relation to Fisheries {s.141 and Sch.17}

It is the duty of the Authority to maintain, improve and develop salmon, trout, freshwater and eel fisheries {s.141(1)(a), replacing s.28(1) Salmon and Freshwater Fisheries Act 1975}. In addition the Authority is to establish and maintain advisory committees of persons who are not members of the Authority but who appear to be interested in fisheries in the different parts of the fisheries area of the Authority {s.141(1)(b), replacing s.28(2) Salmon and Freshwater Fisheries Act 1975}. The Authority is to consult the advisory committees as to the manner in which it is to perform its duty to maintain, improve and develop fisheries {s.141(1)(c)}.

Regional Fisheries Advisory Committees

As was previously required of water authorities (under s.28(2) Salmon and Freshwater Fisheries Act 1975, repealed), the duty of the Authority in relation to fisheries advisory committees is to establish and maintain a regional advisory committee for each region and local advisory committees where considered necessary. The Authority is to ensure that one of the regions for this purpose consists wholly or mainly of, or of most of, Wales

{s.141(2)}. The Authority is to pay to the chairman of an advisory committee remuneration, travelling and other allowances, determined by the Minister with the consent of the Treasury. Payments are to be made to other members of the committee for loss of remuneration, travelling expenses and other out-of-pocket expenses determined in the same way {s.141(3), replacing s.28(2A) Salmon and Freshwater Fisheries Act 1975}.

Area for Fisheries Functions

The area in respect of which the Authority is to carry out its functions in relation to fisheries is to be the whole of England and Wales together with the adjacent territorial sea extending six nautical miles from the baselines from which the breadth of that sea is measured {s.141(4)(a), replacing Sch.2 para.4(1) Water Act 1973 and Sch.2 para.19 Fishery Limits Act 1976}. The area of the Authority is to extend to so much of the river Esk with its banks and tributary streams up to their source as is situated in Scotland in relation to the duty to maintain, improve and develop fisheries and duties arising under the Salmon and Freshwater Fisheries Act 1975 and the Diseases of Fish Act 1937 {s.141(4)(b)}.

Amendments to the Salmon and Freshwater Fisheries Act 1975

The Salmon and Freshwater Fisheries Act 1975 remains the principal enactment relating to the fishery functions of the Authority, but this Act is amended in a number of respects by Schedule 17 {effective under s.141(5)} in order to accomplish the transfer of fishery functions from the water authorities. A key modification of the law brought about under Schedule 17 is that any provision concerning fishery functions which refers to a water authority is to have effect after the transfer date as if it were a reference to the Authority {Sch.17 para.1(1)}. Similarly references to water authority areas are to be construed as the whole area of the Authority, unless they arise in a local statutory provision or subordinate legislation and refer to a particular water authority, in which case they are to have effect in relation to the area of that authority before the transfer date {Sch.17 para.1(2)}. The main effect of Schedule 17, therefore, is to translate reference to water authorities in freshwater fisheries legislation to references to the Authority, and consequent changes are made to the Diseases of Fish Act 1937, the Sea Fisheries Regulation Act 1966, the Sea Fish (Conservation) Act 1967, the Salmon and Freshwater Fisheries Act 1975, the Diseases of Fish Act 1983 and the Salmon Act 1986 {Sch.17}.

Amongst the more significant incidental changes that have been made to the Salmon and Freshwater Fisheries Act 1975 is a revision of the power of the Minister to make an order for the general regulation of fisheries within a defined area {s.28(3) and Sch.3 Salmon and Freshwater Fisheries Act 1975}. This is replaced by a power allowing a Ministerial order to be made, on application by the Authority, for the imposition on the owners and occupiers of fisheries of requirements to pay contributions to the Authority in respect of the expenses of carrying out the Authority's functions with respect to fisheries in that area {Sch.17 para.7(7)}. The Minister may not make an order of this kind, however, unless the Authority has caused notice of the Minister's intention to make an order, the place where copies of the draft order may be inspected, and the time within which objections may be made, to be published in the *London Gazette* and in any other manner for informing persons affected {Sch.17 para.7(14)(a)}.

Another incidental change to the 1975 Act amends the power to require returns from persons fishing for specified kinds of fish of particulars of fish which they have taken or a statement that they have taken no fish {Sch.3 para.32 Salmon and Freshwater Fisheries Act 1975}. This power is replaced by a power to require persons to send returns to the Authority giving particulars of the periods during which they have fished, of whether they have taken specified kinds of fish and, if they have, of what they have taken {Sch.17 para.7(14)(d)}. The new power will allow fishing effort, measured in terms of time, to be gauged alongside the size of the catch. Another change to the 1975 Act is an increase to the period for which a person convicted of an offence under that Act may be disqualified from holding a netting licence from one year to five years {Sch.17 para.7(15), amending Sch.4 para.9 Salmon and Freshwater Fisheries Act 1975}.

Part III Chapter V Water Act 1989

5.07 Navigation, Conservancy and Harbour Authority Functions {s.142}

Where the functions of a water authority, by virtue of any local statutory provision, included any functions of a navigation, conservancy or harbour authority, and those functions are not otherwise transferred, they are to become functions of the Authority on the transfer date {s.142(1)}. Correspondingly, any function provided for under a local statute relating to navigation, conservancy or harbour authorities is to have effect as if any

reference to a water authority is a reference to the Authority and as if anything done by a water authority had been done by or in relation to the Authority {s.142(2)}.

"Navigation authority" is defined to mean any person who has powers under any enactment to work, maintain, conserve, improve or control any canal or other inland navigation, navigable river, estuary, harbour or dock {s.189(1)}. "Conservancy authority" means any person who has a duty or power by or under any enactment to conserve, maintain or improve the navigation of a tidal water, and is not a harbour authority or navigation authority {s.189(1)}. "Harbour authority" means a person who is a harbour authority within the meaning of the Prevention of Oil Pollution Act 1971 and is not a navigation authority {s.189(1)}.

CHAPTER 6

SUPPLEMENTARY PROVISIONS ON THE PROTECTION OF RIVERS

Part III Chapter VI Water Act 1989

6.01 Research Duties of the Authority {s.143}

Replacing the former duty of water authorities to carry out research {under s.24(10) Water Act 1973, repealed}, it is the duty of the Authority to make arrangements for the carrying out of research and related activities, whether by the Authority or others, in respect of matters to which the functions of the Authority relate {s.143(1)}. Specifically in relation to the assessment of demand for water, and of actual and prospective water resources, it is the duty of the Authority to collate and publish information from which assessments can be made of actual and prospective demand. If appropriate, the Authority is to collaborate with others in collating and publishing similar information in relation to places outside England and Wales {s.143(2), replacing s.24(1) Water Act 1973}.

6.02 Overseas Activities of the Authority {s.144}

Powers analogous to that introduced under the Water Act 1983 allowing for water authorities to undertake overseas activities subject to certain permissions being obtained {s.5 Water Act 1983, repealed}, are granted to the Authority. The Authority may provide advice or assistance, including training facilities, for any person outside the United Kingdom as respects any matter in which the Authority has skill or experience {s.144(1)}. This power is not, however, to be exercised except with the written consent of the Secretary of State. If exercise of the power involves capital expenditure by the Authority, or the guaranteeing by the Authority of any liability, the additional approval of the Treasury is required {s.144(2)}.

6.03 General Powers of the Authority {s.145}

Previously water authorities possessed a residual power to do anything which was necessary to facilitate, or was conducive or incidental to, the discharge of any their functions {Sch.3 para.2(1) Water Act 1973, repealed}. Essentially the same residual power is given to the Authority in that it is provided that it is to have power

to do anything which is calculated to facilitate, or is conducive or incidental to the carrying on of its functions {s.145(1)(a)}. In addition, it is made explicit that, in carrying out its functions, the Authority is to have power to institute criminal proceedings, to acquire and dispose of land and other property and to carry out engineering or building operations at appropriate places {s.145(1)(b)}. "Engineering or building operations" is stated, without prejudice to the generality of the expression, to include the construction, alteration, improvement, maintenance or demolition of any building or structure or of any reservoir, watercourse, dam, weir, well, borehole or other works, and the installation, modification or removal of any machinery or apparatus {s.189(1)}.

