Parliamentary and Health Service Ombudsman

The Earl Report: An investigation into a complaint about the Environment Agency

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Public Service Ombudsman

HC 1233

Parliamentary and Health Service Ombudsman

The Earl Report: An investigation into a complaint about the Environment Agency

Presented to Parliament pursuant to Section 10(3)
of the Parliamentary Commissioner Act 1967

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Foreword

As Parliamentary and Health Service Ombudsman, I have the responsibility to make recommendations to Government departments to put right any suffering and injustice caused by their actions. It is important that departments fix mistakes when they happen. Failure to do so erodes public trust and confidence in the public services provided.

The case outlined in this report sets out how the Environment Agency (the Agency) failed to effectively manage an application for a hydroelectric scheme. Furthermore, since our initial publication of the report, we consider the Agency has not complied with all our recommendations. It has not sought to sufficiently minimise the impact of its failings on the complainants.

Steve and Ewan Earl operate a small building firm. They complained that the Agency's actions had a catastrophic impact on their business, resulting in significant financial losses. They also said failure to resolve issues about how to remedy the mistake meant they could not move on with their lives. This caused prolonged upset and emotional distress to the brothers and their wider family.

We have continued to try and mediate between both parties. The Agency initially agreed to implement recommendations from our original investigation. In compliance with the first three recommendations the Agency apologised to the Earls and paid them an interim sum, pending the determination of a final settlement, engaged with an independent review by Counsel which failed, and then engaged with a review of the case by the Department for Environment, Food and Rural Affairs (DEFRA).

The failure of the process means that, in our view, the Earl brothers have yet to receive a sufficient remedy for the hardship they have suffered. The Agency later increased the level of compensation offered to the brothers following further discussions with PHSO and DEFRA. However, in our judgement, the increased offer was still inadequate, despite the considerable additional time taken before this was made.

Bodies in our jurisdiction should comply with PHSO's recommendations. Parliament gave me powers, on behalf of citizens, to investigate complaints about Government departments and their agencies. When I find failings, I can make recommendations for redress. However, it is highly unusual for my recommendations to be rejected. In this case, the Agency considers that its approach to compensation is appropriate and proportionate. I do not agree. In such circumstances, I can lay a report before Parliament so that MPs who created this failsafe for citizens using Government services, can examine the situation. I have decided to lay this report in Parliament considering the unbridgeable gap between the PHSO and the Agency.

I want to thank the Permanent Secretary in DEFRA for her efforts to resolve this matter and for the review carried out by DEFRA, the findings of which played an important role in the progress of the case. We note that accountability rests with the

arms' length body and not with the Government Department. I am therefore laying this report before Parliament, under section 10(3) of the Parliamentary Commissioner Act 1967. I bring this to the attention of Parliament for it to consider taking action to remedy the failure of the Environment Agency, provide adequate compensation and deliver justice to the Earl family.

Rob Behrens CBE
Ombudsman and Chair
Parliamentary and Health Service Ombudsman

The complaint

1. The Earls complained that when assessing their application for an abstraction licence, the Environment Agency (the Agency):

- gave the Earls incorrect information
- failed to comply with internal procedures and were potentially biased[1] in favour of a competing scheme
- failed to comply with statutory procedures
- abused their power by deliberately halting the Earls' appeal
- delayed issuing the licence following the decision of the Administrative Court to quash the Agency's deemed refusal of their licence application
- breached Agency conduct rules.

2. The Earls complained they had still not had a decision on their application and suffered financial loss as a result of the Agency's actions, as well as inconvenience.

The decision

3. We partly uphold the Earls' complaints. We found maladministration in the way in which the Agency dealt with the problem of two competing applications and in how they dealt with and communicated with the Earls. We found that their maladministration resulted in a delay in starting to apply a merits-based approach which we have calculated at 21 months, resulting in a great deal of stress and anxiety for the Earls. On the balance of probabilities, we are not able to say that the Earls would have been awarded the licence had there been no maladministration.

The Ombudsman's remit

4. We explain the Ombudsman's jurisdiction and role in Annex A to this report. In essence, the Ombudsman's approach when deciding complaints is to compare what should have happened with what did happen, and to decide if what did happen was such poor service as to amount to maladministration. In order to do this we use an overall standard. This is a combination of the general and the specific standards. In reaching a decision about the Earls' complaint, we have also used the *Ombudsman's Principles*. More information about this, and the principles most relevant to the Earls' complaint, is set out in Annex B.

[1] In this report, we have adopted the definition in the Oxford English dictionary: *'inclination or prejudice against one individual or group, especially in a way considered to be unfair'*.

General background

The Agency

5. The Agency is a non-departmental public body of the Department for Environment, Food and Rural Affairs. It was set up under the Environment Act 1995. Section 4 of the Act sets out the principal aim of the Agency - in discharging its functions, the Agency is required to protect or enhance the environment.

The Agency's approach to hydropower schemes

6. In 2003 the Agency published a *'hydropower handbook'* for staff to help them deal with hydropower proposals in a *'positive, consistent and efficient manner'*. The handbook was also available to developers and other interested parties to help explain the Agency's statutory duties in relation to hydropower. It provided guidance to staff on the Agency's legal obligations, their regulatory function and the considerations they were required to make when dealing with hydropower schemes.

National Permitting Service

7. In 2008/09 the Agency started to see an increase in the number of applications for hydropower schemes. The Agency said that this was because of an increase in government subsidies for such schemes, the development of cheaper technology and the investment opportunities provided by renewable power. Before this time, hydropower licensing, also known as permitting, had been managed locally, with 26 offices across the country managing the permitting process for their geographical area. This led to some inconsistency in licensing requirements. Permitting was centralised in 2008 and the national permitting service was created.

8. As a result of the increase in hydropower schemes, the Agency experienced a backlog of applications in 2008/09. There was no increase in resource to deal with these applications but a specialist team was created. This had some impact on the decision making process as applications that were not processed by the required deadline were automatically deemed valid (see paragraph 10).

Applying for a hydropower licence

9. The Water Resources (Abstraction and Impounding) Regulations 2006 (the Regulations) set out the procedures for applying for licences for a hydropower scheme. The Regulations say an application for an abstraction or impoundment licence must include information and reports the Agency needs to determine it. The application must be made to the Agency on a form issued by the Agency and accompanied by a fee.

10. Once an application is received by the Agency, they have a 21 day period within which to check the application is valid. This includes five days when the application is first received, during which the permitting support centre should check it has all the necessary initial information. The application is then passed to a permitting officer to check it is valid (this is not a statutory timescale). The permitting officer's checks include making sure the application has all the necessary technical information. The officer will liaise with the applicant to ensure that all the required information is available. If all the necessary information is provided, the application will be considered valid and the applicant is told this. If an application is valid, at the end of the 21 day period, the Agency will set a 'relevant date'. It is on this date that the clock for determining the licence starts ticking. The Agency must write to the applicant and confirm receipt of the application within 28 days of the relevant date. In their acknowledgement letter, the Agency should provide the applicant with the relevant date, and give them the date by which the application is required to be determined.

11. Depending on the application made, the Agency may have to advertise a proposed scheme. Should this be the case, the permitting officer has a statutory deadline of four months in which to determine the application.[2] The period of time for determination can be extended by agreement in writing with the applicant. The application will be advertised and there is a 28 day period within which members of the public can make representations about a proposed scheme. An internal consultation is also conducted before the permitting officer completes the determination; this involves asking for the views of a variety of specialists within the organisation on the proposed scheme.

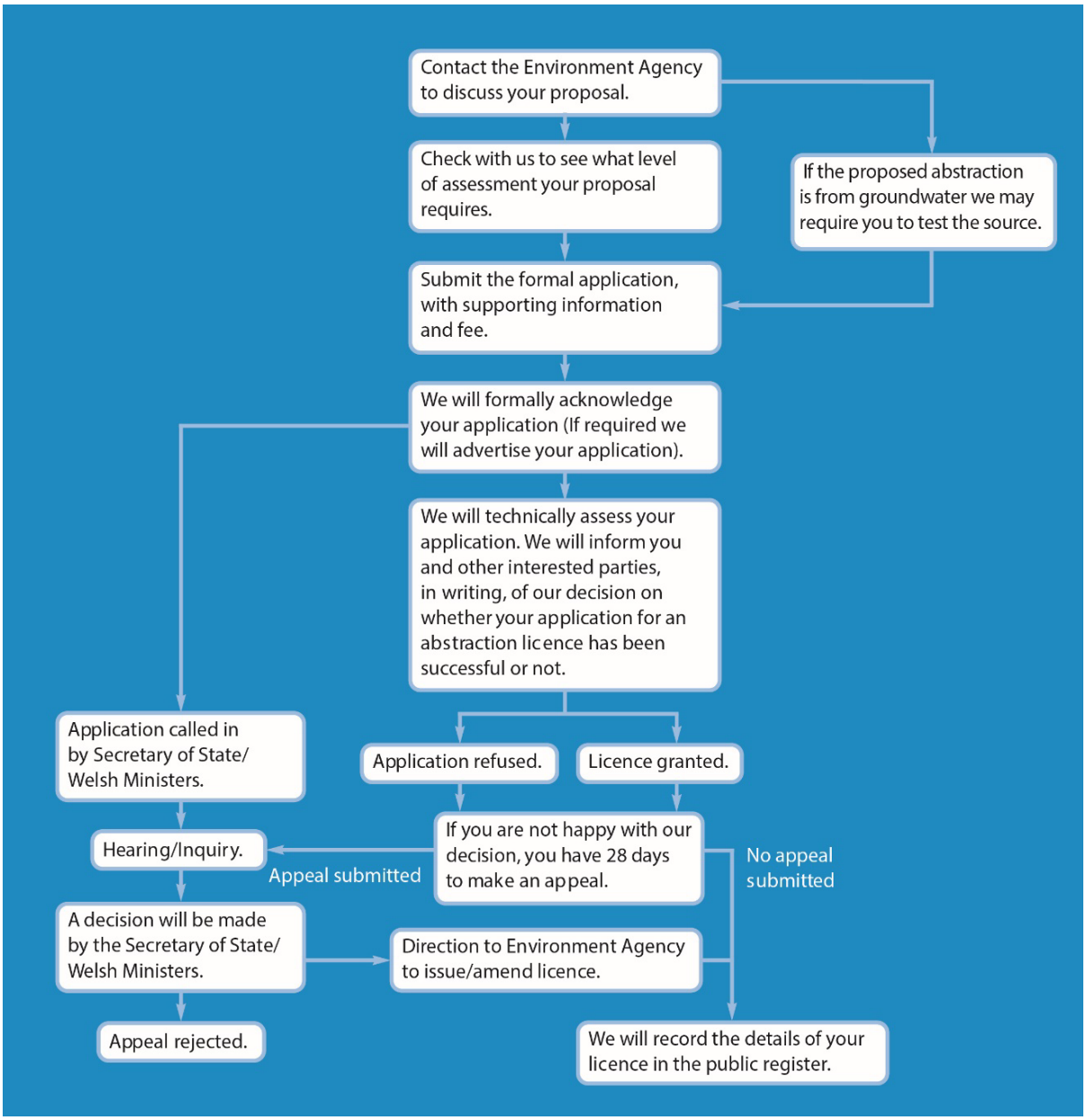
12. Once an application has been advertised and the consultation completed, the permitting officer will draft a determination report and a licence. These documents should be peer reviewed by a more senior member of staff to make sure they contain the correct information. This includes checking that the correct licence conditions have been included. Once the peer review is complete, the draft licence is sent to the applicant. This is for the applicant to check there are no errors. About a week later, a formal licence is issued. According to the Agency it is very rare for a formal licence not to be issued once a draft licence has been shared. The Regulations say the Agency must give the applicant notice in writing of their decision.

