

Regulation,
Regulators, and
the Crisis of Law
and Government

Water Rights and Stewardship

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Policy Brief

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The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**

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.

A longer version of this discussion can be found in McGillivray, D. (2013) 'Water Rights and Environmental Damage: An Enquiry into Stewardship in the Context of Abstraction Licensing Reform in England and Wales', *Environmental Law Review* 15.3: 205–24, also available at <http://ssrn.com/author=565207>.

Executive Summary

- In English law, the right to abstract water is essentially a property right which is then subject to an administrative licensing system. This system has traditionally favoured existing abstractors. It has essentially been a way of deciding who gets to abstract water. It has been of limited use in protecting the water environment from ecological harm.
- Stewardship, meaning responsibility to care for land, is a central concept in property law. But there is much debate about the extent to which property ought to be subject to inherent stewardship obligations or whether there is already support for this, theoretically or in practice. The more that we can say that property rights are limited by stewardship duties, arguably the greater the scope for regulatory restrictions in the public interest.
- This brief looks critically at one particular law reform — section 27 of the Water Act 2003 — which enables abstraction rights to be varied or revoked without compensation in order to protect waters or aquatic flora and fauna from ‘serious damage’. The extent to which this reform to abstraction licensing law can be said to exemplify stewardship in a water rights context is examined.
- It is suggested that a range of factors are likely to limit the impact on private water rights. The case of section 27 should make us wary of whether any specific formal, doctrinal reform is likely to exemplify, or support, a shift towards stewardship in water or property law, and it draws out some of the complex relations between public and private interests that characterize stewardship.

Water Rights and Stewardship

Introduction

To what extent are water rights subject to restrictions based on ideas of stewardship? Water rights are, at common law, property rights. In England and Wales they have been subject to administrative control for fifty years, but property rather than regulatory thinking has tended to dominate. For example, existing abstractors effectively enjoyed protected rights to abstract whatever they had been abstracting when licensing came into effect; many of these generous rights still exist.

An obvious problem with abstraction licensing was that it could be fairly powerless to prevent environmental damage caused by existing abstractors. Abstraction licences could be varied or revoked but, showing the influence of property rights thinking as well as protection for investments, compensation had to be paid. The amount of compensation was a significant obstacle and few licences were altered other than voluntarily.

In 2003, Parliament enacted, as section 27 of the Water Act 2003, a provision under which abstraction rights may be varied or revoked without compensation in order to protect waters or aquatic flora and fauna from 'serious damage'. This provision came into effect in 2012. Simply put, the idea behind this is that no abstractor, whatever their licence allows, ought to cause serious environmental harm. This seems to be a strong example of environmental stewardship.

The literature on stewardship in property law does not follow a common path. For some, stewardship justifies a reordering of property rights, perhaps even by replacing private property with stewardship. Some point to existing examples of stewardship, but do not go so far as to argue for stewardship as a recognized facet of property

generally. More strongly, others argue that stewardship already exists, citing examples such as public 'right to roam' laws which limit the rights of landowners to restrict recreational walkers from their land. The stewardship debate, then, is a mix of theoretical and empirical arguments.

There is very little discussion in the literature about water rights and stewardship. Water rights may be more problematic to assess in stewardship terms, because of factors such as relatively ambiguous regulatory standards and the need to balance the interests of different water rights holders. Section 27 of the Water Act 2003 appears to be a good example of stewardship in practice. But on closer examination a number of factors limit the extent to which it can justify this description.

This analysis contributes to the debate about stewardship. Its contribution is distinctive because it looks in depth, and from a myriad of angles, at one specific example — in this case drawn from water rights reform in England and Wales. The hope is that it will give us pause when claims about stewardship in a water context are made, and contribute more widely to the critical literature on the exercise of rights and responsibilities in practice.

Stewardship

Stewardship is a concept found both in property law as well as in more general discussion of ethical responsibility towards the environment. In the main, law responds to problems of environmental damage not by reforming property law but through public, regulatory law. However, debates about property are relevant to public law reform (and vice versa). Ideas about property impact on what regulation may be able to achieve. These ideas shape our understandings of the relative importance to be attached to private rights and public responsibilities, and shape the way in which this balance or calibration is undertaken, for example whether

society should compensate owners for the loss of their rights, or otherwise what degree of respect and protection we feel the rights holder is entitled to. Liberal approaches to property typically focus on what are argued to be core rights (for example, rights of use, access, and alienation) that are said to inhere in property. By contrast, stewardship approaches typically stress the extent to which outward-looking obligations are inherent. For some, the essence of a stewardship approach entails certain restrictions on land rights in the wider public interest. Others stress that stewardship also entails the owing to others or to the natural world of duties.