Charges and Capacity

Without prejudice to these incidental powers, the Authority has the power to fix and recover charges for services provided in the course of carrying out its functions {s.145(1)(c)}, subject to any express statutory provision with respect to charging (see s.129 and Sch.12 para.9). Another explicit power of the Authority is to exercise powers conferred under s.1 Local Authorities (Goods and Services) Act 1970, allowing it to enter into agreements with local authorities for the supply of goods and certain services by the local authority {s.145(2)}.

The general power of the Authority relating to carrying out of works is not to be construed as conferring any power to do anything except for the purpose of giving the Authority capacity as a corporation to do that thing. This stipulation is to be disregarded, however, for the purpose of determining whether the Authority is liable on grounds other than incapacity, for any act or omission in exercise of a power to carry out works conferred under the general power {s.145(3)}.

6.04 Ministerial Directions to the Authority {s.146}

Previous powers to give Ministerial directions to water authorities arose under the Water Resources Act 1963 {s.107 Water Resources Act 1963, repealed}, and under the Water Act 1973 {s.5 Water Act 1973, repealed}. These provisions have been replaced by a measure consolidating the powers of the Secretary of State and the Minister to give directions to the Authority.

Ministerial directions of a general or specific character may be given to the Authority by the Secretary of State with respect to its control of pollution, water resource, navigation, conservancy and harbour functions other than applications for orders relating to

nitrate sensitive areas {s.146(1)(a)}. In relation to the making of orders concerning nitrate sensitive areas, and in respect of flood defence and fishery functions, directions may be given by the Minister or the Secretary of State {s.146(1)(b)}. With respect to anything connected with the Authority's functions generally, and not within those areas, directions may be given by the Secretary of State and the Minister acting jointly {s.146(1)(c)}. In any case where a general or specific direction is given it is the duty of the Authority to comply with it {s.146(1)}.

Community Obligations and International Agreements

Ministerial directions to the Authority may include directions which the Secretary of State, the Minister, or both of them consider appropriate in order to enable the Government of the United Kingdom to give effect to any European Community obligations or any international agreement to which the United Kingdom is for the time being a party {s.146(2), and see also s.2 European Communities Act 1972}. In any case the power to give a Ministerial direction in accordance with these provisions is to be exerciseable, except in an emergency, only after consultation with the Authority {s.146(3)}.

Other Ministerial Powers

The powers of the Secretary of State and the Minister to give directions of these kinds are without prejudice to other powers to give directions {s.146(4)}. This is a reference to a number of other Ministerial powers to give directions for particular purposes granted elsewhere in the Act {Under ss.125, 149, 160 and 170, and Schs. 1, 12 and 24}.

6.05 Powers of Entry {s.147}

Previously water authorities possessed a range of specific powers of entry upon land arising under diverse enactments {including ss.111 and 112 Water Resources Act 1973, repealed, ss.91 and 92 Control of Pollution Act 1974 and s.32 Salmon and Freshwater Fisheries Act 1975}. General provision for powers of entry is made under the 1989 Act so that any person designated in writing by the Secretary of State, the Minister or the Authority may enter any "premises" for specified purposes {s.147(1)}. Previously the word "land" had been used in this context but it is not clear that any change of substance is intended {contrast s.111 Water Resources Act 1973, repealed, and s.91 Control of Pollution Act 1974}.

The purposes for which entry of premises is permitted include

that of ascertaining whether any provision of a specified enactment, subordinate legislation, or other instrument or any byelaws made by the Authority is being or has been contravened {s.147(1)(a)(i)}. Persons so designated may also enter premises for the purpose of determining whether, and in what manner, any power or duty conferred or imposed on the Secretary of State, the Minister or the Authority, under specified enactments, is to be exercised or performed {s.147(1)(a)(ii)}. Likewise entry is authorised for the purpose of exercising or performing any power or duty which is conferred or imposed upon the Ministers or the Authority {s.147(1)(a)(iii)}.

Inspections and Samples

Alongside the powers of entry granted to persons designated and authorised in writing, designated persons are authorised to carry out inspections, measurements and tests on any premises or vessels and articles found therein where the entry is in accordance with the powers of entry. The designated person may also take away samples of water or effluent or of any land or articles which the Secretary of State, the Minister or the Authority considers appropriate in relation to the purposes for which entry is authorised, or samples of matter which the designated person has been authorised to take away {s.147(1)(b)}.

In relation to the control of pollution provisions of the Act, the powers of entry described above are conferred for the purpose of enabling the Secretary of State, the Minister or the Authority to determine whether any provision of the Act has been contravened or whether, or in what manner, to exercise or perform any power or duty conferred in relation to the control of pollution. For that purpose these powers are to include the power, in order to obtain the information on which that determination may be made, to carry out experimental borings or other works on those premises and to install and keep monitoring equipment and other apparatus there {s.147(2)}.

Entry of Residential Premises

Without prejudice to any power exercisable by warrant {under ss.178 and 179}, no person is to make an entry into any premises or vessel by virtue of these powers except at a reasonable time or in an emergency. If the premises are residential premises, or the vessel is used for residential purposes, or the entry is to be with heavy equipment, no entry is permitted until after seven days' notice has been given to the occupier of the premises or vessel {s.147(3)}.

Scope of Powers of Entry

The powers of entry apply to any provision contained in the parts of the Water Act 1989 concerned with the control of pollution, water resources, flood defence, fisheries and navigation, conservancy and harbour authority functions. In addition, the powers may be exercised in relation to the Water Resources Act 1963, the Land Drainage Act 1976 or any other enactment in relation to which, the Authority carries out functions {s.147(4)}.

6.06 Admissibility of Analyses of Samples {s.148}

Formerly provisions concerning the admissibility of samples and formal procedures for taking samples arose under the Water Resources Act 1963 {s.113 Water Resources Act 1963, repealed}. These have been replaced by the requirement that the result of an analysis of any sample of any effluent passing from any "land" {contrast the use of "premises" in s.147(1)(a) discussed above} or vessel, taken on behalf of the Authority in exercise of any power conferred by the 1989 Act, is not to be admissible in any legal proceedings unless the person who took the sample has complied with certain formal requirements. These are, first, that the person taking the sample notified the occupier of the land or the owner or master of the vessel of his intention to have it analysed; second, that there and then the sample was divided into three parts and each part placed in a container which was sealed and marked; and, third, one part of the sample was delivered to the occupier of the land or the owner or master of the vessel and one part retained for future comparison, apart from the one submitted to be analysed {s.148(1)}.

In the event of it not being reasonably practicable for a person taking a sample of effluent to comply with the formal requirements on the taking of samples, the requirements are to be treated as having been satisfied if they were complied with as soon as reasonably practicable after the sample was taken {s.148(2)}. In relation to proceedings in respect of effluent passing from a public sewer or other outfall belonging to a sewerage undertaker into any water, these provisions are to have effect as if the references to the occupier of the land were references to the sewerage undertaker in which the sewer or outfall is vested {s.148(3)}.

Meaning of "Analysis"

The application of the requirement of a formal threefold sampling procedure under previous legislation gave rise to some

dispute as to the meaning of the term "analysis", defined to include the subsection of a sample to a test of any description {s.189(1)}, for the purpose of applying the procedure. In *Trent River Authority v Wardle Ltd.* ([1957] Crim L.R. 196) it was held that the placing of fish in a sample of effluent did not constitute an "analysis" and, therefore, the failure to adhere to the threefold sampling requirement did not preclude admissibility of evidence of the effect upon the fish of being placed in the sample. More recently, in *Wansford Trout Farm v Yorkshire Water Authority* {unreported, Queen's Bench Division, 23 July 1986} it was decided that the admissibility of readings from a dissolved oxygen meter in evidence did not depend upon adherence to the threefold sampling procedure. These decisions continue to be relevant to the interpretation of the sampling requirement under the 1989 Act.

6.07 Provision of Information to the Ministers {s.149}

Replacing previous duties of water authorities to provide Ministers with information {under Sch.3 para.41 Water Act 1973, repealed}, the Authority is placed under a duty to furnish the Secretary of State or the Minister with all information that is reasonably required concerning, the Authority's property, the carrying out and proposed carrying out of its functions and, its responsibilities generally {s.149(1)}. Information required in accordance with this duty is to be furnished in a form and manner, and be accompanied or supplemented by such explanation as may reasonably be required {s.149(2)}. The information which the Authority may be required to furnish is also to include information which, although not in the possession of the Authority, is information which it is reasonable to require the Authority to obtain {s.149(3)}. For these purposes a requirement to provide information is to be contained in a direction {s.149(4)}. In addition the Authority is to permit any person authorised by the Secretary of State or the Minister, to inspect and make copies of the contents of any accounts or other records of the Authority and give such explanation of them as may reasonably be required {s.149(5)}.