[2] This period is three months if the application is not being advertised.

The Agency's external guidance

13. In November 2008 the Agency produced a guide to abstracting water (removing water from a surface source) for abstraction licence applicants. The guide explained that an abstraction licence gave the licence holder a guarantee that their share of water would not be taken by future licence applicants. The guide also set out the application process. It said that applicants should initially contact the Agency to discuss their proposals. The Agency would then be able to advise on any relevant local issues and provide guidance on matters specific to the application. Applicants would need to complete an application form and may also need to provide the Agency with supporting information. The guide said applicants should contact the Agency to find out what they needed to do. The guide said that '*to ensure the best possible opportunity for eventual success, it is essential that you contact us as early as possible to discuss your proposals, and certainly before you make a formal application*'.

14. The abstraction guide contained a flow chart setting out the application process:



15. The abstraction guide said that provided an applicant supplied them with all the required information, they aimed to make a decision within three months of accepting the application, or four months if the application needed to be advertised. If the application was complex, it may take longer. The Agency said they would advise applicants if this was the case and get their agreement to an extension of time for their decision.

The pre-application process

16. In 2009 the Agency had a non-statutory pre-application process in place; this was not set out in the abstraction guide. This involved completing a preliminary enquiry form setting out the basic details of the proposed application, including the purpose, volume of water required and how this had been calculated, and the location of the proposed scheme. There was also a box for applicants to provide any additional information.

17. In 2010 the Agency introduced good practice guidelines in order to address situations where applicants provided insufficient information, either at the pre-application or formal application stage. The guidelines contain a series of pre-application checklists which needed to be ticked off. Any boxes which cannot be ticked off inform the Agency about what further discussions need to be had with the prospective applicant. The guidelines were written by the Agency's hydropower specialist.

Internal guidance for dealing with applications

18. The Agency produced a manual for staff dealing with abstraction licences. This said that determining a licence application was the most challenging part of licensing work. The Agency needed to pull together an applicant's proposal, what was known about the water environment and the likely effects of the licence. The Agency would then recommend, within constraints set out in law (Water Resources Act 1991) whether to grant a licence and on what terms. The manual said the process of considering an application was *'part science, part professional judgement'*. The key was for them to make a defensible decision and for audit trail purposes it was therefore essential that the decision making process was properly recorded. The decision might not *'be popular with the applicant, or even with colleagues, but if you have satisfied yourself on the basis of the evidence before you that you have established the right balance and adhered to the law, then the decision will be sound'*. The Agency should not be afraid to refuse an application if conditions could not be attached to it to make it acceptable, and would then defend their decision on appeal.

19. The manual said the Agency's key policy approaches were sustainable development; modem, risk-based regulation; and demand management. These policies were reflected in the Agency's approaches to abstraction and impoundment licensing in the manual.

20. When determining a licence application, the Agency produce a determination report. The manual said that this report should show that the Agency had been *'robust, honest and transparent'* in carrying out its duties. It should show in an open, defensible way that the Agency had made their decision and the factors which led to their conclusions. Before the Agency issues licences, the proposed licence and the determination report should be signed off. This means the Agency will either have prepared a draft licence or prepared a draft

letter setting out why they are refusing to grant the licence. This should then be circulated within the Agency for approval. At the very least, the draft should be seen by the officer responsible for licensing in a particular area or region. That officer should check the document for technical content and compliance with policy among other factors. When the draft has been signed off, the licence can be granted.

21. The manual says that the Agency can and does formally refuse to grant licences. It says that this can happen after it has been advertised and technically assessed, but that it should be obvious at a much earlier stage in the process, preferably before an application is submitted in draft, that a licence will be opposed. The manual says refusals should be very carefully considered and discussed. The Agency should not refuse an application simply because they could not judge the impact it would have on water resources satisfactorily, or because there was not enough information. If there was a lack of information, this should be sought from the applicant.

Appealing the Agency's decision

22. Applicants for abstraction and impoundment licences can appeal under sections 43 to 45 of the Water Resources Act 1991. Appeals can be made if an application has been refused or if the Agency has failed to determine the application within the specified period of time. If an applicant appeals on the basis the Agency failed to determine the application within the specified period of time, their appeal will be taken as an appeal against a refusal of the application; this means their application will be deemed refused.

23. The Planning Inspectorate have said that in 2010 they could not look at two competing licence applications where one had been granted and one refused. If both licence applications had been refused and both parties had appealed to the Planning Inspectorate, then they would have looked at both cases together. A planning inspector would then have determined which scheme was better.

24. In 2015 the Planning Inspectorate adopted a policy to deal with competing hydropower applications. The Inspectorate agreed with Defra that a planning inspector can take into account the merits of both hydropower schemes when considering an adverse decision on one of the schemes. It would be for the planning inspector to consider the merits of the evidence and the 'weight' attached to that evidence, taking into account the particular circumstances of the case. Under section 52 of the Water Resources Act 1991 there is a provision to propose modification (by variation or revocation) of a licence already granted. This provision can be invoked by the Agency or the Secretary of State if they think there are sufficient grounds. In the event of competing applications, a planning inspector would hold an inquiry at which the parties with an interest in the scheme would have a *'more elevated status'* than otherwise is given to a third party. This would enable the inspector to have as much evidence as possible about both schemes. If the planning inspector were to find in favour of

the previously refused scheme, the Secretary of State could then direct the Agency (through the Planning Inspectorate) to revoke the existing licence and grant a new licence.

How licence applications were prioritised in 2009

25. In March 2009 the Agency published their water resources strategy for England and Wales (the strategy). The strategy set out how the Agency believed water resources should be managed until 2050 and beyond to ensure there would be enough water for people and the environment. In the strategy the agency said they needed to improve the way that water resources were allocated. They said *'the current "first come first served" approach to licensing abstraction may not be suitable beyond the short term. We need to look at different options for licensing and different methods of allocating water in the future'*. In considering the future allocation of water resources, the Agency said that *'[w]hen determining abstraction licences, we follow the "first come first served" principle, allocating water by dealing with each application as it is received. This approach is stable and well understood'*.

The Innovations Panel

26. The Agency's Innovations Panel was responsible for ensuring that innovations by businesses or Agency staff were not hindered by the Agency's regulatory activities. The Panel's approach in considering innovative proposals was to *'remain outcome- focused and risk-based'* and to *'communicate clearly and deliver in a consistent manner'*. The Panel considered water resources permitting and other regulatory activities which could act as a barrier to innovation. Their specific responsibilities included making sure the Agency was not seen as a barrier to innovation; ensuring that responses to innovative proposals did not undermine the Agency's regulatory and environmental requirements or damage their reputation; and ensure timely responses to innovative proposals from external and internal representatives. The Panel was made up of senior managers from within the Agency and met fortnightly by telephone-conference.

27. The Panel's responses to proposed innovations should be customer focused and reflect a positive attitude to innovation.

The investigation

28. During the course of our investigation we have considered evidence provided to us by the Agency, including documentary evidence and interviews with Agency and ex-Agency staff. We interviewed the Agency's hydropower specialist, who has left the Agency. We have also interviewed the Earls and their agent and considered thepapers they have sent us.

29. This is a very detailed complaint with a long history. In focusing on the broad themes of the complaint, we have not included in this report all of the information we have seen regarding the Earls' complaint. We are satisfied that nothing of significance to the complaint or our findings has been omitted.

Background

30. The Earls own a mill on a weir on the River Avon. On the opposite side of the river on the same weir is another mill, owned by Mr F. In 2009, both mill owners separately decided to apply for licences to use water from the weir for a hydropower scheme to generate electricity. Mr F's application was dealt with by permitting officer A. The Earls' application was dealt with by permitting officer B. These two officers were based in different offices in different parts of the country.

