

# Salmon & Trout Association & Anglers' Conservation Association

October 2003

## Response to the ENVIRONMENT AGENCY Trading Water Rights – a Consultation Document

The Salmon & Trout Association (S&TA) and the Anglers' Conservation Association (ACA), while pleased to have the opportunity to respond to this document, nevertheless view the prospect of trading in abstraction licences as set out in the document with grave distrust. Inevitably trading will be concentrated on abstractions from areas where over-abstraction already occurs or which are over-licensed and thus potentially over-abstracted. That brokers might be attracted to seek out trading possibilities, perhaps build up a portfolio of licences for sale and hawk them around in search of a profit is to say the least not an edifying picture. It becomes even more objectionable when the product for sale is something so environmentally vital as water from an over-abstracted catchment. But that could happen if licence trading became popular and is actively encouraged. If trading does not become popular, there would seem to be little need to provide for it.

If it has to be accepted that licence trading has been approved and is encouraged at Government level, very careful control will have to be exercised to ensure that no environmental harm results. While with care licence trading may permit in the end a fairer share out of such water as may be available, it is not clear how its use can reliably achieve any environmental improvement.

It is with that background that the following responses to the various questions have to be made. **It must be emphasised that in most cases we are considering transactions to be made in an area where water is scarce and already actually or potentially over-abstracted.**

*WRT1 Would adopting existing tests for assessing reasonable need be appropriate for water rights trading or would it give rise to any particular problems? If you consider that existing tests would cause problems for trading, how should reasonable need be assessed for trading applications or particular types of trading application?*

A. Broadly, yes, to the first question, but see also the response to WRT4 in particular cases. Reasonable need must be the first requirement to be considered in any application; there can never be justification for unreasonable need. The existing tests as such should not create unnecessary problems in trading, though it may be necessary in certain circumstances, as shown in answers to later questions, to include other tests.

*WRT2 Do you consider that we need to assess reasonable need when determining trading applications or should we presume that a need is reasonable if someone is prepared to pay for it?*

A. To the first part of the question – certainly, “Yes!” To the second part of the question – emphatically, “No!” Financial aspects of trading must never have priority over environmental ones. An applicant's willingness to pay is no guarantee of reasonableness of need.

*WRT3 Should brokers be able to apply to change the conditions of an abstraction licence to sell water rights on and, if so, should any particular constraints be placed on such licences?*

A. Whether sold through a broker or directly from abstractor to purchaser, any request to change the conditions must be considered on its merits and in no case should relaxation of conditions be made that would have harmful environmental consequences. Brokers do not hold licences and

should not therefore be in any position to apply for any change unless acting as an accredited agent of and at the request of the purchaser.

*WRT4 Should we adopt a test of reasonableness of purpose when assessing applications for abstraction licences resulting from water rights trades? If a test of reasonableness of purpose is adopted, how should we establish a hierarchy of purposes against which reasonableness should be assessed?*

A. Reasonableness of need must be the first and essential test to be passed. As for reasonableness of purpose we have to be sure what is meant by the phrase. For example a non-consumptive abstractor such as a fish farmer may want to sell all or part of his licence to an agricultural farmer for totally consumptive irrigation purposes. To the purchasing farmer that would constitute both a reasonable need and a reasonable purpose, but in the context of a water starved river it would be unreasonable. It should therefore not be permitted. That may be an extreme example but nevertheless illustrates the need to consider purpose outside the realms of Planning or Local Authority issues in certain cases. If each case is dealt with on its merits the need for establishing a formal hierarchy can surely be avoided. The EU SEA Directive (Strategical Environmental Assessment) and the forthcoming revision to the EU EIA Directive (Environmental Impact Assessment) should impose requirements to determine reasonableness.

*WRT5 Should we assess water efficiency when determining a trading application or should the level of efficiency achieved be left to the market to determine? If we should assess water efficiency, are existing water efficiency tests suitable for trading applications or would you suggest an alternative approach?*

A. All users of water have or should have a duty to use their water efficiently. Reasonableness of need must therefore allow for efficient use and this in turn must place a duty on the Agency to be satisfied that the application is consistent with efficient use. Such water efficiency tests as are available, for example, complying with BPEO (Best Practicable Environmental Option) and BATNEC (Best Available Technology Not Entailing Excessive Cost), should be used; if more can be devised they should be utilised.

*WRT6 Do you agree with our view that an abstraction licence cannot be granted for in situ use and do you have any comments on the reasoning behind that proposal?*

A. Yes. While the idea of acquiring licences for environmental purposes to prevent abstraction has a superficial attraction, it is contrary to the purposes and intentions of abstraction licensing. Such artificial devices are not the correct way to protect the environment; that should be done by limiting used abstractions to such amounts as avoid environmental damage.