Responsibility with respect to property is central, but beyond this there are peripheral, and more problematic, aspects of stewardship. The first is what is the benchmark or baseline for any stewardship obligation? This can be a problem because what is judged to be a minimum environmental-regarding duty might be based on regulatory standards which are transient or extremely imprecise, such as ‘good environmental or agricultural practice’.

A second issue is whether stewardship can arise from, or can attach to, voluntary or personal (rather than property) actions? Can a voluntary economic incentive scheme — such as Environment Stewardship, one of the main schemes which implements EU agri-environmental law and policy — illustrate ‘stewardship’ as this is understood as a duty-imposing concept?

A third problem relates to compensation; if compensation is paid for the loss of a right, does this matter how we think of this in stewardship terms? There is an increasing use of economic mechanisms to deliver environmental policy goals, including the ‘payment for ecosystem services’ agenda. Typically this approach emphasizes both the value of paying for the provision of public, ecological benefits, and the primacy of the land manager as ecological custodian. This approach emphasizes that income may be foregone and public benefits generated which the public should pay for. Arguments in favour of stewardship in property law generally include arguments against financial compensation for loss of ‘rights’, either because the right to determine how land is used must necessarily be already restricted in the wider public interest or, in the case of statutory

developments, the legislative reform signals the social, attitudinal shift which justified the rebalancing in the first place.

These three factors seem to muddy the waters of the stewardship concept. They are, perhaps, not so peripheral but, actually, rather central to our understanding of stewardship as a concept.

One way to help understand these points is to set up two distinct, though related, models of stewardship. On the one hand there is stewardship as a model in property law, and on the other there is stewardship as a policy approach. Better stewardship of natural resources can be approached through either route. For example, property rights can be recalibrated by, amongst other things, legislative or judicial realignments, or land can otherwise be subject to techniques to encourage certain land management practices. The former more clearly engages stewardship as a property concept; the latter is more in line with stewardship as a policy approach. Under the policy approach, whether, for example, money is paid out is essentially a policy question, to be decided on the basis of whether doing so would be necessary to influence behaviour and would be good, effective public policy, although this cannot be approached without regard to prevailing social attitudes. Similarly, a voluntary approach can be justified as good policy because of the principle in favour of liberty, and because it is likely to be less of a regulatory burden, but a more mandatory, prescriptive approach may be justified if voluntarism is not effective. In practice, there is likely to be significant cross-over between these approaches.

Abstraction licensing: law and reform

In England and Wales, statutory controls on water abstraction were first introduced in 1965 under the Water Resources Act 1963 and the law is now contained in Part II of the Water Resources Act 1991 which sets out the basic framework of regulatory controls over abstraction and impounding, the regulator being the Environment Agency or Natural Resources Wales. Ever since the 1963 Act, however, existing abstractors have been treated generously, being given permanent licences — ‘licences of right’ — based on their prior use, on a ‘first come first served’ basis.

The Water Act 2003 made some important changes to the law on water resources. These were motivated partly by national concerns, and partly by the need to implement the EU Water Framework Directive. The passage of the 2003 Act preceded the enactment of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, the principal implementing measure, and makes no mention of the Directive. But it is clear that the Directive played a role in shaping the 2003 Act, though the division between Act and Regulations was messy and unimaginative.

The Water Framework Directive contains provisions as to water quantity as well as quality, though both feed in the basic legal requirement to 'aim to achieve' 'good status' of certain waters by 2015. There is uncertainty about the precise legal obligations in the Directive and when they need to be achieved. The UK government terms the 2015 objectives the 'default objectives' of the Directive, but also speaks of the Directive's 'alternative objectives' which essentially need to be met by 2027. It is a matter of uncertainty what 'aiming to achieve' these objectives entails. In England and Wales about 4 per cent of rivers are failing to support Water Framework Directive good ecological status due to pressures from over-abstraction.

An abstraction licence can be changed voluntarily, without compensation. If voluntary agreement cannot be reached, the Environment Agency has powers to propose to vary or revoke the licence. This is subject to ministerial scrutiny and to compensation.