Events during the period complained about 2009

The Earls' and Mr F's applications submitted

31. Mr F submitted a preliminary enquiry form for an impoundment and abstraction licence on the River Avon on 24 June 2009. He completed all sections of the form apart from the box in which he could provide additional information; Mr F said that a proposal summary would be sent to the Agency once he had a contact there. The Agency considered Mr F had provided insufficient information and asked him to provide a feasibility report about his proposed scheme. The Earls met with the planning authority to discuss their plans for installing a turbine.

32. On 3 July 2009 the Agency's development and flood risk engineer (the engineer) emailed the Earls an application form for land drainage consent.[3] In the email the engineer told the Earls that they should contact the Agency's water resource permitting team about a potential hydropower installation at the mill.

[3] This is a permission which is required before any work can be done on a watercourse, such as erecting scaffolding or carrying out alterations to a mill. It is required to make sure that any works do not increase flood risks on the watercourse. It is also known as flood drainage consent.

33. On 14 July 2009 the Earls applied to the Agency for consent to build a flood defence. They told the Agency that an application to install a Kaplin Bulb turbine in front of the waterwheel at the mill would follow. The Agency advised them to install an Archimedes screw in preference to a Kaplin turbine as it was considered more fish-friendly.

34. On 22 September 2009 the Earls made an application for an abstraction licence. The 21 day period for checking the application would start at this point. There is no evidence on file of any checks on the application carried out by the permitting support centre or the permitting officer (paragraph 10), so we are unable to know exactly what checks were made on the Earls' application. We note that senior permitting officer B said '[permitting officer B] *took the* [Earls' application] *from the queue after the 21 day 'rejection window' had passed, so had no choice but to accept (and request any further required reports within the determination time')*.[4]

35. Permitting officer A circulated Mr F's hydropower proposal for comments within the Agency on 20 October 2009 in advance of '*inviting* [Mr F] *to make a formal application*'. In response, the Agency said the Earls were investigating installing a hydropower scheme on the same weir, which meant there would be competition for water flow.

36. The relevant date for the Earls' application was set as 23 October 2009.

37. On 19 November 2009 permitting officer B wrote to the Earls and told them their application had been accepted as valid. He said that the formal decision process had started on 23 October 2009 and the Agency would have reached a decision by 23 February 2010, unless they required more information, in which case an extension would be necessary. The application needed to be advertised in the local newspaper and on the Agency's website. Permitting officer B said that if the Earls' scheme was approved, the Agency would issue them with an abstraction[5] and an impoundment[6] licence.

38. Permitting officer B circulated the Earls' application for consultation to Agency staff on 20 November 2009 saying that the Earls had applied for licences to abstract and impound water[7].

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[4] Senior permitting officer B made these remarks on 15 January 2010 as part of her enquiry to the Agency's technical helpdesk (paragraph 48).
[5] The abstraction licence was for the transfer of water from one source of supply to another.
[6] An impoundment is a structure within inland waters that can temporarily or temporarily change water level or flow, for example dams or hydropower turbines. A licence is required before starting to build such a structure, or before altering or removing existing structures.
[7] The Earls had submitted an application to abstract water. There was no mechanism on the form to apply for an impoundment licence.

39. One of the respondents to the consultation said she had concerns about the Earls' application because there was another licence (Mr F's) at pre-application stage which was also proposing to abstract water from the weir. The respondent said there was not enough water in the weir to support both abstractions at the quantities proposed by the two applicants.

40. On 9 December 2009 permitting officer A completed a complaint form. She said that Mr F had complained that despite following the Agency's advice and completing the pre-application process before making a formal application, he had *'been beaten to the water'* by the Earls, who had not followed the same process. Permitting officer A said that there was insufficient water for both schemes to proceed. Therefore, the Earls' formal application would be given preference *'as the first come first served basis is only applied to formal applications'*. Permitting officer A said she had spoken to Mr F and explained the situation. She also said that *'the general issue of the first come first served principle should also be highlighted as there is some contradiction between the advice to submit provisional applications and the fact that no consideration is given to these when it comes to the allocation of resources'*.

41. On 10 December 2009 Mr F submitted a formal application for a licence to impound water (this was recorded as received by the Agency on 11 January 2010).[8]

42. On the same day permitting officer A emailed Mr F. She told him that the Agency had received and accepted as valid an application from the Earls. Permitting officer A said the Agency operated on a *'first come, first served'* principle which was not explicit in legislation but was implicit in how the Agency were required to consider applications to enable them to manage water resources effectively. Permitting officer A said that the Agency assumed that all formal applications would be granted favourably and as such, once they received a valid formal application, the water was reserved for that applicant until the Agency had determined the application. Permitting officer A said that the Earls' application currently had priority over any provisional pre-applications although this did not necessarily mean that the Agency would grant the Earls their application. Mr F complained to the Agency on 11 December 2009.

43. On 16 December 2009 the engineer emailed permitting officers A and B about the two applications. He said that there was growing concern from Mr F that he had spent a lot of time and money compiling the data the Agency required for the pre- application process, only now realising that the Earls had *'just thrown in an application cold, although* [they are] *perfectly entitled to do so'*. The engineer said it was *'imperative'* the Agency made sure the Earls were treated in exactly the same manner as Mr F in providing the necessary information to support their application. He said any *'inference that we are not*

[8] The Agency told us that Mr F only needed an impoundment licence so he did not apply for an abstraction licence.

being fully consistent or 'fast-tracking' Mr Earl on a first come, first served basis WILL result in a major complaint headache'.

44. On 4 January 2010 in an internal email senior permitting officer B said that before Christmas there had been agreement that the first come, first served policy for formal applications needed to be reviewed. This was because hydropower guidance advised people to make a pre-application enquiry, and because this approach had raised issues in relation to this weir where the Earls and Mr F wished to build their schemes. Senior permitting officer B said the existing legislation only dealt with formal applications and without amending it, the Agency would always be vulnerable to challenge if they developed a system which included any system of preapplication. Permitting team leader A responded on the same day. She said her team had discussed this issue at a meeting on 25 August 2009 and it was agreed that they would stick to the first come, first served principle at formal application stage. Permitting team leader A said she had written a summary of the issues for the Agency's legal team to use as a possible case study for training purposes but she had not specifically asked for legal advice on the principle *'as I felt we had the answer but were uncomfortable with where it left us'*.

45. The Agency wrote to Mr F on 14 January 2010 to say that they had accepted his application for an impounding licence as valid and had begun the formal decision process on 112 January 2010.

The Agency's internal discussions

46. In an internal email on 14 January 2010 permitting officer A discussed the Agency's first come, first served approach. Permitting officer A said she had discussed this with the Agency's solicitor who had told her he *'wasn't convinced'* the Agency should be following that approach. She said the solicitor was of the view that there should be a *'first past the post'* system in place where the first application determined got the licence, regardless of the order in which the applications were received. Permitting officer A asked for clarification of the approach the Agency was taking. She said if it was the first come, first served approach, she did not think it would be fair for her to continue processing Mr F's application.

47. On 14 January 2010 in an internal email the Agency's senior environmental planning officer said the Agency were in a difficult situation because their own rules said that they considered abstraction licence applications on a first come, first served basis. As the Agency had received the Earls' application first, they had to look at it first, even though they had been working with Mr F for a longer period of time. The senior environmental planning officer said the Agency should not be a mediator in this situation and the only way to try to resolve the situation was to involve external mediators to try to get to a resolution. He said that he thought the case may turn into some very bad publicity for the Agency or worse, an appeal or Ombudsman investigation.

Advice from the technical helpdesk

48. Senior permitting officer B submitted an enquiry to the Agency's technical helpdesk on 15 January 2010 regarding the first come, first served principle. The issue of the two applications had highlighted an inconsistency between the Agency's agreed policy and their recommended process. On the one hand the process encouraged customers to use the pre-application route, which helped the Agency to consider all the permitting requirements for the schemes at an early stage and ensure complete applications. On the other hand, their agreed policy was to apply the first come, first served principle from receipt of a formal application, *'so it is in the interest of operators to bypass the pre-application route and apply with minimal supporting info and supply any other information during the determination process'*. Senior permitting officer B asked the technical helpdesk to clarify whether the first come, first served principle applied to both the formal application, and the issue of the licence, or only once the licence had been issued.

49. The technical helpdesk provided their advice on 27 January 2010. They said the first come, first served principle only applied once a licence had been granted (to reserve the water for the licensee) and there was no policy that applied this principle to formal or pre-applications. The technical helpdesk said that where two or more applications were competing for the same water, then to a certain extent there was a race for that water but *'there is little that can be done about that'*. They said that engaging in pre-application work took longer but reduced the risk an application would be delayed at the formal stage whilst further information was requested, and this was a risk the applicant had to take. The Agency needed to make sure they treated applicants in the same way and required the same supporting information and advertising requirements regardless of whether any pre-application work had taken place. The technical helpdesk said the approach the Agency needed to take was that the first applicant to provide all the necessary information to enable them to grant the licence would be the successful one. This would not necessarily be the application that was received first; the applications needed to run in tandem up to the point that a licence was granted. If there was insufficient information in the Earls' application to evaluate it then they would need to provide more, and it would need to be of the same standard as that provided by Mr F. In the meantime, there was nothing to stop the Agency continuing with Mr F's application. If they could grant Mr F's licence before the Earls submitted the additional supporting information, the Earls' application would be unsuccessful.

50. The following day, 28 January 2010, the Agency's solicitor emailed the permitting team leaders and permitting officers A and B. He said that he saw no legislative basis for saying the first come, first served principle applied from the date of application; protected rights only accrued when a person became a licence holder. The solicitor said he had discussed the issue with a colleague that morning, who had not been aware that a first come, first served practice had

grown up in the Agency; both agreed it was legally wrong to apply it from the date of application.

