

Regulation,
Regulators, and
the Crisis of Law
and Government

Is there still an Economic Right to Water?

An analysis of the intersection of
rights and regulatory regimes

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Policy Brief

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The Foundation for Law, Justice and Society

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The Foundation for Law, Justice and Society

Regulation, Regulators, and the Crisis of Law and Government

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.



Executive Summary

- This policy brief addresses how the meaning and scope of farmers' economic rights to access and use water are changing through increasing emphasis on stewardship responsibilities. It outlines how regulation is increasingly seeking closer alignment of water use and stewardship by injecting public interest considerations into the legal interpretation of water rights. This has the potential to enhance the public accountability of private right holders. Market-based water resource management in England and Wales is currently considered by the UK government as one option for further promoting water stewardship.
- This policy brief highlights key issues discussed during a workshop held in Oxford on 19 March 2013 that addressed the question whether it is still meaningful to talk of an economic 'right' to water in the context of increasing restrictions on water use in England and Wales.
- The discussions brought to light the key challenges to understanding how water use rights can be transformed through stewardship of water systems, such as the multiple interpretations of key concepts, the need to integrate knowledge across distinct disciplines, the need to find a clear legal approach, and the need to devise effective behaviour-change strategies.
- Developing an appropriate legal and institutional framework for delivering an integrated catchment approach is critical to aligning water use with water stewardship. Farmers, as managers of extensive land areas, need to be part of this. Integrated catchment management needs to entail clear standards of performance for water users in order to align water use with water stewardship.
- The question of who should pay for water stewardship remains unanswered. Should it be the farmer as abstractor of water in a catchment, or should it be a wider range of end users of water supply services? The answer to this also depends on whether stewardship is perceived as addressing environmental harm or is treated as a water supply chain issue.
- This brief is one of several policy briefs emanating from the workshop. The briefs written by other workshop participants give a deeper analysis of specific issues that are covered here. These include:
 1. 'Rights, Interests and the Water Resource: Crossing the Rubicon?' <www.fljs.org/content/rights-interests-and-water-resource-crossing-rubicon> by Professor Karen Morrow, Swansea University;
 2. 'Water Rights and Water Trading in England and Wales' <<http://www.fljs.org/content/water-rights-and-water-trading-england-and-wales>> by Jon Stern, City University London;

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3. 'Integrated Water Resource Management and the Right to Water Security' <www.fljs.org/content/integrated-water-resources-management-and-right-water-security> by Professor Bill Howarth, University of Kent; and,
 4. 'Private Rights and Public Responsibilities: Recent Developments in Scots Water Law' <<http://www.fljs.org/content/private-rights-and-public-responsibilities-recent-developments-scots-water-law>> by Dr Sarah Hendry, University of Dundee.

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Introduction

This policy brief discusses how the meaning and scope of an economic right to water is being transformed through water stewardship obligations. Farmers are a key target group of stewardship obligations and their individual legal rights of access to, and use of, water are evolving to reflect this. Increasing regulation through both the state and markets may potentially change our understanding of the 'right to water'. In particular, regulation seeks closer alignment between water use and water stewardship and is becoming increasingly significant in light of recurring extreme weather events leading to alternate periods of water scarcity and flooding. Regulation seeks to inject public interest considerations into the legal interpretation of the scope of water rights in order to enhance the accountability of private water rights holders. This raises the question of whether there is still an economic right to water. Participants in a workshop at Oxford, held on 19 March 2013, debated this question.

Water stewardship: an emphasis on responsibilities in relation to water use?

Abstraction licensing in England and Wales is one of the main routes for acquiring administrative economic rights to water. The UK government's Water White Paper sets out proposals to reform the state-enforced regulatory system through the dynamics of a market in water, which potentially limits the security and certainty of abstraction rights (HM Government 2012). But currently administrative regulation of access to, and use of, water is still at the heart of water resource management in the UK, and consultations over the delivery of a more adaptable abstraction management system for more effective sharing of water resources between all uses are ongoing. This involves action through abstraction licensing, the

Environment Agency's Restoring Sustainable Abstraction Programme, the revision of Catchment Abstraction Management Strategies, and the drafting of the second round of River Basin Management Plans under the EU Water Framework Directive. All these administrative regulatory strategies have the potential to impact on the way that water is shared between abstractors and the environment and, hence, they also shape the contents and meaning of an economic right to water. The Department for Environment, Food and Rural Affairs (DEFRA 2013) has recently provided further guidance about the important role of River Basin Management Plans in contributing to the development of a catchment-based approach to water resources management planning.

Water abstraction matters for irrigation farmers (Allan 2011). Abstracting water for primary production may be framed as a property right: water is diverted from a catchment to be used as a private good with legitimate commercial expectations of use for primary production (Chartres and Varma 2011; Sax 2011). This private goods conception of abstraction accords with the fact that access to water can sometimes be purchased with land, that such water rights influence the cost of the land, and that access to water is central to realizing the economic value of the land, giving it a quasi-property status generating expectations of certainty of supply and protection from expropriation (Rochford 2011). But how can a public interest in potentially limiting this transfer of water from the environment to primary production be adequately taken into account if we think of water as being protected as a private economic right?