6.08 Annual Report of the Authority {s.150}

Following previous provisions applicable to water authorities {under Sch.3 para.40 Water Act 1973, repealed}, the Authority is placed under a duty to prepare annual reports. As soon as reasonably practicable after the end of each financial year, the Authority is to

prepare a report on its activities during the year and send a copy of the report to the Secretary of State and the Minister {s.150(1)}. The report is to set out any Ministerial directions issued to the Authority during the year {s.150(2)}. The report is to be in such a form and contain such information as may be specified in any direction given to the Authority jointly by the Secretary of State and the Minister {s.150(4)}.

CHAPTER 7

POWERS IN RELATION TO LAND AND WORKS

Part IV Water Act 1989

7.01 Compulsory Purchase {s.151 and Sch.18}

Following the previous position of water authorities (under ss.65 and 66 Water Resources Act 1963, repealed), the Authority is granted extensive powers of compulsory purchase over land, subject to Ministerial permission being obtained. The Authority may be authorised to purchase compulsorily any land in England and Wales which is required for the purposes of, or in connection with, the carrying out of any of its functions. The same power is also provided to water and sewerage undertakers. Authorisation is by the Secretary of State or the Minister in the case of compulsory purchase by the Authority, and by the Secretary of State in relation to purchases by water or sewerage undertakers — {s.151(1)}.

The power of the Secretary of State or the Minister to authorise compulsory purchase includes the power to authorise the acquisition of interests and rights over land by the creation of new interests and rights. By authorising the acquisition by the Authority or a water or sewerage undertaker of any rights over land, this Ministerial power may also provide for extinguishment of rights {s.151(2)}. Land acquired compulsorily in this manner may include land required for the purpose of exchange for land which, under the Acquisition of Land Act 1981, forms part of a common, open space or a fuel or field garden allotment {s.151(3)}. Subject to certain provisions on mineral rights, the 1981 Act is to apply to compulsory purchases of land by the Authority, or water or sewerage undertakers, and detailed provisions of that Act are to apply to the acquisition of rights and creation of new rights {s.151(4)}. Specified matters of detail concerning compulsory purchase of land are made subject to key provisions of the Compulsory Purchase Act 1965. Schedule 18 of the 1989 Act {effective under s.151(5)} makes certain modifications to the provisions of the Compulsory Purchase Act 1965 in relation to compulsory purchase of land by the Authority or a water or sewerage undertaker.

7.02 Restrictions on Disposals of Land {s.152}

As previously {under s.70(1) Water Resources Act 1963}, where land has been compulsorily acquired subsequent disposal of that land is made subject to certain restrictions. In particular the Authority is not to dispose of any compulsorily acquired land except with the consent of, or in accordance with a general authorisation given by the Secretary of State or the Minister {s.152(1)}. Accordingly a consent or authorisation for these purposes is to be set out in a notice served by the Secretary of State or the Minister on the person who is authorised to dispose of the land {s.152(3)}. The consent or authorisation may be given on such conditions as the Secretary of State or Minister considers appropriate {s.152(4)}. Notably the conditions of a consent of this kind may include a requirement that before disposal of the land, an opportunity of acquiring the land is to be made available, on specified terms, to a person specified or to be determined {s.152(5)(a)}. It might, for example, be possible for this power to be used in an appropriate case to follow the *Crichel Down principle* of allowing the resale of property no longer required by the Authority to the person from whom it had been compulsorily purchased.

7.03 Laying and Vesting of Pipes {s.153 and Sch.19}

Powers are conferred upon the Authority and water and sewerage undertakers, to enable them to lay pipes and sewers and to carry out related works, under Schedule 19 of the Act {effective under s.153(1)}. Schedule 19 follows previous legislation {Sch.3 Water Act 1945} in covering matters such as street works and works on private premises and the availability of compensation for such operations. As a matter of practice it is likely that these powers will be exercised more commonly by water and sewerage undertakers than the Authority. Provision is also made for the vesting of pipes so laid in the Authority and in water or sewerage undertakers {s.153(2)}.

7.04 Power to deal with Foul Water and Pollution {s.154}

Alongside the power of the Authority to carry out anti-pollution works and operations {under s.115}, the Authority has the power on any land which it owns, or over or in which the necessary easements or rights have been acquired, to take measures to deal with foul water and pollution. The same power is possessed by water undertakers. This power permits the Authority or a water undertaker to construct and maintain drains, sewers, water-

courses, catchpits and other works for specified purposes, namely, intercepting, treating or disposing of any foul water arising or flowing upon land or otherwise preventing the pollution of certain waters {s.154(1)(a)}. The waters concerned are, surface or underground waters, which belong to the Authority or any water undertaker, or from which the Authority or undertaker is authorised to take water; any reservoir which belongs to or is operated by the Authority or a water undertaker, or which the Authority or a water undertaker is proposing to acquire or construct; or any underground strata from which the Authority or a water undertaker is authorised to abstract water in pursuance of a licence under the Water Resources Act 1963 {s.154(1)}.

Duty of an Undertaker to Consult the Authority

Where a water undertaker is proposing to carry out works to deal with foul water or pollution and the proposed works will affect a watercourse, the undertaker is to consult the Authority before carrying out the works {s.154(2)}. Subject to certain provisions on the protection of specified undertakings (under s.160), the powers to deal with foul water and pollution do not permit the Authority or a water undertaker to intercept or take any water which a navigation authority are authorised to take or use for the purposes of their undertaking without the consent of the navigation authority {s.154(3)}.

7.05 Compulsory Powers for carrying out Works {s.155 and Sch.20}

In the past water authorities were empowered to apply for Ministerial authority for the conduct of engineering or building operations compulsorily {s.67 Water Resources Act 1963, repealed}. This facility is preserved so that where the Authority is proposing to carry out any engineering or building operations, or to discharge water into any inland water or underground strata, it may apply to the appropriate Minister for an order providing for compulsory powers in relation to the carrying out of works. The same power is provided to water undertakers {s.155(1)}. "The appropriate Minister" means the Secretary of State or the Minister in relation to an application made by the Authority, and the Secretary of State in relation to an application made by a water undertaker {s.155(7)}. Where an application of this kind has been made to the Minister he may grant an order conferring compulsory powers which he considers necessary or expedient for the purpose of enabling any engineering or building operations or discharges of water to be carried out or made {s.155(2)}.

Requirements in relation to Orders

The detailed procedure relating to Ministerial orders conferring compulsory works powers is set out in Schedule 20 (effective under s.155(3)). This sets out the requirements in relation to applications for orders, including matters such as service of notice of the order applied for and the publicity which must be given to the order, and the availability of copies of the order. Provision is made for the consideration of objections received by the Minister, the giving of notice of any order made and the payment of compensation to persons whose interests are injuriously affected by the grant of an order.

Nothing in an order providing compulsory powers for carrying out works is to exempt the Authority or any water undertaker from any restrictions imposed in relation to the abstraction and impounding of water under the Water Resources Act 1963 {s.155(5), and see Part IV Water Resources Act 1963 as amended}. An order of this kind may, however, grant authority for discharges to be made by the Authority, or a water undertaker, where no previous power of discharge existed {s.155(6)}.

7.06 Power to carry out Surveys and Search for Water {s.156}

Previously water authorities had powers to survey and search for water on certain land with Ministerial consent {s.8 Water Act 1948, repealed}. This power has been retained so that, without prejudice to certain powers of entry with respect to the laying and maintenance of pipes (under Sch.19 para.10), any person designated in writing by the Authority or a water undertaker may enter any premises for specified purposes in relation to the conduct of surveys and the searching for water {s.156(1)}. The purposes for which entry is allowed are to carry out any survey or tests to determine whether it would be appropriate to acquire land or rights for purposes connected with the carrying out of functions of the Authority or the undertaker, or to determine whether it would be appropriate to apply for an order granting compulsory powers for carrying out works {s.156(2)}. The power to carry out surveys and to search for water in accordance with this provision encompasses, first, the power to carry out experimental borings or other works for ascertaining the nature of the sub-soil and the presence of underground water and its quality {s.156(3)(a)}; second, the power to install and keep monitoring or other apparatus on the premises for the purpose of obtaining the information on which determinations as to the presence and quality of underground water can be made {s.156(3)(b)}; and, third,

the power to take away and analyse samples of water or of any land or articles as the Authority or undertaker considers necessary for the purposes authorised {s.156(3)(c)}.