51. On 29 January 2010 the Agency's permitting manager sent an email to the permitting team leaders, the permitting officers and the solicitor. He said he thought the response from the technical helpdesk was balanced and sent a clear message that submitting a formal application did not mean the applicant was reserving the available water. The national permitting service centre manager said the advice from the helpdesk could be used to reinforce the message that the pre-application process was the correct one to follow.

February 2010

52. Senior permitting officer B provided her views on the technical advice on 2 February 2010. She said she was encouraged by the advice as it was fair and encouraged pre-application, putting the onus on the applicant to provide the Agency with the information they required to grant a licence. She said that it was important they clarified the system in the hydropower guidance so that potential applicants were aware of it. She said the Agency needed to make absolutely sure they treated every application consistently as the approach would almost certainly cause refusal decisions. She said the Agency would *'desperately need some more specific guidance on determining HEP* [hydropower scheme] *permits'*.

53. Senior permitting officer B emailed permitting officers A and Bon 2 February 2010. She said they all needed to keep talking about this *'landmark situation and make absolutely sure we treat both applications fairly'*. She said the approach the Agency was now taking was *'first past the post'*: whoever's licence is determined first.

54. Permitting officer B sent the Earls' draft impoundment and abstraction licences on 12 February 2010. He said the licences were a rough draft and were likely to change as they had been sent round the Agency for comment. At this point the officer sent the draft licences for peer review. On 26 February 2010 the peer reviewer asked *'have we managed the fact that the applicant only applied for a transfer licence in a way that clearly negated the need for us to get into the section 36a*[9] *loop, i.e., where the applicant only applies for one permit, and we believe that more than one is required?'* We have not seen a response to this query about whether there should be one or two licences in the file, nor any evidence that this issue was raised with the Earls at this time.

55. Permitting officer B emailed the Earls on 17 February 2010. He said that their application was now at the review stage, so unless anyone raised anything, he saw no problem with it. He said that it would appear that after issuing the licences, the Agency would be judicially reviewed. As such, he would have to

[9] Section 36a 1991 Water Resources Act, as amended by the Water Act 2003 which sets out provisionson abstraction licences.

send his determination report to the Agency's legal team to make sure there were no problems with the Agency defending their decision to issue the Earls with the licence. Permitting officer B therefore asked the Earls if it would be possible to extend the deadline for issuing the licences by two weeks to 9 March 2010. The Earls agreed to the extension.

56. On 25 February 2010 the Agency's legal team sent an internal email asking for more information about the pre-application issues Mr F had faced and why he was required to go down that route when the Earls were not. This was to inform them of the risk of legal challenge by Mr F if the Agency granted the Earls their licence.

View of the hydropower specialist: split the water or refuse both

57. On 26 February 2010 the Agency's hydropower specialist sent the permitting team leaders and officers and the legal team his thoughts on the competing applications. He said that if the Earls and Mr F could not agree to divide the available water between themselves, the Agency should refuse both applications. The hydropower specialist said he thought that granting the licence to the Earls would send a message to other applicants that getting in a formal application quickly was better than following the pre-application route, which would *'not do anything for the work that have been trying to put in place'* [sic] through their guidance and the pre-application process. He said that the Agency should split the available water between the applicants as neither had a stronger justification of need and both applications were for hydropower; this would mean neither party could complete their scheme. Ideally the Earls and Mr F would come to an agreement about how the water should be divided between them and a period of six months could be given for agreement to be reached. If there was no agreement, both applications could be deemed to be lapsed. The hydropower specialist said that an appeal or judicial review of their decision not to issue an impoundment licence where weir ownership was split, or lapsing the licence if no agreement was reached, would help them confirm their policy. He also said that before taking his proposed action, the Agency needed to write their policies on impoundment licences on weirs with split ownership, and dealing with conflicts of multiple interests in abstracting water for hydropower in locations where they were incompatible.

58. On the same day the Agency's legal team expressed doubts that the Agency could justify refusing both applications because they had a statutory duty to secure the proper use of water resources. The legal team said that if the Agency were going to go down the suggested route, they would need a 'watertight' policy statement which would be subject to legal scrutiny in the event of any challenge.

59. The permitting team leaders, officers A and B, the legal team and the hydropower specialist held a telephone conference on 26 February 2010. The note of the call said that the problem the Agency faced was that they had two

conflicting applications for the same water, and they could not make a judgement in favour of one. The hydropower specialist said he was very keen to avoid a race for water and felt the Agency needed to amend their policy to state that they could not permit two hydropower schemes on the same weir. Drawing up this policy would take time and needed to reflect the Agency's duty of fair allocation. Permitting team leader A suggested that the Agency contacted both applicants and told them they were unable to determine either application until the *'potential operational issues'* had been resolved and they had received further legal advice. The note said the Agency was proposing to request an extension to the determination of the applications for six months so that they could resolve their policy issues and so that the Earls and Mr F could discuss a joint approach. If there was no resolution at the end of that period, the Agency would have to refuse both applications.

60. On 28 February 2010 the hydropower specialist drafted a paper dealing with conflicting abstraction proposals. This paper said that in normal circumstances, the Agency would only be considering one application for an abstraction licence, which would be dealt with on its individual merit. A decision on the grant of the licence would be made using Agency guidance. The paper said it was uncommon for the Agency to have more than one application for an abstraction licence for the same water at the same time, although this situation had occurred in the past.[10] The paper said the Agency had encouraged pre-application discussion of abstraction proposals, particularly complex proposals such as hydropower, so that the requirements of an acceptable scheme could be agreed before a formal application was made. Where the Agency were aware of two or more schemes that were the subject of active pre-application discussion or formal applications, they should take account of the duty to act fairly, rationally and even-handedly; to consider the applications to be a race for whichever was determined first did not take account of these duties. One office handling both applications could be accused of bias, and two officers in a race would also not take account of the duties. Whichever party had made the formal application first, or started the pre-application process first, the other party had valid grounds for objection, which needed to be considered in the determination of either of the licence applications. Where both schemes had a justification of need, the Agency should not seek to judge one scheme more favourably than the other. The paper put forward three options for dealing with competing schemes:

- The first was that the Agency could provide both parties with the total volume of water available for abstraction and ask them to agree how the volumes should be split between them
- The second was that the Agency could suggest a split in the volume of water between the two parties
- Finally, the Agency could refuse both proposals.

[10] The Agency told us that they had not encountered the same set of circumstances presented to them by the Earls' and Mr F's competing applications before.

Suitable time periods could be allowed for the parties to reach agreement, failing which the application would be refused. If two licences were granted, they would be granted on the same day so that neither party had protected rights against the other. If the formal application was refused the applicant had the right of appeal to the Secretary of State. Any objectors to the proposal had the right to be reconsidered and make further objections. If the other party submitted a formal licence application that should also be refused. If the licence was granted, the objector had no right of appeal but could seek judicial review.

March 2010

Legal advice on refusing both applications

61. On 1 March 2010, the Agency's legal team advised that there was only a legal duty to act rationally. The other considerations - to act fairly and even-handedly - were not valid legal justifications. The team advised that the proposed policy of refusing both applications if the parties could not reach agreement between themselves was legally questionable and that it could be argued that it would be irrational for the Agency to deny one application at the expense of the other, and draw up a policy on that basis. The legal team said there had been some concern about the approach the Agency was taking as it was '*evident that we are making up policy on the hoof*'.

62. On the same day the hydropower specialist sent an internal email, sharing the policy papers he had drafted. He said he was looking to avoid a 'race for water' which could damage all that the Agency were trying to do in ensuring that applicants had good pre-application discussions with them. The hydropower specialist said that the Agency may well face an appeal or judicial review proceedings whatever decision they made. He said that a race for water would not do the Agency or the applicants any favours and could be subject to '*much inquiry*'. He said the Agency needed a fair and transparent process.

63. According to the Agency, on 2 March 2010 in an internal telephone call, the hydropower specialist said that the helpdesk had retracted their advice[11] (paragraph 49).

64. Senior permitting officer B emailed the Agency's policy manager on 4 March 2010. She said it was necessary for the Agency to amend their policy to include the approach they would take when two competing applications were submitted. She said the plan was to write to both applicants explaining that the Agency could not determine either licence and were minded to refuse them both. The alternative would be for the applicants to agree a six-month extension during which time the applications would be kept on hold. This would allow time for both applicants to reconsider and come up with a single scheme. Senior permitting officer B said that at a recent meeting on the issue, there had been

[11] In their comments on the draft report, the Environment Agency said '*the helpdesk response remainsvalid and correctly states the position.*'

discussions about the poor impression the Agency were giving to their customers by telling them they would act in one way and then having to tell them they had changed their mind. This had been acknowledged by the hydropower specialist who considered that it would be more damaging to accept an application which promoted a race for water than one which had not been through the pre-application process.

65. Senior permitting officer B wrote an update note on the two applications on 5 March 2010. In the paper she said that following the technical helpdesk advice, the Agency had been minded to grant the licences applied for by the Earls, which would have forced them to refuse the application made by Mr F. Both applicants had been made aware of the Agency's intention and they expected a formal challenge to their decision. Senior permitting officer B set out the proposed policy by the hydropower specialist. Whoever was turned down would challenge the Agency's decision. There was no policy in place to deal with the situation and there was a need to develop policy *'swiftly'* to cover other sites where similar issues might arise. Given the extremely tight timescales they were working to (the Earls were expecting a decision by 9 March 2010), and the likelihood that the Earls would refuse to agree a further extension, she said the Agency did not have the option of making changes to their policy in time to apply them to this case and a decision had been taken to write to the Earls and Mr F to tell them that the Agency would not be proceeding any further with either licence application until the viability issues had been resolved; that the Agency were minded to refuse their applications; and to offer them the alternative of agreeing to a further extension of six months to put forward a revised scheme or schemes.