*WRT7 Do you have any comments on the possible approaches to site-specific environmental proposals arising through trades?*

A. No, the proposals seem entirely adequate and correct.

*WRT8 Do you consider that consistency with water resources and drought plans provides an appropriate framework to consider proposals from water companies that wish to trade in headroom or should there be more or fewer constraints upon such trades?*

A. Water companies are private companies which draw water under abstraction licences to sell to members of the public (whether private individuals or other industries or organisations) or even amongst themselves. They also have a statutory duty to maintain such supplies. For such

companies to allow what would in effect be just another customer to take surplus water that may temporarily be available, however environmentally undesirable, would hardly equate to licence trading. There would seem very little that the Agency could do about it. Perhaps Ofwat could exert influence if necessary.

*WRT9 To what extent will the Agency's proposals to apply existing tests of reasonable need, as discussed in section 3.1.1, discourage the abuse of dominant market position in a catchment?*

- A. To the extent that attempting to obtain water rights is for the purpose of obtaining a dominant position, the criterion of reasonable need would oblige the Agency to refuse any such application. The onus must be on the applicant to prove reasonable need, or where reasonable need exists to show that the point at which the licence is applied for is the only practicable location. The proposed bulleted precautions would seem to provide acceptable safeguards. Since it would be possible to trade only in specific sectors and locations, with the exception of water companies it would scarcely be possible to build up such a position.

*WRT10 What are your views on the options for trading in over-abstracted and over-licensed catchments that we have considered and on our preferred option for such trades? Are there any options you feel we should consider further or dismiss entirely, or any other options you believe we should consider?*

- A. This is the area of major concern to the S&TA and ACA. Any trading in over-abstracted or over-licensed catchments is likely to have as its aim the abstraction of unused water in existing licences and thus to increase the total amount abstracted. While the document appreciates these dangers, the various options considered all present their own problems. Option 1 appears to have been dismissed because its rigidity effectively prevents trading in over-abstracted and over-licensed catchments. Yet it provides the most environmental safeguards; on that basis it ought to be encouraged. Option 4 has been preferred on claims that it can achieve within 12 years a return to sustainable conditions. In practice even with the benefit of time limited licences there must be doubt how this can be assured. Moreover 12 years is too long. Even the graphic illustration increases concern, for that shows a significantly increased abstraction for about the first six years. This surely is a case of pie tomorrow.

While fully appreciating the Agency's dilemma in which trading in over-abstracted and over-licensed catchments must put them, the S&TA and ACA feel strongly that a return to the drawing board is needed. For trading to result in an increase of abstraction in sensitive locations for as long as six years, or even at all, makes no environmental sense. At the very least there must be some clear cut statement as to how any improvement will be achieved and how long that will take. With so much uncertainty it is no surprise that the explanations in the Document in favour of Option 4 are far from convincing. Nor would it appear that Option 4 could comply easily with the requirements of the EU Water Framework Directive for Good Ecological Status.

*WRT11 Is the existing pre-application consultation process, together with greater availability and accessibility of information, sufficient to support the trading process without a pre-approval system and, if not, what else is required?*

- A. Yes. The present arrangements for informal pre-application discussion are just as appropriate for those wishing to trade as they are for first time applicants. Pre-approval prior to a formal application should never be given. That must still be the case even if the trade is like for like in every particular, and approval might be expected to follow as a natural consequence. In practice completely like for like trading may well be rare.

*WRT12 Is a case-by-case approach, with indications of likely requirements for particular types of trades, an appropriate way to specify supporting information for a trade or should more clearly defined approaches be sought for particular types of trade? To what extent will better availability of information help potential buyers and sellers to assess what supporting information will be necessary? If we were to indicate the likely supporting information for particular types of trades, how certain would applicants need to be that this would be the information needed to support their particular application?*

A. Yes, to the first question. A case-by-case approach is the only appropriate way to deal with trading applications in a sensitive area. Providing additional information leaves the Agency open to criticism if any of it should prove to be wrong.

*WRT13 Do you agree with the proposed definition of a short-term trade? If not, how would you change the definition?*

A. The text preceding this question is of greater importance and raises its own questions: what is meant by “environmentally beneficial” and how does this affect the need to advertise? In an over-abstracted or over-licensed catchment it is not easy to see how any trade that does not *decrease* the amount abstracted could be regarded as environmentally beneficial. Even short term increases in this respect can only be harmful. Perhaps a no change in volume but a switch from Summer abstraction to Winter could show some benefit, but in general there seems little opportunity for avoiding advertising on the grounds that there will be environmental benefit. The prospect of a pooled licence from which several abstractors can draw suggests an undesirably complicated arrangement difficult to control and enforce. More explanation of what the Agency regard as environmental benefit and how trading can provide it is urgently required. See also the response to WRT10.

Yes, the definition of short-term trades is agreed.

*WRT14 How could environmentally beneficial and short-term trades be further facilitated within the structures provided by the Water Bill.*

A. How indeed! This may be more easily answered when the Water Bill becomes law.

*WRT15 If generic rules cannot be established for trades between surface water and ground water, do you feel that this is likely to significantly discourage such trade?*

A. Undoubtedly it will, but that can surely be accepted for as is stated such trades are likely to be rare and the need for site-specific investigation may be complicated.