Reservations upon the Power to Search and Survey

Reservations are imposed upon the power to carry out surveys and search for water under these provisions. Specifically, the power is not to be exercised for purposes connected with the determination of whether, where or how a reservoir should be constructed or a borehole should be sunk for the purpose of abstracting water from or discharging water into any underground strata. In these situations the powers are not to be exercised unless the Secretary of State has given his written consent for the exercise of the powers for those purposes {s.156(4)}. The Secretary of State is not to give authorisation unless he is satisfied that the notice of the proposal to apply for the authorisation has been given to the owner and to the occupier of the premises, and he has considered any representations or objections which have been duly made to him by the owner or occupier within a specified period {s.156(5)}. In any case no entry is to be made in accordance with these powers except at a reasonable time and after seven days' notice of the intended entry has been given to the occupier of the premises or in an emergency {s.156(6)}.

7.07 Duties to make Recreational Facilities Available {s.157}

Previously an order of the Secretary of State granting compulsory powers to a water authority for the construction of a reservoir could require recreational facilities to be made available to persons in the area (ss.20(5) and 21(5) Water Act 1973, repealed). This power has been retained in respect of compulsory powers conferred by the Secretary of State in relation to the construction or operation of reservoirs by the Authority or a water undertaker. Where powers of this kind are conferred a duty may be imposed to make recreational facilities available {under s.155}. The duty to provide these facilities may be imposed where the works to be carried out may permanently affect the area in which they are situated and are not primarily intended to benefit the inhabitants of that area. In those circumstances the Secretary of State may include in the order conferring compulsory powers a provision requiring the provision of facilities for recreation or other leisure-time occupation for the benefit of those inhabitants {s.157(1)}.

Recreational Provision in relation to Wales

In addition to the duty discussed above, specific provision for recreational facilities is made in relation to the construction or operation of a reservoir in Wales which permanently affects one or more communities and is not primarily intended by the Authority or a water undertaker to benefit the inhabitants of that or those communities. In this case it is the duty of the Authority of the undertaker to make available facilities for recreation or other leisure-time occupation for the benefit of those inhabitants or to assist others to make the facilities available {s.157(2)}. In performing this duty it is the obligation of the Authority, or the undertaker, to consult the community councils of the communities affected and the council of any district in which any community affected is situated {s.157(3)}.

7.08 Byelaws with respect to Waterways {s.158}

Recreational facilities at reservoirs and other waters were previously subject to byelaw regulation by water authorities under the Countryside Act 1968 {s.22(6) Countryside Act 1968, repealed}. Those provisions have been replaced by a power of the Authority to make byelaws with respect to any waterway which it owns or manages and with respect to any land held or managed along with the waterway. The same byelaw-making power is possessed by water and sewerage undertakers {s.158(1)}. For these purposes, "waterway" means any lake, river, canal or other waters which is suitable, or which can reasonably be rendered suitable, for sailing, boating, bathing or fishing {s.158(6), and s.114(1) National Parks and Access to the Countryside Act 1949}. In all instances, Authority byelaws are to be made in accordance with the procedure set out in Schedule 24 (effective under s.186).

The Authority also has the power to make byelaws with respect to any inland waters and associated land in relation to which there is a public right of navigation if navigation in those waters is not subject to the control of any navigation authority, harbour authority or conservation authority. Alternatively the Authority may make byelaws in respect of land subject to the control of a navigation authority, harbour authority or conservancy authority where that authority is prescribed by the Secretary of State because it is unable to carry out its functions {s.158(2)}.

Purposes of Byelaws

The byelaws which may be made by the Authority in relation to any waterway, inland waters or associated land may be for a

number of specified purposes. These are, the preservation of order, the prevention of damage to anything on or in the waterway, waters or land, and the purpose of securing that persons resorting to the waterway, waters or land avoid undue interference with the enjoyment of others {s.158(3)}.

Without prejudice to this general formulation of the byelaw-creating power of the Authority, and other powers in relation to the creation of byelaws {under s.144, s.79 Water Resources Act 1963, as amended by Sch.13 para.21, and s.113 Transport Act 1968, as amended by Sch.25 para.38}, byelaws may be created for a number of explicit purposes. The purposes are regulating sailing, boating, bathing and fishing and other forms of recreation {s.158(4)(a)}; prohibiting the use of the waterway or inland water by boats which are not for the time being registered, as required by the byelaws, with the body making the byelaws {s.158(4)(b)}; and requiring the provision of sanitary appliances necessary for the purpose of preventing pollution {s.158(4)(c)}. Byelaws created by the Authority may also provide that contravention is to constitute a summary offence, punishable by a fine not exceeding level five on the standard scale, presently £2,000, or a smaller sum specified in the byelaws {s.158(4)(d)}. Also byelaws may authorise the making of reasonable charges in respect of the registration of boats for the purposes of the byelaws {s.158(4)(e)}.

7.09 Mineral Rights {s.159 and Sch.21}

Replacing previous provisions on minerals and works conducted by water undertakers {under Sch.3 Part IV Water Act 1945, repealed}, new provision is made for the acquisition of mineral rights by the Authority and water and sewerage undertakers. The Authority, and the undertakers, become subject to Schedule 21 {effective under s.159}, making provision with respect to the acquisition of mineral rights and the working of mines and minerals where pipes, sewers or other related works are affected.

7.10 Protection of Certain Undertakings {s.160}

Nothing in the Act confers a power upon the Authority or a water or sewerage undertaker to carry out any works which interfere with works or the use of works or property of persons carrying on certain kinds of undertaking without their consent {s.160(1)}. Likewise nothing in the Act confers a power upon the Authority or a water or sewerage undertaker to do anything which prejudices the exercise of any statutory power, authority or jurisdiction of any person carrying on specified kinds of

undertaking {s.160(2)}. The persons carrying on undertakings from whom consent is required include the Authority and water and sewerage undertakers themselves, but also extend to the undertakings of a number of listed statutory bodies. The bodies specified include the Civil Aviation Authority, the British Coal Corporation, the Post Office, telecommunications undertakers, airport authorities, public gas suppliers, the Central Electricity Generating Board and Area Boards, navigation, harbour, conservancy authorities and internal drainage boards, British Railways Board, London Regional Transport and any public statutory utility undertaking {s.160(3)}.

Interference with Works

Without prejudice to these reservations protecting undertakings, nothing under the Act is to confer power on any person to do anything, except with consent, which interferes with any sluices, floodgates, groynes, sea defences or other works used by any person for draining, preserving or improving any land under any local statutory provision or with any of those works used by any person for irrigating land {s.160(4)}. In cases where consent for works is required from one or more specified undertakers {under s.160(1) and (4)}, the consent must not be unreasonably withheld {s.160(6)}. Disputes as to interference caused, consent unreasonably withheld, or consent conditions are to be referred to arbitration {s.160(7)}.

The Duty to Consult Internal Drainage Boards

Where the Authority or any water or sewerage undertaker proposes, other than in exercise of compulsory powers, to construct or alter certain inland waters a duty to consult internal drainage boards arises. Hence where the Authority or an undertaker wishes to construct or alter an inland water, other than a water forming part of a main river {s.160(9), "main river" defined under s.8(3) Land Drainage Act 1976}, in any internal drainage district, or to construct or alter any works on or in any inland water, the Authority or undertaker is to consult the internal drainage board before doing so {s.160(5)}.

7.11 Saving for Planning Controls (s.163)

Under s.40 of the Town and Country Planning Act 1971, deemed planning permission was granted to water authorities in respect of certain developments carried out in their capacity as "statutory undertakers", a term encompassing persons autho-

rised to carry on an undertaking for the supply of water {s.290(1) Town and Country Planning Act 1971}. Planning permission was only given in this manner, however, where the authorisation of a government department was required for a particular project and where the department concerned directed that planning permission for the development was deemed to be granted {s.40(1) Town and Country Planning Act 1971}.