At one stage charging was seen as a way of driving voluntary conversion from permanent to time-limited licences, though this was quickly ruled out. However, charging has also been seen as a mechanism through which compulsory licence changes could be funded. The charging scheme includes an environmental improvement unit charge (EUIC). The EUIC is, in principle, to recover the costs of compensation payments paid under the Environment Agency's Restoring Sustainable Abstraction (RSA) programme, which provides a mechanism for licences to be removed where an abstraction is causing environmental damage. RSA is a non-statutory process, and applies to sites designated for nature conservation reasons. Licences may be varied or revoked but, as a straight application of the Water Resources Act 1991, compensation is paid. This review process was to

have been concluded by 2010, but remains ongoing. The basic idea was to use charging to incentivize behavioural change towards more efficient and less environmentally harmful water use. The reality is that the EUIC has not accumulated sufficient funds and only a relative handful of licences have been reformed on a compulsory basis. The process has essentially stalled and has been described as 'clearly unsatisfactory and ... causing ongoing and severe damage to the environment'.¹

For the future, the current Water Bill envisages that the price review process, under which the privatized water and sewerage companies' prices and investment decisions are determined for five-year periods, will be used to fund sustainable abstraction schemes. To help drive this, water companies will not be compensated for withdrawal or variation of their licences, in effect applying the thinking behind section 27 to all water company abstractions. In parallel, non-legislative initiatives such as OFWAT's voluntary Abstraction Incentive Mechanism will be rolled out. The longer term may see more general reform of abstraction licensing.

Section 27 Water Act 2003

Section 27 removes the right to compensation where an abstraction licence, which was granted before 1 April 2006 and which is not time limited, is varied or revoked, as directed by the Secretary of State or Welsh Ministers on or after 15 July 2012, to protect the water environment (as broadly defined) from serious damage. Although section 27 only refers to the role of the Secretary of State, in reality section 27 is the end point of a process that begins with a search for voluntary licence change, and cases will only be referred to the Secretary of State if the licence holder formally objects to a compulsory licence change.

Section 27 does not define 'serious damage', prompting concerns about legal uncertainty. Interpretive guidance, which indicates that the term includes potential or risk of serious damage, uses three principles under which the qualitative nature of the damage, the extent and magnitude of the damage, and whether the damage is reversible and how long recovery may take, are to be established. All three principles are to be considered and the final decision taken on a case-by-case basis. Cases are to proceed by trying to negotiate a voluntary variation

(and in an extreme case, revocation) to the licence (which would not entail compensation) and only if this is not successful to look to use section 27.

Section 27 and stewardship

What might section 27 have to say about water rights and stewardship? Since it has yet to be used since coming into force, there are obviously certain limits to any analysis. Nevertheless, although in a sense they are all regulatory in nature and hence related, there are specific interpretive, and wider regulatory and economic, factors surrounding this provision which can inform such an analysis.

Interpretive factors

Whether section 27 is used is ultimately dependent upon the Secretary of State being 'satisfied' that this is 'necessary'. This form of wording is clearly less qualified than some environmental remediation provisions, but it is also somewhat less than an automatic public law duty, which could have been cast as requiring, if serious damage is occurring, variation or revocation to prevent such damage. Part of the intention, as evidenced by guidance, is to allow the Environment Agency or Natural Resources Wales discretion to use the threat of section 27 to reach a negotiated solution with abstractors before the matter is referred to the Secretary of State, but equally the Secretary of State also has some degree of discretion in deciding whether to serve a direction to the Agency or Natural Resources Wales to vary or revoke because he or she could be satisfied that ongoing negotiations meant that it was not 'necessary' to serve.

There is also a lack of clarity about whether the use of section 27 should be driven by Water Framework Directive implementation. The 2012 deadline suggests implementing the provision of the Directive concerning programmes of measures to be operative, which had to be completed by then, but the 2003 Act is wholly silent about the Directive. Although section 27 could, it seems, be used either to give effect to the Directive or just for national reasons, the lack of clarity, both of section 27 and the guidance, further complicates matters.

There is also the very ambiguity about what the objectives of the Directive require. The general

quality objectives of the Directive, and the dates by which these are to be achieved, create a considerable degree of interpretive uncertainty. The vagueness of the Directive's objectives may in practice limit its application, because of the discretion not to find that, for the purposes of the Directive, there is 'serious damage' (the negative concept of damage not fitting well with the positive concept of good status which the Directive uses).

Regulatory factors

A number of regulatory factors shed light on section 27 from a stewardship perspective. Firstly, section 27 seems to be aimed at incentivizing holders of licences of right to convert to time-limited licences, for which the nine years between enactment of the Water Act 2003 and its coming into force would seem to have been ample time. But there is no evidence that this has occurred. Nor is there evidence that section 27 has driven behavioural change in abstractors who might be likely to be caught by its provisions. The consultation process and issuing of Guidance on the implementation of section 27 was completed *after* the section was in force. This hardly suggests an official view that providing potentially affected abstractors with more specific guidance on how 'serious damage' would be interpreted for the purposes of section 27 would force behavioural change in the intervening period.