*WRT16 Do you support the enforceability of licence conditions against both the buyer and the seller in a trade or would trading be further encouraged if only the buyer or the seller was to be liable for enforcement purposes?*

A. Yes, if linked licences are permitted, the conditions should be enforceable against all the holders.

*WRT17 Do you agree with our proposals on price information or would you prefer to have access to information on the prices paid as part of specific trades?*

A. The Agency should do no more than proposed and should not get involved in giving information about prices which are primarily private matters between the parties trading.

*WRT18 What is the minimum information that potential buyers and sellers would require to take part in trading and would changes to the form in which we hold this information encourage you to trade?*

- A. Surely the primary purpose of the Agency is to regulate the amount abstracted and the conditions under which abstraction can take place, not provide special information to encourage those wishing to trade. Potential traders should find that access to the information available to the public is adequate, but there is no obvious justification for providing more.

*WRT19 Will the information suggested for CAMS provide the information that buyers and sellers would find useful in these documents, or would you suggest any changes in the information or format suggested?*

- A. The primary purpose of CAMS is to achieve the sustainable management of water resources within each catchment. If in the process of producing CAMS in this way information is made available which is of value to potential traders, well and good. But it is no business of CAMS to assist trading unless it can be clearly shown that by doing so the aims of CAMS in terms of ensuring sustainability are being more efficiently achieved.

*WRT20 Do you believe that the development of a trading website by the Agency would be of value or is this something that should be developed by the private sector?*

- A. The Agency should not get involved in matters outside their proper functions. One of the main concerns of the S&TA and ACA over trading is that the Agency will become involved in additional administrative demands for which their resources may be inadequate without prejudicing their environment protecting duties.

*WRT21 Would the provision of a website by the Agency confuse its role with the role of brokers.*

- A. Yes.

*WRT22 Do you agree that the Agency should not act as a broker of water rights nor establish any specific system of accreditation or regulation? If you believe that the Agency should carry out one of these roles, please explain why.*

- A. The Agency's job is to ensure that trading is accomplished without detriment to the environment. It should be no part of the Agency's duties to act as broker or actively encourage trading except where such would clearly be of environmental benefit. In environmentally sensitive areas, that includes in the short term as well as in the long term.

*WRT23 Do you consider that the lack of any specific scheme for regulating or accrediting brokers would significantly impair the development of the water rights trading market and, if so, in what way?*

- A. This is not a task the Agency is equipped to do, it is a matter for Ofwat. Persons acting as brokers do not and must not own water rights; their only authority must be in the capacity of properly accredited agents of prospective traders. See also the response to WRT3.

*WRT24 Do you consider that any further monitoring of water rights trading is required and, if so, what should this involve?*

- A. Monitoring should concentrate on the pattern of abstraction, its duration, the volumes of water abstracted, and the method of final disposal of the abstracted water before and after trading. The fate of the water is just as important as how, where and in what volume it is abstracted. Will it become more or less consumptive? Will it be finally discharged as a potentially polluting effluent? Will the location of the discharge change, and will it be more or less environmentally damaging. Those are the factors on which the Agency's monitoring of trades should be based.

*WRT25 Do you have any comments on our intention not to auction trading rights without additional statutory powers, but to explore options for auctioning water rights in the future..*

- A. Auctioning of water rights should NOT be a matter for the Agency.

*WRT26 Is the potential conflict between the Agency acting as a regulator and a seller of water rights acceptable or should we refer applications in which we have an interest to the Secretary of State or the National Assembly for Wales, in the same way as other licence applications made by the Agency? Alternatively, are the conflicts inherent in the Agency trading licences such that licences held by the Agency should not be traded as a matter of principle?*

- A. The S&TA and ACA feel strongly that if licence trading proceeds, the Agency should adopt a hands-off attitude to all commercial aspects of trading whether concerned with promotion or pricing. They should be concerned only with their regulatory duties for ensuring that abstractions are licensed and managed in the best environmental interests. The Agency should not therefore sell any of the licences they already hold which are all for special or environmental purposes which in the two Associations' view make them unsuitable for trading.

**Finally, it cannot too strongly be emphasised that licence trading, by its very nature, is likely to be most attractive to potential traders in those catchments which are already over-abstracted or over-licensed. This places a special responsibility on the Agency to ensure that whatever trading is permitted does not lead to yet further environmental deterioration in a catchment already under stress. If trading proceeds – and how committed is the Agency to trading? - that must be the principal role of the Agency. They should not get involved in promoting trading *per se*, or in the financial transactions between buyers and sellers.**

**The Salmon & Trout Association and the Anglers' Conservation Association are also concerned that as a development of abstraction licence trading, there may be moves to encourage trading of discharge consents. This would be little better than trading in pollution, a concept which is frankly odious. That is why it is important that when considering licence trades, due attention is paid to the final disposal of the water abstracted, so that apart from any harmful effects from the withdrawal of water, there are no other adverse consequences from its final disposal.**