Deemed Planning Permission

The facility for deemed planning permission under the Town and Country Planning Act 1971 is retained under the 1989 Act, and the Authority and water and sewerage undertakers are deemed to be "statutory undertakers" for that purpose {Sch.25 para.1(2)(xvii)}. In relation to any provision made by or under the 1989 Act relating to the functions of the Authority and water and sewerage undertakers, however, nothing in the Act is to be construed as authorising the carrying out of any development without the grant of any planning permission required by the 1971 Act {s.163}. Notably this will not affect the range of operations within the functions of the Authority and the undertakers which are granted planning permission as permitted developments under the General Development Order {Sch.2 paras.15 to 17 Town and Country Planning General Development Order 1988, SI 1988 No.1813}.

7.12 Maps of Water Mains {s.165}

Formerly it was a duty of water authorities to prepare and keep maps of underground works {Sch.3 s.12 Water Act 1945, repealed}. This has been replaced by a duty of the Authority and every water undertaker to keep records of the location of every resource main, water main or discharge pipe which is for the time being vested in the Authority or the undertaker. Records must also be kept of any other underground works, apart from service pipes, which are for the time being vested in the Authority or the undertaker {s.165(1)}. It is the duty of the Authority and of every water undertaker to secure that the contents of any records are available, at all reasonable times, for inspection by the public free of charge at an office of the Authority or undertaker {s.165(2)}. Any information which is required to be kept and made available for inspection by the public by the Authority or undertaker is to be made available in the form of a map {s.165(3)}.

The duty to keep records requires modification of records to be made as soon as reasonably practicable after the completion of

the works which make the modification necessary. Where modification of the records is necessary the modification and the date of modification, and of the completion of the works, is to be incorporated in the records {s.165(4)}.

7.13 Offence of Interference with Works {s.167}

Previously offences arose where persons interfered with valves and apparatus or extended or altered pipes belonging to water undertakers {Sch.3 paras.67 and 68 Water Act 1945}. These have been replaced by measures which provide that an offence is committed where, without the consent of the Authority or a water undertaker, a person intentionally or recklessly interferes with any resource main, water main or other pipe vested in the Authority or an undertaker. A "resource main" means a pipe, other than a trunk main, which is used for the purpose of conveying water from one source of supply to another, from a source supply to a regulating reservoir, from a regulating reservoir to a source of supply, or giving or taking a supply of water in bulk {s.167(7) and Sch.19 para.1(6)}.

It is an offence to interfere with any structure, installation or apparatus belonging to the Authority or a water undertaker {s.167(1)(a)}. Alternatively an offence is committed where a person negligently interferes with any main or other pipe or any structure, installation or apparatus so as to damage it or to have an effect on its use or operation {s.167(1)(b)}. In each of these cases a person is liable, on summary conviction, to a fine not exceeding level three on the standard scale, presently £400 {s.167(1)}.

Exceptions

The exceptions to the offences concerning interference with works provide that a person will not be guilty of an offence by reason of anything done in an emergency to prevent loss or damage to persons or property {s.167(2)(a)}. Also excepted is anything done by reason of a person opening or closing a stopcock fitted to a service pipe supplying water to any premises where this is done with the consent of every consumer whose supply is affected, or where a stopcock was closed otherwise than by the undertaker {s.167(2)(b)}.

Other Offences

Specific offences are provided for in respect of persons making attachments or alterations to certain water supply pipes. An offence is committed where any person, without the consent of

the Authority, or a water undertaker, attaches any pipe or apparatus to any resource main, water main or other pipe vested in the Authority or undertaker. Likewise an offence is committed where a person attaches any pipe or apparatus to any service pipe which does not belong to an undertaker but which is a pipe supplying water to any premises by an undertaker {s.167(3)(a)}. An offence is committed where a person makes any alteration in a service pipe supplying water, or alters any apparatus attached to any such water pipe {s.167(3)(b)}. Subject to a due diligence defence {under s.167(4)}, it is also an offence to use any pipe or apparatus which has been attached or altered in contravention of these provisions {s.167(3)(c)}. The due diligence exception makes it a defence for a person to show that he did not know, and had no grounds for suspecting, that the pipe or apparatus in question had been attached or altered as mentioned {s.167(4)}. In relation to any of these offences a person found guilty of an offence is liable, on summary conviction, to a fine not exceeding level three on the standard scale, presently £400 {s.167(3)}.

Actions for Breach of Duty

Offences relating to interference with pipes, and the attachment of a pipe or apparatus {under s.167(1) or (3)}, constitute a breach of duty owed to the Authority or water undertaker. Breach of this duty which causes the Authority or undertaker to sustain loss or damage is actionable at the suit of the Authority or undertaker {s.167(5)}. The amount recoverable in an action of this kind from a person who has committed an offence involving the attachment of a pipe or apparatus {under s.167(3)} is to include a reasonable amount in respect of any water wasted, misused or improperly consumed in consequence of the commission of the offence {s.167(6)}.

CHAPTER 8

MISCELLANEOUS AND SUPPLEMENTAL PROVISIONS

Part VI Water Act 1989

8.01 Directions in the Interests of National Security {s.170}

The Secretary of State is empowered to give directions in the interests of national security after consultation with the body to whom the direction is given. Directions may be of a general character as are requisite or expedient in the interests of national security or for the purpose of mitigating the effects of any civil emergency {s.170(1)}. Specifically, directions may be given to the Authority and to every water and sewerage undertaker. A "civil emergency" is a reference to a natural disaster or other emergency which is likely to disrupt water supplies or sewerage services or to involve such destruction or damage to life or property as seriously and adversely to affect all the inhabitants of an area, or a substantial number of them, whether by depriving them of any of the essentials of life or otherwise {s.170(9)}.

After consultation, the Secretary of State may, if requisite or expedient in the interests of national security, or for the purpose of mitigating the effects of any civil emergency, give the Authority a direction requiring it to do, or not to do, a particular thing {s.170(2)}. It is then the duty of the Authority to comply with the direction {s.170(3)}.

Disclosure

A person may be required not to disclose, or to disclose, anything done by virtue of these provisions if disclosure, or non-disclosure, is against the interest of national security and the Secretary of State has notified the person on whom the requirement is imposed {s.170(5)}. Disclosure in contravention of this requirement is an offence punishable, on conviction on indictment, by imprisonment for a term not exceeding two years or to a fine or both {s.170(6)}. The Secretary of State may, with Treasury approval, make grants to bodies to whom directions are given for the purpose of defraying or contributing towards any losses they may sustain by reason of compliance with directions given in the interests of national security {s.170(7)}. Sums required

for making grants may be paid out of money provided by Parliament (s.170(8)).

8.02 Power to give effect to International Obligations (s.171)

The appropriate Minister may make regulations providing that certain provisions of the Act, and other enactments relating to the fisheries functions of the Authority, are to have effect with prescribed modifications for the purpose of enabling the Government of the United Kingdom to give effect to any European Community obligations or any international agreement to which the United Kingdom is a party (s.171(1), and see s.2 European Communities Act 1972). The appropriate Minister to make regulations having this effect is the Secretary of State in respect of those parts of the Act concerned with water supply and the control of pollution. In relation to the provisions concerned with powers relating to the fishery functions of the Authority it is the Minister or the Secretary of State (s.171(2) and (3)).

8.03 Payments to Existing Pension Fund (s.173)

The Secretary of State, with the consent of the Treasury, may make payments into any existing pension fund (maintained under s.7 Superannuation Act 1972) which is appropriate in respect of the actual and prospective liabilities falling to be met. Liabilities may be in respect of persons, or classes of person, who have ceased to be officers or employees of a water authority, or who have ceased to be officers or employees of any person designated for this purpose by the Secretary of State (s.173(1), see also Sch.26 para.2(2)). The Secretary of State is not to make an order of this kind in relation to a person who has ceased to be an employee of a water authority unless that person's activities before the transfer date consisted in, or were connected with, the carrying out of any function transferred under the Act or correspond to a function under the Act (s.173(2)). The persons designated for these purposes are indicated by the Water Reorganisation (Pensions etc.) (Designated Persons) Order 1989 (SI 1989 No.1155) as amended by the Water Reorganisation (Pensions etc.) (Designated Persons) (Amendment) Order 1989 (SI 1989 No.1382).

8.04 General Restrictions on Disclosure of Information (s.174)

Although previous provisions had restricted the disclosure of information by water authority auditors (Sch.3 para.39G Water Act 1973, repealed), and in relation to the control of pollution (s.94 Control of Pollution Act 1974), there was no general provision precluding the

disclosure of information in relation to water authority functions. This position has been modified in that, subject to specified exceptions, a general restriction is imposed upon the disclosure of information obtained under the 1989 Act. No information with respect to any particular business which has been obtained by virtue of any provisions of the Act, and which relates to the affairs of any individual or to any particular business is to be disclosed. This restriction applies during the lifetime of the individual concerned or so long as the business continues to be carried on, so that disclosure may not be made without the consent of the individual or the person for the time being carrying on the business {s.174(1)}.