A second regulatory issue concerns shifts in the nature of regulation itself. The relationship between rights (and, for present purposes, also responsibilities) and regulation, however, is also complicated by the distinction between regulation as providing certainty for property and for market transactions, and regulation pursuing non-market objectives such as ecological enhancement, aims which can be pursued simultaneously but whose simultaneous pursuit, in practice, often tends to prioritize legal certainty. In other words, when we assess a measure for its 'stewardshipness' we need to ask whether the measure really advances community-owed obligations or, and to what extent, it pursues market-stabilizing, property-protecting objectives. Much of the wider context emphasizes the latter more than the former. Some, for example, argue that state-engineered water markets advance community obligations by trying

to provide stability to commercial water transfer.² A third regulatory issue relates to human rights law. There is no evidence that the lengthy time period in section 27 becoming operative was motivated by human rights concerns, but nor is it an irrelevant factor in terms of striking the fair balance needed under the Convention. It is likely that it would have been in the minds of the legislators because both the seriousness of any losses, and the absence of compensation, are factors in determining whether a fair balance has been struck. Both revoking and varying a water abstraction licence lie further towards the 'taking' end of the spectrum of interference rather than controlling the use of the right (the right-holder can't do anything else with the subject of the right). Human rights factors, whilst never as restrictive of regulation as many fear (or, in the case of the NFU in relation to section 27, might like), nevertheless influence the context within which property rights are redrawn.

A final regulatory factor relates to the scientific basis for variation or revocation. Progress has been made under the review of consents process, but generally there are significant limitations in knowledge about the impact of flows on ecology, and resort to modelling. Modelling may be an appropriate tool to inform general catchment management but is likely to be less robust as a justification for removing rights without compensation. Such information-deficit problems limit the likely practical impact of section 27.

Economic factors

Some of the points made above in relation to regulation clearly engage economic issues; for example, human rights claims are likely to be about uncompensated economic interests. Beyond this, further economic issues arise. During the transition period (2003-2012), both the 'review of consents' process and the Restoring Sustainable Abstraction programme have been ongoing. The latter has not been especially effective because of serious weaknesses in the funding mechanism devised. But the former has seen compensation paid out where designated sites are affected. Both processes, then, have involved compensation for the withdrawal of rights, and the time frames have, to say the least, been advantageous to abstractors holding 'licences of right'. Hence, many instances of 'serious damage'

will have been addressed through the payment of compensation before section 27 came into force or, in the case of water companies, dealt with as voluntary changes under section 51 of the Water Resources Act 1991. The extent to which problematic abstraction rights are likely to have been addressed voluntarily, through compensation, makes it more difficult to argue that the reform in section 27 is evidence in practice of a strong shift towards stewardship.

Conclusions

Section 27 of the Water Act 2003 does seem to be aimed at making inroads on the broadly liberal property rights framework. On its face, it seems to embody a strong, and relatively less contentious, stewardship approach, limiting private rights in a water law context in order to advance important public interests. But it is important to drill down into specific legal provisions, and the context within which they have been enacted and implemented, to assess more fully whether such an assessment is justified.

What the analysis reveals is a complex picture involving a confluence of factors at work, many of which engage the fuzzier aspects of stewardship as a concept. Taken together, the various factors discussed limit section 27 in terms of its potential to recalibrate or reshuffle water rights from liberal to stewardship approaches.

It would be wrong, however, to suggest that section 27 somehow advances a liberal model of property. The example indicates some of the complex ways in which private rights and public interests interact formally and in practice. The private right to abstract water without regard for serious environmental consequences is now subject to legislative control, and this in itself is a significant step in the direction of stewardship. But what if we pose the issue from a different angle and ask: 'Is the abstractor who causes serious environmental harm now subject to environmental stewardship responsibilities?' It is suggested that if this were asked today the answer to this might not, for the reasons set out, be so embracing of stewardship.

Implications

For those, like the author, who think that there are strong theoretical and ethical arguments to be made for stewardship as an approach to land rights, the implications of this analysis are somewhat uncomfortable. They seem to weaken the argument that because we can find examples of stewardship 'on the ground', this strengthens the argument for stewardship as an orienting approach to property law. Put simply, it just matters whether we build arguments on solid foundations.

None of this, of course, restricts the scope for the law to move in the direction of greater stewardship responsibilities towards land and towards water. But it should give us pause about the nature of existing rights and responsibilities, not least when some would probably like to be seen as custodians, or stewards, of the water environment.

Notes

¹ House of Commons Environment, Food and Rural Affairs Committee, *The Water White Paper*, Second Report of Session 2012–13, HC 374, para. 18.

² Stern, J. (2013) 'Water Rights and Water Trading in England and Wales', FLJS Policy Brief. Oxford: Foundation for Law, Justice and Society. Available at: <http://www.fljs.org/content/water-rights-and-water-trading-england-and-wales>



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