The Agency ask both parties for a six month extension

66. The Agency wrote to the Earls on 8 March 2010. They explained that it was not possible for the two schemes to operate on the weir because there was not enough licensable water to meet the requirements of them both. The Agency said they believed they would be in breach of their duties to secure the proper use of water resources and to ensure that the proposals of the applicants were reasonably likely to be feasible in practice if they granted either application as it stood. As such, they were minded to refuse both applications. However, the Agency did recognise the potential for hydroelectricity generation at the weir and would prefer to see something come of the schemes that would be beneficial to both parties. They asked the Earls to agree to an extension of six months, to 9 September 2010, to give both them and Mr F the opportunity to come to an agreement for a joint scheme or a mutually acceptable solution. If the Earls did not agree, the Agency said they were minded to refuse both applications. The Earls could then appeal to the Secretary of State. The Agency sent the same letter to Mr F.

67. In an internal email on the same day, the permitting team leader said that both Mr F and the Earls had agreed to the six month extension to the determination date.

68. The Earls wrote to the Agency on 9 March 2010. They said they *'took this opportunity to amend our flow requirements downward'* from 10.6 cumecs to 6.8 cumecs. In their letter the Earls said that as their application had been in process for a considerable time longer than Mr F's, they would expect first call on the water. They said the proposed new amount was brought about by the economics of the project being altered. They said that by this they meant that when the flow of water over the weir was reduced to 6.8 cumecs they were able to use all of it and Mr F's turbine would have to shut down. The Earls said they were disappointed with the Agency's handling of their application. They said they were only willing to extend the determination process by a further two weeks and not until the end of September. They said they still had to go through the planning application process and in the meantime their building project at the mill was on hold. The Earls said they had requested a site meeting with all the affected parties and the Agency to be held before 20 March 2010.

69. A site meeting took place at the weir on 19 March 2010. At the meeting the Earls agreed to a further extension of two weeks.

70. The Earls wrote to the Agency on 27 March 2010. They said they were disappointed that issues remained unresolved, and it was clear that the Agency's policies and procedures were not helping them to reach a conclusion. The Earls said they did not think it was right that the Agency should suggest they join together with Mr F to create a single scheme with the implication that if they did not, neither scheme would be allowed. The Earls said they were finding the matter *'frustrating in the extreme'* and that it appeared ridiculous that a fantastic opportunity to generate green power might be lost because of the Agency's bureaucracy.

April 2010

71. In an internal email on 6 April 2010 the permitting manager said he had spoken to the Earls and they had verbally confirmed their agreement to extend the determination date to the end of June. The service manager said that as a result, they did not need to refuse the Earls' applications that day.

June 2010

Policy paper from the hydropower specialist

72. On 10 June 2010 the hydropower specialist shared his position statement and policy paper on dealing with multiple hydropower proposals on the same weir. The position statement said that the *'Agency will support the development of only one hydropower scheme on a weir'*. It said the Agency encouraged pre-

application discussion on hydropower proposals. These discussions were an iterative process. The use of the Agency's good practice guide and other guidance would enable an agreed scoping to be made of the information to be provided in an environmental report which would support the licence applications and the later planning application. All other applications for a weir would be discouraged once there was a firm commitment to undertake an environmental report, and the report would have a time limit for submission. Formal applications for hydropower permits submitted without adequate supporting technical documentation in an environmental report would not be treated as valid; ensuring this took place would enable the Agency to avoid a race for water. The paper said that the first come, first served principle applied to abstraction rights after the grant of a licence. However, abstraction licence applications had normally been dealt with in order of application, and the Agency would continue to do so. There had been few occasions where competing valid applications had been made for more water than was available.

73. The hydropower specialist's policy paper set out how the Agency should deal with their current situation of having two competing valid applications for hydropower on the same weir. The Agency's position was that they would support the development of only one hydropower scheme on a weir. The paper said that the Earls had submitted a formal application that had a poor level of information in support of it, little pre-application discussion and had pre-empted a scheme that was undergoing more detailed pre-application discussion. The application should not have been accepted as valid but at the time procedures were not in place to carry out relevant checks. Criteria on the supporting information required with a hydropower application had not been applied and there was an element of perceived unfairness against legal rectitude. The paper said that three principles had been adopted where there were currently two schemes on one weir. The two parties should be asked to consider whether one agreed scheme could be proposed. Failing that, the parties should agree how the available flow should be split between the two schemes and also present ways that the two schemes could be controlled to maintain the specified flow. The Agency said it was not for them to facilitate these arrangements. If this failed, the Agency had three options:

- **Option 1:** if there was a failure to achieve agreement the Agency could refuse both schemes, after which both parties could appeal. The Agency would ask for both appeals to be heard together and the Planning Inspectorate would be faced with the same dilemma as the Agency. The advantage of this approach was that the Agency did not make the decision, but the costs would be high and the appeal could take a long time. The Agency's position statement was likely to be used to solve the problem, there would be negative publicity, and there was the legal justification for refusal of an application that was made first where it met other legal requirements.
- **Option 2:** the Agency could decide which of the schemes had the most benefit for renewable energy and the environment. This would enable the

best scheme to be developed but there were too many judgements to be made on what was best, and the schemes might change.

- **Option 3:** the Agency could take account of the pre-application discussion with the Agency and accept the scheme that first met all the legal requirements. This approach would adopt the principles recommended for avoiding two competing schemes on one weir (see the other policy paper). The disadvantage to this approach was that the principles in the policy paper would have to be applied retrospectively in the current cases and the other scheme would be refused.

In all cases one of the schemes was likely to be refused. In an email accompanying the paper, the hydropower specialist said that the Agency needed to consider what taking forward the final option would mean.

74. On 14 June 2010, in response to a freedom of information request from the Earls, the permitting manager emailed the legal team. He said that he had not been party to any of the meetings where the hydropower specialist's policy paper was discussed. He said that *'much, if not all'* the work on the policy had been done by the hydropower specialist.

75. On 16 June 2010 senior permitting officer B said she had been looking at timelines of the two applications to see if she could establish which applicant had met all the legal requirements first. The officer said that by asking Mr F to submit further information at the pre-application stage the Agency had effectively discouraged him from submitting a formal application, and had thus prevented him from demonstrating he could meet the legal requirements,[12] which only became effective on receipt of the formal application. The Earls' formal application was technically complete when it was submitted as far as the Agency's guidance was concerned and they had no reason not to accept it as valid. She said she felt she was trying to make a judgement on a highly sensitive issue without any firm criteria to base it on, whilst at the same time being aware that the Agency was under pressure to make a decision quickly. If they were unable to make a decision then their only option was to refuse both applications and effectively force a decision by the Planning Inspectorate. She said that given the Agency had pledged to support the development of renewable energy, it was not good for them to be in a position of not making a decision on the schemes.

76. On 16 June 2010 the Earls emailed the Agency. They said they had obtained the relevant forms and would be submitting an appeal to the Planning Inspectorate on 30 June 2010.

77. On 23 June 2010 senior permitting officer B sent an email to permitting team leader A and permitting officers A and B asking to discuss the Agency's intention for the weir and advise all the parties of their decision. She said that looking at the policy paper they would be refusing both applications, which was consistent with the intention that the Agency had communicated to both parties

[12] The example given was submitting an application fee or supplying the correct signature.

earlier. She said she was disappointed that this was the outcome but could see no alternative and the Agency's refusal would at least enable the applicants to appeal; the Planning Inspectorate would then have the final decision.

78. On 25 June 2010 the hydropower specialist sent an email to senior permitting officer B, the permitting manager and the legal team. He said the Agency needed to consider what the outcomes (of the schemes) may be. He said the Agency had *'placed much emphasis'* on streamlining the pre-application process as a means of improving permitting and he hoped the outcomes from the competing schemes would support that approach. The hydropower specialist said his preferred approach was to go with option three as this supported the development of hydropower and the development of the Agency's guidance on pre-application; this meant granting the licence to Mr F.

79. In an internal email on 25 June 2010 the Agency said that their preferred option for dealing with the two competing applications was option three. This would mean that the Earls' scheme would be rejected. The other two options identified in the paper were considered to be a cop out (option one) or too close to call (option two).

80. On 25 June 2010 the Agency's legal team circulated an email setting out the legal ramifications of two of the three options set out in the position paper - option one and option three (paragraph 73). The legal team said the legal basis for refusing the applications (option one) was problematic. Considered in isolation both Mr F's and the Earls' applications were feasible, but when they were considered together they were not. The legal team said they could refuse both applications on this basis. They were not sure that approach would be accepted by the Planning Inspectorate were the parties to appeal, but considered it was a *'respectable argument to put forward'*. The Planning Inspectorate could either affirm the Agency had done the right thing or award the licence to one or other party and order the Agency to pay the other's costs, thought to be around £20,000. If the Agency refused one application and granted the other (option three), the refused party could start judicial review proceedings, seeking to quash the Agency's decision. The legal basis for granting one and refusing the other could be justified in two ways. The Water Resources Act did not oblige the Agency to grant the first application they received, and they had discretion. It was acceptable for them, subject to challenge on judicial review, to grant the application to the first applicant to provide all the information they needed, or which was first in the queue originally, at the pre-application stage. It was better for there to be one scheme on the river rather than none. The legal team said the Earls could argue they had a legitimate expectation that their application would be determined first, given that it was made first. They said the Agency would respond that the Water Resources Act did not support the first come, first served principle and they had made no statements that they would proceed on that basis. The legal team said the fact they normally determined applications on a first come, first served basis *'could make things uncomfortable for us'*. The legal team said that judicial review was

expensive and it was debatable whether the Earls could afford it. If a judicial review succeeded, the cost to the Agency would be far higher than the costs of the appeal.

81. In response to this advice, on the same day, the hydropower specialist said that his recommendation was that the Agency went for option three.