Exceptions

The listed exceptions to the general principle of non-disclosure of information are as follows. The disclosure restriction does not apply for the purpose of facilitating the carrying out of any functions arising under the Act by the Secretary of State, the Minister, the Authority, the Director General of Water Services, the Monopolies Commission or a local authority {s.174(2)(a)}; or for the purpose of facilitating the performance by a water or sewerage undertaker of any of the duties imposed under the Act {s.174(2)(b)}; or in pursuance of arrangements or duties {under s.27(4) or s.119(1) or (2) or 130(1)(a) or (2)} of the Director General of Water Services {s.174(2)(c)}; or for the purpose of facilitating the carrying out by any Minister of the Crown, the Director General of Fair Trading, the Monopolies Commission, the Director General of Telecommunications, the Civil Aviation Authority, the Director General of Gas Supply, the Director General of Electricity Supply or a local weights and measures authority in England and Wales, of any statutory functions under specified enactments {s.174(2)(d), enactments specified under s.174(3)}; or for the purpose of enabling or assisting the Secretary of State to exercise any powers conferred on him {under the Financial Services Act 1986} including under enactments relating to companies, insurance companies or insolvency and for the purpose of enabling or assisting any inspector to carry out functions relating to these matters {s.174(2)(e)}; or for the purpose of enabling an official receiver to carry out functions under enactments relating to insolvency or enabling or assisting a recognised professional body to carry out insolvency functions {s.174(2)(f), insolvency functions under s.391 Insolvency Act 1986}; for the purpose of facilitating the carrying on by the Health and Safety Commission or the Health and Executive of

functions as a health and safety enforcing authority {s.174(2)(g), under Part I Health and Safety at Work etc. Act 1974}; or for the purpose of facilitating the carrying out by the Comptroller and Auditor General of any of his functions {s.174(2)(h)}; or in connection with the investigation of any criminal offence or for the purpose of any criminal proceedings {s.174(2)(i)}; or for the purpose of any civil proceedings brought under the Act of other specified enactments {s.174(2)(j)}, enactments specified under s.174(3)}; or in pursuance of a Community obligation {s.174(2)(k)}.

The general prohibition on disclosure of information does not restrict matters which may be published in the public interest by the Secretary of State {under s.34} relating to the functions of a water or sewerage undertaker. Similarly information published as a part of a report of the Authority, the Director General of Water Services, a customer service committee or the Monopolies Commission is excluded {s.174(4)(a)}. In addition the prohibition does not apply to any information which has been published or made public as part of that kind of report or to any information of a statistical nature {s.174(4)(b)}.

The prohibition upon disclosure of information is not to preclude disclosure relating to a matter connected with the carrying out of the functions of a water or sewerage undertaker where disclosure is made by one Minister of the Crown or Government department to another {s.174(6)(a)}. Similarly the prohibition does not apply if the disclosure is for the purpose of enabling or assisting any public or other authority designated by an order made by the Secretary of State to discharge any specified functions {s.174(6)}.

Penalties

Disclosure of information in contravention of the general restriction is an offence for which a person will be liable on summary conviction, to a fine not exceeding the statutory maximum, presently £2,000, or on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine of unlimited amount or to both {s.174(5)}.

8.05 Making of False Statements {s.175}

Formerly a series of offences were provided for in relation to the provision of false information to water authorities in situations where information was to be provided to authorities in order to facilitate performance of their functions {for example, s.45 Water Act 1945, s.115 Water Resources Act 1963, and s.93(3) Control of Pollution

Act 1974}. A general offence has been provided for under the 1989 Act of making false statements in furnishing any information or making any application under or for the purposes of any provision of the Act. The substance of this offence is that any person who makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular is guilty of an offence. The punishment for this offence is, on summary conviction, a fine not exceeding the statutory maximum, presently £2,000, and on conviction on indictment a fine of unlimited amount {s.175(1)}. Proceedings for the offence of making a false statement are not to be instituted except by, or with the consent of, the Secretary of State, the Minister or the Director of Public Prosecutions {s.175(2)}.

8.06 Provision of Supplementary Information {s.176}

Specific provision is made in the Act for situations where delays occur in the provision of supplementary information in support of an application or a notice provided under the Act. This arises where any application or notice is required to be supplemented by information required by the person to whom the application is made or on whom the notice is served. If the person to whom the application is made is required to do anything within a specified period the failure to provide the information will not invalidate the application or notice. However, if the requirement to provide information allowed a reasonable opportunity to provide it within the period, the person requiring the information is entitled to delay doing anything required of him until a reasonable time after the information is provided {s.176}. In effect, therefore, a delay in providing information in respect of an application may legitimate a corresponding delay in taking an action dependent upon the provision of that information.

8.07 Offences by Bodies Corporate {s.177}

Following previous provisions {for example s.118(3) Water Resources Act 1963, and s.87(1) Control of Pollution Act 1974}, provision is made for both corporate and individual liability in respect of criminal offences under the Act. This arises where a body corporate is guilty of an offence which is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in that capacity. In that case the individual concerned, as

well as the body corporate, is to be guilty of the offence and will be liable to be proceeded against and punished accordingly {s.177(1)}. Where the affairs of a body corporate are managed by its members, this provision will apply to acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate {s.177(2)}.

8.08 Warrant to Exercise Power of Entry {s.178}

Replacing former powers of entry of water authority officers acting under a warrant {s.111(3) Water Resources Act 1963, repealed, s.91(2) Control of Pollution Act 1974, and Sch.1 para.3 Public Utility Transfers and Water Charges Act 1988, repealed}, specified powers of entry arising under the 1989 Act {most pertinently, under ss.147(1) and 156, and Sch.19 para.10 and Sch.21 para.5} may be exercised under a warrant. Broadly, a warrant authorising exercise of a power of entry may be granted if it is shown to the satisfaction of a justice of the peace, on sworn information in writing, that there are reasonable grounds for the exercise of a power of entry in relation to any premises and specified conditions are satisfied. Where satisfied of this the justice may by warrant authorise the relevant authority to designate a person who will be authorised to exercise the power in relation to those premises in accordance with the warrant, if need be, by force {s.178(2)}.

Conditions

The power of entry by warrant may be exercised if any one or more of the following conditions are satisfied: first, that the exercise of the power in relation to the premises has been refused {s.178(3)(a)}; second, that a refusal is reasonably apprehended {s.178(3)(b)}; third, that the premises are unoccupied {s.178(3)(c)}; fourth, that the occupier is temporarily absent from the premises {s.178(3)(d)}; fifth, that the case is one of urgency {s.178(3)(e)}; or, finally, that an application for admission to the premises would defeat the object of the proposed entry {s.178(3)(f)}.

Where a power of entry has been refused, or refusal is reasonably apprehended, a justice of the peace is not to issue a warrant to authorise entry of premises unless he is also satisfied that notice of the intention to apply for the warrant has been given to the occupier of the premises, or that the giving of notice would defeat the object of the proposed entry {s.178(4)}. A warrant issued in relation to the exercise of powers to carry out surveys in respect of reservoir construction {under s.156(4)} is not to be issued

by a justice of the peace unless he is satisfied that the Secretary of State has given his authorisation in relation to the case {s.178(5)}. Every warrant under these provisions is to continue in force until the purpose for which it is issued have been fulfilled {s.178(6)}.

8.09 Provisions Supplementary to Powers of Entry {s.179}

In the place of previous provisions relating to supplementary powers of entry {s.112 Water Resources Act 1963, repealed, and s.92 Control of Pollution Act 1974}, the 1989 Act includes supplementary provisions in relation to the power to exercise a power of entry under warrant. A person designated to exercise any power of entry is to produce evidence of his designation and other authority before he exercises the power {s.179(2)}. The authorised person, subject to the terms of the warrant, is entitled to take with him on to the premises such other persons and equipment as may be necessary {s.179(3)}. The person entering premises in exercise of these powers is to leave the premises as effectually secured against trespassers as he found them {s.179(4)}.