Contemporary understandings of socio-economic and environmental well-being, embed private interests within community concerns for stewardship of resources, thereby subjecting private water rights to greater public scrutiny. Enabling this relies on the law to provide a clear definition of to

‘whom’ and for ‘what’ stewardship responsibility is owed. Responsibility is concerned with conduct in the exercise of rights and its impact upon others (Cane 2002). Law and legal institutions can help to enable ‘water stewardship’, by setting the ‘formal rules’ about what is needed to prevent harm to the water environment and maintain catchment systems for posterity (Barnes 2009).

Stewardship is often understood as responsibility to care for property (Stevenson 2012). Historically related to estate management, it finds contemporary expression through farmer stewardship of the countryside (National Farmers Union 2012). This includes sustainable abstraction and ‘wise’ use of water for primary production, protecting the countryside, and maintaining scope for future generations’ resource use options (Nixon et al. 2000; Environment Agency 2009; Natural England et al. 2009; HM Government 2012). Understood more ambitiously, it is an active management process for maintaining ecosystem services that recognizes the integral role that farmers play in the management of catchment systems, while recognizing the state’s overall responsibility to set broad directions for maintaining those systems (Chapin et al. 2009). Water stewardship requires abstractors to recognize water as a form of environmental wealth that is held in trust and needs to be managed for the benefit of society as a whole (Byron 1975; Chapin et al. 2009; Iza and Stein 2009). This may be achieved by engendering a sense of individual responsibility for social goals by linking licensed water access and use rights with public good aspirations for sustainable management of environmental systems (McCann 2004; Environment Agency 2009; Rodgers 2009).

Specific rights and responsibilities in relation to water use that legally hold farmers (and other water users) to account for the protection of environmental systems can be an important element for realizing stewardship in catchments (Lucy and Mitchell 1996; Martin 2008; Iza and Stein 2009; Rodgers 2009). These must be clear so that the right holders are not subject to the risk of open-ended and unbounded water stewardship responsibilities (Fisher 2009; Shephard and Martin 2011). Importantly, the definition of rights and responsibilities should not be divorced from

localized governance settings (e.g., catchment management), since individual water user behaviour has been linked with communities re-establishing links to river and catchment systems and the ecosystem services these provide, enabling effective stewardship for a particular place (House of Lords European Union Committee 2012).

This brief has so far set the context for discussion and addressed the main themes of the workshop, including the question of whether and how the nature of a farmers’ economic right to water is changing amid UK government reforms to abstraction licensing. Further detailed analysis of these issues is available in the other policy briefs emanating from the workshop (see Executive Summary).

Emerging research themes in relation to water rights and stewardship

This section provides a reflection on the emerging themes, perceived knowledge gaps, and future research needs arising out of the workshop debates. It is based on a discussion during the final panel of the workshop, at which Bettina Lange,¹ Ronan Palmer,² Paul Hammett,³ and Bill Howarth⁴ shared their views and fielded questions from the audience. The discussion revolved around several unresolved challenges for developing water use rights in conjunction with stewardship of water systems. These include: the multiplicity of interpretations of key concepts, along with the need to integrate knowledge across disciplines; to find a clear legal approach; and to devise effective behaviour change strategies. Each of these challenges is addressed in greater detail below.

Emerging Theme 1: Pinning down the meaning of water stewardship and other key concepts

Stewardship has multiple meanings. It has been defined in this brief mainly in terms of care for property related to private entitlements to water and land areas. However, it may also include care for ‘un-owned’ public environmental goods (Alliance for Water Stewardship 2010). These different interpretations reflect contrasting views about what drives water stewardship behaviour: concern for private benefit versus public good.

Terms like ‘water scarcity’ may also mask different analytical approaches. For example, the legal framework directs us to understand scarcity mainly in terms of whether there are restrictions on what can be abstracted under a licence, yet this neglects the importance of drainage returns. Waste water management is a key aspect of securing environmental objectives associated with water stewardship. How waste water is managed in concert with abstraction volumes is a crucial issue for tackling water scarcity.

Water scarcity and drought are also terms whose meaning is sometimes confused, with important implications for distinguishing between private and public water stewardship responsibility. Water scarcity is a chronic problem of ordinary water use that puts too much pressure on the environment over prolonged periods. Drought, by contrast, is an acute period of reduced availability, amplified by the underlying persistent pressure of water scarcity. Water scarcity is framed as a private risk for individual abstractors to bear by managing reservoirs and trading water as part of their business. In periods of drought the risk becomes public. Conceiving of water scarcity as private risk and knowing how to respond to it, is a point discussed further in the section relating to Theme 4 below.