82. An email from senior permitting officer B on 25 June 2010 said the Agency's good practice guidelines pre-dated the Earls' formal application and were widely available so it was fair to say that any prospective applicants should have been aware of the Agency's preferred approach. She acknowledged however that it was not a statutory requirement.

Innovations Panel discussion

83. The permitting manager shared the hydropower specialist's position statement and policy paper with the Innovations Panel on 27 June 2010. In his accompanying email he said the Agency needed to make a decision on the applications by 30 June 2010.

84. The Innovations Panel considered the issue in a series of emails on 28 June 2010.

85. The permitting manager emailed the Innovations Panel on 28 June 2010. He said that as it stood, the Agency would be determining the applications in favour of Mr F, who had gone through the process they set out in their good practice guide, and the recently agreed position statement. The permitting manager said that the Agency had taken every possible step to get the Earls and Mr F to work together but this had not happened. Splitting the water was not an option because of the environmental impact of not being able to enforce two impoundment permits. It was also a *'real judgement call'* to decide which of the two schemes would be the most beneficial in terms of minimising environmental impacts and the provision of renewable energy to combat climate change.

86. The permitting manager emailed one of the Innovations Panel members on the same day. This was in response to an email from that Panel member suggesting the Agency determine the Earls' formal application if it met all the criteria to be valid. The Panel member had also said the Agency should follow a first come, first served approach. The Permitting Manager said the Panel member's email ran counter to the decision the Agency were about to take. He said the decision was highly political and must be determined by the end of the month. In response, the Panel member said that he thought what he suggested was entirely compatible with the proposed way forward. A later email from another Panel member asked whether the agreement was that the Earls' application would be decided and Mr F's second; if the Earls' application was ok, then they would get the go-ahead. The Agency's director of environment and business replied to this email and said that the Agency would not be determining

the Earls' application first unless they were satisfied there was no other option. He said it did not seem fair to Mr F, who had only done what the Agency had advised him to do. He said it would leave them open to charges of maladministration. He said the applications needed to be discussed as soon as possible.

87. The Innovations Panel held a telephone conference to discuss the competing applications on 29 June 2010. The note of the meeting said it did not seem possible to issue both parties with licences because there was insufficient water for both schemes. It was not apparent how the Agency could set licence conditions that would allow two schemes on the weir; the two parties were unable to agree to work together. This left two possibilities: to refuse both or to grant one and refuse one. The Panel had decided that if the application from Mr F was satisfactory the Agency would likely issue to him because he had approached them first and was following their advice to have pre-application discussions. The Earls' application would have to be refused.

88. Senior permitting officer B sent an email on 29 June 2010. She set out the various guidance the Agency had produced which referred to the pre-application process as evidence that the Earls should have been aware of it. She said that she considered the Agency could show that they had made every effort to alert their customers to the benefits of, and their preference for, pre-application discussions.

89. The solicitor sent an internal email on 30 June 2010. He said the Agency were not yet in a position to say that Mr F's application would be granted. The earliest possible time the decision would be ready was 9 July 2010. The solicitor said this created problems for refusing the Earls' application that day as agreed. If the Agency were to refuse the Earls' application before Mr F's was granted, it would create substantial problems for the Agency at any judicial review the Earls might apply for. The solicitor said the Earls could argue, *'with some force'*, that the Agency's approach showed they were biased in favour of Mr F, or at the very least there was a perception of bias because the Agency would have refused the Earls application before they could satisfy themselves they could grant Mr F's. The solicitor said they should defer refusing the Earls' applications until they knew they could grant Mr F's.

90. In an email later on the same day, the solicitor said that the Agency thought they would be in a position to determine Mr F's application on the following Monday, so would hold off refusing the Earls' licence until then.

91. The Earls emailed the Agency on the evening of 30 June 2010. They said they would be appealing to the Planning Inspectorate on the grounds that the Agency failed to determine their licence application. They asked for confirmation that no other licence application relating to the weir would be determined during the appeal process.

Mr F's application granted and the Earls' application deemed refused

92. On 19 July 2010 the Agency wrote to Mr F to tell him that his application for a full impoundment licence had been successful.

93. On 20 July 2010 following legal advice the Agency wrote to the Earls. In their letter they said the Earls were aware that the Agency's date for determining their applications had passed and the Agency had not been in a position to make a decision by the deadline. They said that as the Earls had lodged an appeal (paragraph 91) they had deemed the Agency's decision refused. The Agency said they had told the Earls they would continue with the determination process and send them their decision. As such, this letter was not a refusal letter but set out the grounds for the refusal that the Agency had intended to give before the deadline had passed. The Agency said they thought it appropriate to wait until they had determined Mr F's application before telling the Earls of the decision on their application. The Agency set out their reasons for refusing the Earls' two applications[13]. These were that the Agency would support the development of only one hydropower scheme on a weir; there was insufficient water to support the two schemes proposed; there had been no proposal for a joint approach that could utilise the available flow; the Agency had taken account of the pre-application discussions relating to the proposed scheme for Mr F's mill; and they had also taken account of their position statement and the improvements they were seeking to make to the hydropower permitting process (paragraphs 72 and 73). The Agency said they were granting the licence to Mr F who was already undertaking pre-application discussions and investigations with the Agency when the Earls submitted their application.

August 2010

94. The Earls wrote to the Agency on 18 August 2010. They said that the Agency had denied them their legal rights to appeal the decision by granting Mr F the licence as the Planning Inspectorate could not remove a licence once it had been granted. The Earls said they believed the Agency had acted illegally in issuing Mr F the licence and that the process they had followed would not stand up to scrutiny. They said they did not consider they had any other choice but to apply for a judicial review.

95. The Planning Inspectorate wrote to the Earls on 24 August 2010. They said they were in receipt of their appeal, dated 5 July 2010. The Planning Inspectorate said that the grounds for appeal were that the application should have been determined when the draft licences were sent and that the Agency had not operated with due diligence and had failed to meet their obligations. The Inspectorate said that on 20 July 2010 they had been sent the Agency's intended decision, which set out the reasons for refusing the Earls' licence, and which the Agency had intended to send before the determination deadline. They

[13] Although the Agency referred to the Earls' *'transfer abstraction licence and an impoundment licence' applications'*, in fact they had applied only for an abstraction licence.

said the Earls had then sent them a second appeal, against the intended decision. The Inspectorate said they had taken the view that the intended decision did not constitute a refusal notice and they therefore could not accept the Earls' second appeal - they would only consider the Earls' first appeal.

96. The Agency replied to the Earls' letter (paragraph 94) on 26 August 2010. They said they had not denied the Earls' the right to appeal (by granting Mr F the licence) because the right to appeal only existed in relation to their decision on the Earls' licence, and not to any decision on Mr F's application. The Agency said they had no power to withdraw Mr F's licence and any decision by the Planning Inspectorate would only relate to the Earls' application.

September 2010

Application for a judicial review

97. On 24 September 2010 the Earls' solicitor sent the Agency a *'letter before claim'* to start judicial review proceedings. The letter said that the Earls were applying for a judicial review of the grant of an impoundment licence to Mr F; the new policy the Agency had introduced prioritising applications where pre-application discussions had taken place; and the decision to refuse their abstraction and impoundment licence applications.

October 2010

98. The Agency contested the proposed claim for judicial review; they said they had considered all the competing factors, including environmental factors, before they had decided to grant the licences to Mr F. The deciding factor had been that Mr F had approached the Agency first and had been following, and relying upon, their advice to engage in pre-application discussions.

99. The Earls made their application for judicial review on 15 October 2010.

2011

100. On 18 March 2011 a judge granted the Earls permission to judicially review the Agency's decision. In his observations the judge said that he thought it was arguable that there was *'a great deal more'* in the Earls' first ready, first determined principle than the Agency would allow. He said that the position was that the Earls had submitted their application on 25 September 2009 and no queries were raised on it and no information was sought. The Agency's decision was therefore required within 4 months, by 16 February 2010. Mr F had not made his application until 11 February 2010 and it could not lawfully be determined before 11 March 2010. The judge said that there were arguably never two competing applications and the Agency could only ever consider the two applications together by breaching their duty to determine the first one within four months of the relevant date.

Negotiations on a split scheme

101. On 20 May 2011 the Agency's solicitor wrote to the Earls' legal representatives. He said he thought it would be beneficial for all the parties concerned to attend a *'without prejudice'* meeting to see whether the proceedings could be resolved *'before the amount of work and costs escalates substantially in the run up to the hearing'*. The solicitor said that the Agency had given further consideration as to whether there might be the potential for two schemes on the weir and were optimistic this might be possible. The solicitor said he had spoken to Mr F, who had agreed to attend and was prepared to be flexible by dropping the maximum flow of water his scheme needed so that the water could be shared between the parties. The solicitor attached an *'alternative proposal'* document to his letter. This said that it would be possible for there to be two schemes on the weir if each used less water.

102. The meeting took place on 17 June 2011 at which the Agency proposed their two schemes solution. They said that after further consideration, it might be possible to set up two schemes on the weir, which would involve a degree of co- operation between the two parties. The Agency said that in earlier discussions, the Earls and Mr F had been asked to jointly propose working arrangements for a split scheme, but the Agency had now considered the role they could play in considering working arrangements for the two schemes.

103. The Earls' legal representatives wrote to the Agency on 18 July 2011 and said that having discussed the matter at length, the Earls had decided to reject the Agency's proposal of a two scheme split on the weir. This was because it would not work economically. The Earls were, however, prepared to consider a two scheme approach provided they had first call on the water.[14] They said that if one scheme was not in operation, the other scheme would be able to use the available water up to the limits that would apply if there was only one scheme in operation.