Compensation

It is the duty of the authority entitled to designate the person exercising the power of entry, to make full compensation to any person who has sustained loss or damage by reason of the exercise of that power. Similarly compensation is payable for loss suffered through exercise of any power of the designated person to take any person or equipment with him when entering the premises {s.179(5)(a)}. Likewise full compensation is to be made for the performance of, or failure to perform, the duty to leave the premises effectually secured against trespassers {s.179(5)(b)}. Compensation will not be payable, however, for loss or damage which is attributable to the default of the person who sustained it, or loss or damage in respect of which compensation is payable by virtue of any other provision of the Act {s.179(5)}.

Disputes as to entitlement to compensation in relation to the exercise of powers of entry, or the amount of compensation, are to be referred to a single arbitrator appointed by agreement of the relevant authority exercising the power of entry, and the person who claims to have sustained the loss or damage. In default of an agreement about the appointment of an arbitrator, appointment is to be by the President of the Lands Tribunal where the relevant authority is the Secretary of State or the Minister and the Secretary of State or the Minister in any other

case. Compensation to be paid by the Secretary of State or the Minister is to be paid out of money provided by Parliament (s.179(6)).

Failure to Comply with Formal Requirements

For the purposes of the obligation effectually to secure premises, and the obligation of the relevant authority to provide compensation, a person is deemed to enter premises by virtue of a power of entry despite failing to comply with certain formal requirements. Specifically, entry is deemed to be by virtue of a power of entry notwithstanding that the person entering has failed to produce evidence of his designation and authority when he exercises the power, and despite any failure to enter premises at a reasonable time or failure to give the required notice of the intended entry (s.179(7)).

Obstruction

A person who intentionally obstructs another person acting in the exercise of any power of entry will be guilty of an offence and liable, on summary conviction, to a fine not exceeding level three on the standard scale, presently £400 (s.179(8)). Past decisions have shown that "obstruction" need not involve any kind of physical violence (*Borrow v Howland* (1896) 74 LT 787), and may be construed as an action which makes it more difficult for a person to carry out his duty (*Hinchcliffe v Sheldon* [1955] 3 All ER 406). A mere standing by and doing nothing is not obstruction unless the person concerned is under a legal duty to act (*Swallow v London City Council* [1916] 1 KB 224), and it is to be stressed that *intentional* obstruction is the substance of the offence at issue, consequently an accidental or inadvertent act will not suffice (*R v Senior* [1899] 1 QB 290).

8.10 Impersonation of Persons Exercising Powers of Entry (s.180)

A new offence arises under the 1989 Act where a person who, without having been designated or authorised for the purpose by the relevant authority, purports to be entitled to enter any premises in pursuance of designation or authorisation is guilty of an offence and liable, on summary conviction, to a fine not exceeding level four on the standard scale, presently £1,000 (s.180(1)). Where a person purports to be entitled to enter premises it is immaterial that the power which the person purports to be entitled to exercise does not exist or would not be

exercisable even if that person had been designated or authorised by the relevant authority {s.180(2)}.

8.11 Local Inquiries {s.181}

Following previous provisions concerning water authorities {for example, s.109 Water Resources Act 1963, and s.96 Control of Pollution Act 1974}, extensive provision is made for public inquiries to be held in relation to the functions of the Authority {provisions for local inquiries concerning the Authority arise under ss.111, 112, 120, 131, and 137, and Sch.12 para.4, Sch.20 para.4 and Sch.24 para.5}. Local inquiries under the Water Act 1989 are to be subject to provisions arising under s.250(2) to (5) of the Local Government Act 1972 {s.181(1)}. Section 250(4) of the 1972 Act is to apply in relation to local inquiries under the 1989 Act, held with respect to any matter affecting the carrying out of any function of the Authority, as if the reference to a local authority in that subsection included a reference to the Authority {s.181(2)}.

8.12 Judicial Disqualification {s.182}

No judge of any court or justice of the peace is to be disqualified from acting in relation to any proceedings to which the Authority or a water undertaker or sewerage undertaker is a party by reason only that he is or may become liable to pay a charge to the Authority or that undertaker in respect of any service that is not the subject-matter of the proceedings {s.182}.

8.13 Byelaws {s.186 and Sch.24}

Detailed provisions are made with respect to any byelaws made by the Authority under any power conferred on it by virtue of the Act {under ss.114 and 158} or any other enactment {for example, Schs.1 and 3 Salmon and Freshwater Fisheries Act 1975, and s.34 Land Drainage Act 1976}, and also with respect to any byelaws made by water or sewerage undertakers {under s.158} in relation to waterways in which they have an interest {s.186}.

Procedure for Creation of Byelaws

Schedule 24 of the Act {effective under s.186} sets out the procedure relating to the creation of byelaws along similar lines as provided for under previous legislation {Sch.7 Part II Water Act 1973, repealed}. No byelaw made by the Authority will have effect until it receives Ministerial confirmation {Sch.24 para.1(1)}. This is to be preceded by advertisement of the notice of application to the Minister in the *London Gazette*, and otherwise in a manner

appropriate to bring the proposed byelaw to the attention of persons likely to be affected by it {Sch.24 para.1(2)}. For a period of one month before application to the Minister a copy of the proposed byelaw is to be made available for inspection and copies are to be made available free of charge {Sch.24 paras.1(3) to (5)}. Thereafter the Minister may refuse to confirm the byelaw, or may confirm it, either with or without a local inquiry, and either with or without modifications {Sch.24 para.2(1)}. Conversely, if it appears to the Minister that the revocation of a byelaw is necessary or expedient he may, after giving notice to the body which made the byelaw and after considering any representations or objections made by the body, and holding a local inquiry if requested, revoke the byelaw {Sch.24 para.5}.

The Appropriate Minister

For the purposes of approval of byelaws under Schedule 24 the appropriate Minister is the Minister in relation to byelaws on flood defence having effect primarily in England. In relation to byelaws on salmon and freshwater fisheries the appropriate Minister is the Secretary of State or the Minister. In relation to all other byelaws the appropriate Minister is the Secretary of State {Sch.24 para.7(1)}.

8.14 Interpretation of References to the Service of Documents (s.187)

Following previous provisions {s.120 Water Resources Act 1963, and s.95 Control of Pollution Act 1974}, the 1989 Act makes explicit the procedures required in relation to the service of documents under the Act. A document required or authorised to be served under the Act on any person may be served by delivering it to him or by leaving it at his proper address or by sending it by post to him at that address {s.187(1)(a)}. If the person is a body corporate, service may be by serving the document on the secretary or clerk of the body {s.189(1)(b)}, or if the person is a partnership, by serving it on a partner or a person having the control or management of the partnership business {s.187(1)(c)}.

The proper address of any person on whom a document is to be served is his last known address, except in the case of service on a body corporate or its secretary or clerk where it is the address of the registered or principal office of the body {s.187(2)(a)}. In the case of service on a partnership or a partner, or a person having the control or management of a partnership business, it is the address of the principal office of the part-

nership {s.187(2)(b)}. For these purposes the principal office of a company registered outside the United Kingdom is the principal office within the United Kingdom {s.187(2)}.

If a person to be served with a document has specified an address within the United Kingdom other than his proper address as the one at which he will accept documents of the same description as that document, that address will also be treated as his proper address for this purpose {s.187(3)}. Where a document is required to be served on the owner or occupier of any premises and the name or address of the person or occupier of the premises cannot after reasonable inquiry be ascertained, or the premises appear to be or are unoccupied, the document may be served either by leaving it in the hands of a person who is or appears to be resident or employed on the land, or by leaving it conspicuously affixed to some building or object on the land {s.187(4)}. These provisions do not apply to a document in relation to the service of which provision is made by rules of court {s.187(5)}.

8.15 Interpretation of Certain References to Functions {s.188}

Specific provision is made in respect of the construction of an enactment which confers powers in relation to a number of incidental matters within the functions of the Authority or water or sewerage undertakers {s.188(1)}. Accordingly, these functions are to include joining together or acting on behalf of one another for the purpose of carrying out any works or acquiring any land which at least one of the bodies is authorised to carry out or acquire {s.188(2)}.

Collaborative Activities

For the purpose of collaborative activities the functions of the Authority and water and sewerage undertakers are to include the protection against pollution of any waters, surface or underground, which belong to the Authority or any water undertaker or from which they are authorised to take water {s.188(3)(a)}. Without prejudice to this, the functions include protection against pollution of any reservoir which belongs to or is operated by the Authority or any water undertaker, or which it is proposed to acquire or construct and operate {s.188(3)(b)}. The functions also include the protection against pollution of any underground strata from which the Authority or any water undertaker is authorised to abstract water in pursuance of a licence under the Water Resources Act 1963 {s.188(3)(c)}, and Part IV Water Resources Act 1963}.