Emerging Theme 2: Developing knowledge about water stewardship and water security

Modelled trading systems offer insights into the different ways that water may be shared within a market. For example, the water trading project in East Anglia sought evidence about effective ways to trade water in a catchment by trialling models of improved pair-wise water trading and water trading within a common pool with abstractors and regulators in the Upper Ouse and Bedford Ouse River catchments (Raffensperger and Harou 2012). These simulations develop knowledge about the potential contribution of markets in water for promoting water stewardship.

But a complicating factor in developing knowledge about water stewardship and water scarcity here is that each academic discipline has a distinct perspective that may lead to different framings of the objectives and nature of water stewardship, and the meaning of key concepts used in discussion

about the regulation of the water environment. For example: law views a river in terms of a linear system to which are attached rights and obligations that regulate relationships between property holders, whereas economists view a river as part of a common water pool in a catchment system. These divergent perspectives highlight the importance of cross-disciplinary dialogue.

Similarly, from an economic perspective, barriers to free trade in food may be perceived as problematic. Global food trade, on the one hand, can offset the impacts of water scarcity. On the other hand, it can make the development of citizens’ awareness of water stewardship more difficult. For example, the EU Water Blueprint (European Commission 2012) identifies illegal abstraction and widespread over-abstraction as a current problem in southern European Union Member States. Trade in food from these countries further unsustainably depletes their water resources by export of water embedded within food: so-called ‘virtual water’.

Emerging Theme 3: Finding the right legal arrow to hit the target

Different types of law provide various strategies for thinking about what a right to water means, with no unified vision of what a fundamental right to water actually entails. For example, we encounter different conceptions of rights to water in property law, administrative environmental law, and human rights law. It is important to understand the differences between these legal interpretations of rights to water and to understand how such interpretations, and the regulatory strategies they engender, can be informed by water stewardship.

Moreover, rights to water are often embedded within institutional-legal frameworks. A key example here is river basin planning under the European Union Water Framework Directive. River basin management planning raises questions such as:

- (i.) Who generates expert knowledge for understanding the river basin and catchments within it?
- (ii.) What are the communities of interest?
- (iii.) How can their capacity be enhanced to develop stewardship approaches for the management of local water?

Managing the risk of water scarcity in an unpredictable physical system requires institutions that can plan and operate in order to provide water of the right quality, in the right place, and at the right time. This is likely to involve farmers as the managers of 75 per cent of the water catchment areas in England and Wales. In order to manage this risk, farmers need a clear standard of water use and water stewardship to work to. This may change with shifting expectations over time, but must be clearly specified as a means to reconcile private and public interests. There are already examples of farming practice standards that can serve as a benchmark for ecosystem service provision, such as the code of good agricultural practice (DEFRA 2009).

Emerging Theme 4: Shaping conceptions and changing behaviour

What contribution can socio-legal research provide to thinking about rights, regulation, and water stewardship? Distinctions between private and public rights need to be questioned in order to develop a deeper understanding of approaches to water stewardship in various networks of key stakeholders. An interesting issue here are agreements in the water supply chain. Water companies sometimes enter into agreements with farmers to shift standard farm practice when it impacts on an important water source. Another example of such ecosystem service provision may be the use of upstream farmland for flood storage.

But there is still an unresolved question of whether downstream water customers should pay for these upstream services or whether farmers should bear the cost of adopting alternatives to harmful practices. This points to another unresolved question: what does society want farmers to produce in a catchment? Media coverage of drought in the UK suggests that the impact of water shortages on food prices is what concerns the public, not how farmer stewardship might improve water security. For example, *The Daily Telegraph* published an article in May 2011 that described drought as 'a crisis that

will land, inevitably, on the city dweller's food plate, in the form of inflated prices', and supermarkets are blamed for pushing up the cost of food in response to predicted shortages (Aslet 2011). In February 2012, *The Observer* warned that farmers' choices about what not to grow due to drought 'could mean rising food prices for consumers' (Harvey 2012).

Hence, water scarcity demands a new approach to risk management from farmers, and for this, they need reliable information to understand what the risks are, how to manage them, and what can be done now to improve existing practices in water use and address the chronic water scarcity problem before the acute problem of drought arrives again.

Conclusions: Future research and implications for policy

This policy brief outlined how the meaning and scope of an economic right to water is being transformed through water stewardship obligations. The primary challenges to tackling this issue are the multiplicity of interpretations of key concepts, the challenge of integrating different disciplinary perspectives, the need to identify a clear legal approach, and the challenge of devising strategies to effectively bring about behavioural change, so as to transform water users into water stewards.

For reform of water rights, further trials of various trading systems are necessary in order to improve knowledge about what trading in water means in practice for water stewardship. Finding the appropriate legal institutional framework for delivering a catchment approach is also critical to aligning water use and water stewardship. Certainly farmers, as managers of extensive land areas, must be considered as an integral part of this. Within that process, the question of who should bear the potentially increased costs associated with a greater emphasis on water stewardship must be addressed, in the light of increasing uncertainty associated with climate change.

Notes

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