104. The Agency wrote to the Earls' legal representatives and Mr F on 22 July 2011. They said they were keen to bring the matter to a conclusion but they could not accept the Earls' proposal that negotiations should continue on the basis of something other than a 50/50 split of the available water. The Agency said there was no basis for favouring the Earls over Mr F in this way and they were of the view that a fair settlement would need to be a 50/50 split. The Agency said Mr F was not prepared to accept the Earls' proposal either. The Agency said that if agreement could not be reached on the equal split, they would withdraw their offer of granting two licences and take alternative action to resolve the current proceedings. They said the action was likely to include the Agency agreeing to quash the decision to grant Mr F's licence (thereby bringing an end to the proceedings) and making a fresh decision on the competing

[14] The Earls said they would consider a scheme based on a water flow of 5.75 cumecs provided they could have first call on the first 4 cumecs and the balance over the available flow could be shared equally between them and Mr F.

applications. The Agency said *'we should make clear at this stage that such a fresh decision ... would not involve the application of any 'first-come, first-served' or 'first-ready, first-determined' principle by the Agency - but would instead involve judging the two competing applications on their merits'*. The Agency would provide parties with a copy of the internal policy guidelines to be applied in making the determination. The Agency said they would also be prepared in principle to make a contribution to the Earls' costs. The Agency gave both parties until Monday 1 August 2011 to consider their offer of split schemes (the Agency subsequently extended the deadline until Wednesday 3 August 2011).

Consent order

105. There is no information on file about either party's response to the Agency's offer set out in their letter of 22 July 2011. On 4 August 2011 the Agency wrote to both parties. It said *'following the failure of the parties to compromise these proceedings on the terms set out in our without prejudice letter of 22 July ... we propose that the proceedings are terminated upon the terms set out in the attached consent order. You will see from this that the Agency consents to the quashing of the decisions under challenge ... on the basis that there will be fresh decisions on both licence applications'*. The Agency asked both parties to agree and sign the consent order.

106. The consent order ordered the quashing of the grant of a licence to Mr F and the deemed refusal of the Earls' two licences. The Agency was ordered to reconsider both licences. Section 6a of the accompanying statement of reasons, written by the Agency, said the Agency's approach to determining schemes would be to license the scheme that was most desirable in the public interest. It said that its role *'will be to make decisions about the appropriate use of the site for the benefit of existing and future generations, bearing in mind the long-term nature of many hydropower schemes and the Agency's statutory remit. That remit includes: contributing to sustainable development, conserving and enhancing the natural beauty and amenity of waterways ... and securing the proper and efficient use of water resources.*

107. Paragraph 6b of the statement said *'The Agency's overall aim ... will be to ensure the development of the best possible hydropower schemes ... if faced with two or more competing schemes, only one of which (at most) can be licensed, it will choose between the schemes on their merits by deciding which scheme offers the greatest public benefit by reference to a number of relevant factors including in particular the need for efficiency in the use of water resources and the need to protect the environment'*. Paragraph 7 said that the Agency now accepted its approach of preferring Mr F on the basis that he had entered into pre-application discussions was arguably unlawful.

108. The Agency undertook to reconsider the two schemes in accordance with their stated approach *'and to do so without further delay'*.[15]

109. On 2 September 2011 the Earls' legal representative wrote to the Agency with some proposed amendments of the consent order and statement of reasons. There is no record of a reply but on 30 September 2011 the Earls' legal representative wrote to the Agency referring to an email from the Agency of 23 September 2011 which is not on file. The letter said that the parties were now all agreed on the substantive terms of a consent order to bring the proceedings to an end. The representative said that they still needed to agree costs with the Agency.

The Earls' complaint

110. The Earls made a formal complaint to the Agency on 20 December 2011. In their complaint, the Earls alleged that senior officials at the Agency had conspired to defraud them of their licence; had acted maladministratively by *'deliberately and unlawfully'* awarding a licence to Mr F; and had committed *'serial violations of the statutory civil servants' code of conduct'*. The Earls also complained that the Agency had deliberately blocked their appeal to the Planning Inspectorate, which had forced the Earls to apply for a judicial review. They said their licence had been fully determined at the start of February 2010 and asked that it be formally issued without delay. The Agency acknowledged the complaint on 22 December 2011.

The Agency's investigation of the Earls' complaint

111. Following receipt of the Earls' complaint, the Agency's director of operations asked one of their senior managers (the senior manager), who was independent of the case, to investigate it. The senior manager took legal advice and assembled a group of Agency personnel to advise him. He interviewed three of the four officers who the Earls had complained about but did not seek to interview the hydropower specialist who no longer worked for the Agency by this time.

112. On 20 January 2012 the Agency's legal team re-iterated to the senior manager advice that officers believed they operated a first come, first serve practice (paragraph 49).

113. On 1 February 2012 the senior manager submitted his draft investigation report into the Earls complaint to the Agency's solicitors. The draft report went through a series of drafts as the senior manager took advice on the law, evidence and draft conclusions. A final report was produced and sent to the Earls on 24 April 2012.

[15] The consent order was finally approved by the High Court on 11 April 2012.

114. The Agency said they had found no evidence of conspiracy to defraud or misconduct in public office. Nor had they found any evidence that officers had acted in bad faith or knowingly acted outside their powers.

115. Most of the senior manager's criticisms of the Agency's processes were reflected in the final report. The Agency told the Earls there had been no robust assessment of the two applications on their technical, environmental or economic merits and the final briefing to the Innovations Panel lacked balance. The Agency said this resulted from a wish by officers to support the good practice guide on hydropower and the difficulty in assessing the technical, environmental and economic merits of two applications. It also resulted from a genuine belief that it was lawful to distinguish between two competing schemes on the basis of pre-application discussions and that it was unfair for Mr F to be disadvantaged after following the pre-application advice. The Agency also considered the officers had not maintained regular contact with the Earls between April and June 2010. They had also failed to act in the way they said they would on a number of occasions throughout the permitting process, including on the application of the first come, first served approach and the reason for the deferment of the first determination date. The Agency said that based on this it was possible to understand that there had been a breach of their code of conduct and they would undertake further work on this.

116. The Agency told us that they did not accept the senior manager's criticisms of the hydropower specialist that appeared in the draft report, and these criticisms were not included in the final report. The Agency told us that they did not accept those parts of the senior manager's report where they considered the evidence did not support his conclusions. For example, the senior manager said that the hydropower specialist's view that the Earls application was incomplete was *'untrue'* because it had been accepted by the permitting officer as valid and complete. The Agency said that, in fact, the Earls application had been deficient as they had not applied for an impoundment licence[16] and so the senior manager's criticism of the hydropower specialist was unwarranted.

The Agency's second investigation

117. Following the senior manager's investigation, at the beginning of June 2012 the Agency's director of operations asked the programme director, again independent of the case, to investigate the issues of staff conduct raised by the senior manager's investigation. By this time the Earls had made a complaint to the police about criminal misconduct on the part of Agency staff. The police case closed on 12 July 2012.

118. On 7 June 2012 the programme director asked the Agency's legal team for advice on the best way to proceed given the Earls' complaint to the police and the judicial review action. The legal team advised the sensible course of action

[16] See paragraph 38. There was not an opportunity to apply for an impoundment licence on the same form at that time.

was to wait until the Agency heard back from the police about the outcome of their fact-finding investigation and in the meantime, the Agency could discuss the possible consequences of the delay.

119. In an email on 15 June 2012 to the Agency's legal team following a meeting with the programme director, the employment law adviser said that given the Agency had already made a large number of findings following the senior manager's investigation, it would be perverse and unreasonable to reopen those findings. The adviser said that the hydropower specialist had left the organisation and the other officers' approach had been based on his instructions.

120. The programme director produced a draft corporate action plan *'to address possible actions in response to Lessons Learned in the ... weir hydropower determinations'*. The draft action plan recommended that when dealing with new and contentious issues the Agency should review the provision of legal advice. It also recommended that the way internal policy and positions were documented and made available to staff should be reviewed. No timescales were given for when this work should be completed and there is no evidence the draft action plan was ever finalised.[17]

121. In response to enquiries we made during the course of our investigation, the Agency told us that they had decided to defer the completion of the programme director's investigation pending the conclusion of the police investigation. This was because there were no grounds to justify disciplinary proceedings. The Agency concluded their final report in December 2013, following an email from us on 6 November 2013 asking for further information about steps they had taken following the senior manager's investigation.

122. The final report concluded that there was no evidence to reasonably justify any disciplinary investigation being pursued against any individual for a breach of the Agency's code of conduct. The recommendation which related to the Earls' complaint was that *'wherever possible policy positions and statements are formally signed off and readily available internally and externally'*.

Report from the Information Commissioner

123. In January 2012 the Information Commissioner wrote to the Agency following an investigation into how the Agency had responded to a freedom of information request from the Earls' agent in June 2010. The Earls' agent had originally asked for *'full disclosure of all emails, meeting minutes, correspondence and related information'* relating to the Avoncliff proposal. By

[17] In comments on the draft report, the Environment Agency said *'Policy positions are clearly described in the Environment Agency's non-financial scheme of delegation. All policies and positions are well promulgated and referenced through operational instructions. We use these materials to train our staff and staff in the National Permitting service are now well aware of these requirements.'*

January 2012 the Agency had provided all but 22 documents which was accepted by the Commissioner and the Earls' agent.

124. The Information Commissioner said *'the manner in which* [the agent's] *requests came to be concluded and the time in which it took the Agency to effectively respond to the same, raises serious questions about the efficacy and reliability of the Agency's processes and procedures for handling EIR/FOI requests ... The serious shortfalls in these processes and procedures all originate from systemic communication failures both within the Agency and externally with its communications to* [the agent]*'*.

125. The Commissioner said *'openness and transparency are essential in order to ensure accountability and promote trust and confidence. The shortcomings in the Agency's handling of this particular matter were so serious it is entirely understandable that* [the agent] *would not feel that he could have this essential trust and confidence in what he was being repeatedly told by the Agency with regard to his requests'*.