Collaborative activities of the Authority and water and sewerage undertakers are to include the furtherance of research into matters in respect of which functions are conferred by or under the Act on the Authority, or on water or sewerage undertakers (s.188(4)). The functions of the Authority and water and sewerage undertakers are to include the provision of houses, other buildings and recreation grounds for the use of employees (s.188(5)). The functions also include the provision of supplies of water in bulk, whether or not those supplies are provided for the purpose of, or in connection with, the carrying out of any other function of the Authority or undertaker (s.188(6)). Finally, the functions of water undertakers include any action taken in pursuance of arrangements between the undertaker and the Authority under a water resource management scheme (under s.126, s.188(7)).

8.16 General Interpretation (s.189)

The general interpretation section of the Act, s.189(1), provides definitions of over sixty of the key terms used in the body of the Act. The most important of these in relation to the Authority have been mentioned in the contexts to which they are most relevant.

Expenses and Concurrent Ministerial Functions

Other matters relevant to the Authority and relating to general interpretation include a stipulation that where a power is conferred under the Act on a person to recover the expenses incurred by the person, those expenses are assumed to include a sum which is reasonable in respect of establishment charges or overheads (s.189(7)). Another matter of general interpretation is the statement that where a function of a Minister of the Crown is exercisable concurrently by different Ministers, the function is also to be exercisable jointly by any two or more of those Ministers (s.189(9)). That is, where one Minister is entitled to act he may act in conjunction with another Minister who is also entitled to act in that respect.

8.17 Amendments, Transitional Provisions, Savings and Repeals (s.190 and Schs. 25, 26 and 27)

Detailed information concerning amendments of other enactments brought about by the 1989 Act, transitional provisions and savings, and repeals are set out in Schedules 25, 26 and 27 to the Act respectively (effective under ss.190(1), (2) and (3) respectively). Without prejudice to other provisions, the Secretary of State and

the Minister are each empowered to make additional consequential amendments of public general enactments (excepting those mentioned in Sch.25) passed before, or in the same session as the 1989 Act, and of subordinate legislation made before the passing of the 1989 Act, where amendments are necessary or expedient by reason of the coming into force of any provision of the 1989 Act (s.190(1)). The transitional provisions and savings set out in Schedule 26 are stated to be without prejudice to ss.16 and 17 of the Interpretation Act 1978, concerned with the effect of repeals, or to the transfer of any rights or liabilities saved by virtue of those sections and in accordance with a scheme under Schedule 2 providing for initial transfers (s.190(2)). The enactments specified in Schedule 27, including some which are spent or no longer of practical utility, are repealed to the extent indicated by the Schedule (s.190(3)).

8.18 Local Statutory Provisions: Consequential Amendments (s.191)

The Secretary of State or the Minister may repeal, amend or re-enact, with or without modifications, any local statutory provision where appropriate. Consequential amendments of this kind are for the purpose of, or in consequence of, the coming into force of any enactment contained in the Act (s.191(1)(a)). Alternatively amendments may be in consequence of the effect or operation, at any time after the transfer date, of any local enactment or of anything done under a local statutory provision (s.191(1)(b)). "Local statutory provision" is defined to mean a provision of local Act, or a provision of a public general Act having effect with respect to a particular area, person or works, or provisions made thereunder, or a provision of any other instrument which is in the nature of a local enactment (s.189(1)).

An order made by the Secretary of State or the Minister by way of a consequent amendment of a local enactment may make provision applying generally in relation to local statutory provisions of a description specified in the order (s.191(2)(a)). The order may make provision in relation to different persons, circumstances or localities (s.191(2)(b)), and may contain appropriate supplemental, consequential and transitional provisions (s.191(2)(c)). An order made after the transfer date may require a provision contained in the order to be treated as if it came into force on that date (s.191(2)(d)). Nothing in any consequential order may abrogate or curtail the effect of a any local statutory provision which confers any right of way, or confers on or

preserves for the public any right of enjoyment of air, exercise or enjoyment on land, or any right of access to land for the purposes of exercise of recreation {s.191(4)}.

The power of the Secretary of State to amend local statutory enactments has been exercised in the Water (Local Statutory Provisions) (Consequential Amendments) Order 1989 {SI 1989 No.1380}. Most significantly the effect of the Order is to replace references in local statutory enactments to water authorities by references to the Authority where functions, property, rights or liabilities are transferred to the Authority.

8.19 Application to Crown Land {s.192}

In contrast to certain previous provisions (see s.105(3) Control of Pollution Act 1974), the Act is generally applicable to Crown land. Subject to specified exceptions, the provisions of the Act have effect in relation to land in which there is a Crown or Duchy interest in the same way as they have effect in relation to land in which there is no such interest {s.192(1)}. Other than in specified circumstances, however, a power which is conferred by or under the Act in relation to land will be exercisable in relation to any land in which there is a Crown or Duchy interest only with the consent of the appropriate authority {s.192(2)}. This consent may be given on financial and other conditions which the appropriate authority giving the consent considers appropriate {s.192(4)}.

By exception, however, Crown or Duchy consent will not be required where any power would be exercisable notwithstanding the stipulation that the Act will apply to Crown or Duchy lands {s.192(3)(a)}. Consent will not be required for the imposition of charges for a service provided by a water or sewerage undertaker in the course of carrying out its functions {s.192(3)(b)}. In addition, consent will not be required for the purpose of specified provisions having effect in relation to grants of authority for discharges of water {under s.155 and Sch.20}, but these provisions are not to be construed as authorising the Authority to require the Crown to make any payment to the Authority {s.192(3)}.

8.20 Application to the Isles of Scilly {s.193}

Subject to the provisions of any order to the contrary, the Act does not authorise any function, duty or power to be carried out, performed or exercised in relation to the Isles of Scilly by the Authority or a water or sewerage undertaker {s.193(1)}. The Secretary of State may, however, on the application of the Council of the Isles of Scilly, make provision by order with

respect to the carrying out in the Isles of functions under the Act with or without modifications {s.193(2)}.

8.21 Commencement and Extent {s.194}

Those parts of the Act conferring any power to make subordinate legislation, or making provision with respect to the exercise of any powers to make subordinate legislation, and those sections concerned with the functions of the Director General of Water Services and mergers of water or sewerage undertakings {under ss.28 and 29} came into force on the passing of the Act on 6th July 1989 {s.194(2)}.

Commencement on the Transfer Date

A number of other provisions are stated to come into force on the "transfer date" which is stated to be the day appointed in accordance with s.4 of the Act {s.189(1)}. Section 4(1) of the Act provides that on the date appointed by the Secretary of State as the transfer date the functions of the water authorities are to become the functions of the Authority or of water or sewerage undertakers. Under the Water Authorities (Transfer of Functions) (Appointed Day) Order 1989 {SI 1989 No.1530} the transfer date was appointed as 1 September 1989. On this date schemes under Schedule 2 of the Act, for the division of the property, rights and liabilities of the water authorities between their successor companies and the Authority, came into force {s.4(1)}.

The provisions of the Act which are stated to come into force on the transfer date are specified to include the following provisions of relevance to the operation of the Authority: Part III, concerned with control of pollution, water resources, flood defence, salmon and freshwater fisheries, and navigation, conservancy and harbour authority functions; Part IV, concerned with powers in relation to land and works; Schedule 26, concerned with transitional provisions and savings; and Part I of Schedule 27, concerned with repeals coming into force on the transfer date {s.194(3)}.

Other Commencements

The provisions not brought into force on the passing of the Act or of the transfer date are to come into force on a day appointed by Secretary of State {s.194(4)}. A commencement order of this kind may make transitional provisions and savings in connection with the bringing into force of any provision which the Secretary of State considers appropriate {s.194(5)}.

Specified sections of the Act are to extend to the whole of the United Kingdom {s.194(6)}, others apply to Britain only {s.194(7)}, and certain sections extend to Scotland only {s.194(8)}. Subject to these stipulations and any enactment by which a provision of the Act has effect in relation to the territorial sea adjacent to England and Wales, and to provisions concerned with fisheries in border rivers {s.39(1) Salmon and Freshwater Fisheries Act 1975}, the Act extends to England and Wales only {s.194(9)}.

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