The redetermination

2012

126. The Agency's environmental planning officer for the South West (the planning officer) wrote to the Earls on 28 February 2012. He said that he would be acting as their account manager during the redetermination process to ensure that correspondence between the Agency and the Earls *'is dealt with in a professional, consistent, transparent and as clear a manner as possible'*. The planning officer said the Agency had put together a team to deal with the redetermination that had not had any involvement with the previous determination. He said the Agency's redetermination would begin when they had received the quashing order from the court. The Agency would try to reconsider the applications as quickly as possible; the relevant date from which the statutory timescales for determination were set, would be 21 days from the date the quashing order was sealed by the court. The planning officer said there were a number of factors that would influence the actual determination time; in particular, any changes from the Earls' original application or their preferences for the type of scheme proposed. He said it currently took the Agency six months from the relevant date to determine an application for hydropower. The planning officer said that within 28 days of the relevant date, the Agency would advertise the Earls' application in the local paper.

127. On 1 March 2012 the Agency completed their draft *'competing hydropower schemes'* guidance. This said that where two or more applicants sought to develop hydropower schemes at a single site, there were a number of possible options: the applicants might be able to develop a joint scheme and then seek the necessary licences from the Agency; the water at the site might be able to be shared with each of the applicants installing their own hydropower

equipment - this would not be possible at all sites and might involve each party accepting a lower abstraction level than they had originally proposed; if neither a split scheme or a shared scheme were possible, the Agency would have to decide which, if any, of the applications should be permitted to proceed. Where applicants were unable to reach agreement, the Agency would consider applications on their merits, having regard to any other competing applications on the same water. The fact that one application had been received first in time, or that a particular applicant contacted the Agency first would not normally be relevant. The ultimate question would be which scheme, if any, was most desirable in the public interest as informed by the Agency's legislative duties and policy aims.

128. On 15 March 2012 the Agency telephoned the Earls' agent. The Agency said that the Earls' agent told them that the Earls now wanted a licence for the higher quantity of 10 cumecs of water and not the reduced flow of 6.8 cumecs proposed by the Earls in their letter of March 2010 and this would dry up Mr F's end of the weir.[18]

129. The Agency telephoned the Earls on 20 March 2012. They said they would be progressing their application on the basis that they needed 6.8 cumecs of water for their scheme. The Agency told the Earls that if they now wanted to increase the quantity of water they needed, they would need to put this in writing and the Agency would need time to evaluate this.

130. Later that day the Earls emailed the Agency. They said they were concerned the Agency were once again starting out trying to satisfy both parties and trying to make the schemes fit with the restrictions that existed instead of looking at the merits of each scheme and making a decision based on that.

131. In a note of a meeting on 4 April 2012 the Agency set out three possible outcomes to the redetermination. The first was a shared scheme but this had been discounted by the Agency because of their knowledge of the relationship between the Earls and Mr F. The second option was a split water scheme through which two turbines could be licensed on the weir. The Agency said they were still working on this option but if it was pursued the parties would not have access to the same amount of water as if theirs was the only turbine on the weir. The third option, which was only applicable if the first two options were not viable, was for only one licence to be granted.

132. The Agency had agreed to pay some of the Earls' agent's costs and all reasonable costs connected with the redetermination. The Agency emailed the Earls on 27 April 2012. They said the Earls had not yet provided engineer's drawings for their scheme and not doing so until their agent's invoice was paid

[18] The Earls had originally applied for 10.6 cumecs of water which had been agreed in the draft licences sent to the Earls in February 2010. On 9 March 2010 the Earls wrote to formally reduce the quantity of water applied for to 6.8 cumecs provided they could have first call on the water (paragraph 68).

was effectively blocking reconsideration of the applications. In response the Earls said they were in an unfair situation because until their agent had received his costs, they could not do anything.

133. The Agency wrote to the Earls on 1 May 2012. They said they were considering the Earls' application as amended by their letter of 9 March 2010 and any changes to the water requirement needed to be made in writing and fully justified. The Agency said that if the original quantity of water was now being sought, they would regard this as a significant change and would need to re-advertise the application. The Agency said the engineering drawing they required was one which was compatible with the amended water quantity of 6.8 cumecs.

134. The Earls replied on the same day. They asked why the application would need to be re-advertised when 10.6 cumecs was the amount of water in their original application, which had already been advertised (paragraph 37). The Earls said they had amended their requested flow amount on 9 March 2010 in response to a threat from the Agency to refuse the licence. This reduction was made on the basis that the Earls would have first call on the water and it was not accepted by the Agency at the time. The Earls said that they did not accept that the licence should be based on a flow of 6.8 cumecs. They said that the engineer's drawings they needed to draw up depended on whether the application being considered was for 10.6 cumecs or 6.8 cumecs.

135. The Agency's solicitor considered the Earls' email on 2 May 2012. She said the Agency needed to be clear about what flows they were working on when the Earls appealed. The solicitor considered it was the case that the Agency would not be able to licence two schemes using the amended flow (10.6 cumecs) and would therefore have to compare the schemes on merit. Even if there was a new amendment to the flow, another option might be to continue with the two schemes and restrict the flows anyway.

136. The solicitor sent another email to the Agency on 11 May 2012. She said that the application returned to the Agency by the court was the amended application, amended by the Earls' letter of 9 March 2010 to a flow of 6.8 cumecs (with the Earls saying they wanted first call on the water). But confusion remained about how many screws the Earls had applied for - this needed to be resolved. The solicitor said that there were differing views as to what the court had ordered them to do. Both the Earls and Mr F believed only one scheme could be authorised so the Agency would have to determine the applications by comparison. The solicitor said that although the court was told there was insufficient water for the two schemes (and therefore the Agency would have to determine at the same time) the Agency's position had now changed (in relation to amounts of water available) so they did not have to determine the two applications at the same time. The solicitor said they were struggling to get the Earls to co-operate and that Mr F was becoming annoyed at the delay. She expressed concern that this could become more serious.

137. In an internal email on 16 May 2012 the Agency discussed a number of options to do with the applications. One of these options was for the Earls to formally vary their application back to 10.6 cumecs. If this happened, the Agency would only be able to grant one scheme on the weir and would therefore have to compare the schemes. This decision would be subject to an appeal but the *'value of an appeal decision makes this not worthwhile'*. There would also be an option for either party to judicially review the decision but they would have to show the Agency had acted irrationally or unreasonably.

138. The Agency met with the Earls on 23 May 2012. The Agency officer apologised for their previous error in determining the applications and assured the Earls they intended to determine the applications in accordance with the consent order as quickly as possible, hopefully by 15 June 2012 unless the recommendation was that only one licence be granted, which would cause a *'lengthy delay'*. The Agency officer said that the Earls' original application had been for a transfer licence, later amended to a transfer and impoundment licence, but no formal application for an impoundment licence had been made. He said that although they have previously processed applications on this basis, they would *'prefer'* that the Earls submit an application for an impoundment licence. The Earls agreed to do so. The Agency officer said they viewed the licences as returned by the court to be the ones seeking to use 6.8 cumecs of water. If that changed and the Earls wanted to revert back to the 10.6 cumecs in their original application, that would need to be advertised, causing a 28 day delay. The minutes of the meeting said that the Earls agreed they did not need more than 6.8 cumecs of water but could not accept a licence that did not enable their 6.8 cumecs to take priority over Mr F's. The Earls repeated this position several times during the meeting. The Agency officer asked Mr Earl if he would accept such a condition; Mr Earl said if the Agency had done what it should they would not be in this position. The Agency officer said that if they determined the applications in the way Mr Earl suggested, the likely outcome would be that Mr F would seek a judicial review and win *'returning us to square one'*. The Agency officer emphasised that the outcome of the determination could be that no applicant is granted a licence, or both are, or only one. The Agency officer said that his initial view was that there was sufficient resource in the river to support both schemes. Both the Earls stated they did not believe there was and they were not interested in two schemes.

June 2012

139. On 1 June 2012 the Earls' agent sent the Agency drawings for their proposed scheme. He said they were separate drawings for the abstraction licence application and the impoundment licence application.

140. The Agency emailed the Earls on 4 June 2012. They said it was not possible for the Agency to reconsider the application based on two versions of their plans. He said it was not the drawing the Earls had agreed to provide at the meeting on 23 May 2012 and failure to provide the information had caused the

redetermination schedule to slip. On 5 June 2012 the Agency received an impoundment licence application from the Earls' agent (para 138). The application, which we have not seen, was for a scheme operating at 6.8 cumecs.

141. On 6 June 2012 the Earls replied to the Agency's email of 4 June 2012. They said that they had supplied, by the agreed deadline, drawings for both their licence applications (abstraction and impoundment). The Agency confirmed on 13 June 2012 that they had received final clarification of the drawing and the Earls' plans on 6 June 2012.[19]

142. In a draft determination report on 6 June 2012, the Agency said that there was sufficient water for a split scheme on the weir.

143. The Earls telephoned the Agency on 13 June 2012. They asked the Agency to confirm whether or not two licences (one to them and one to Mr F) were going to be issued. The Agency told the Earls they were not in a position to confirm this as they had not finished drafting the redetermination reports. The Agency said that their legal advice on the interpretation of the quashing order was different to the Earls' solicitors' view, which was that only one licence should be issued. The Earls said it was obvious the Agency were trying to issue two licences.

144. The Agency sent the Earls their draft determination on 22 June 2012. This said that the Agency granted the Earls an impoundment licence which would allow a maximum operational flow of 6.8 cumecs of water to pass through the turbine. Mr F was also granted a draft licence to impound water. They also included a copy of their competing hydropower schemes guidance.

July 2012

145. The Earls' solicitors wrote to the Agency on 16 July 2012. The solicitors said they were concerned about a number of factors. Firstly the Agency fought the entire judicial review on the basis that there was insufficient water at the site to support two schemes; if that did not represent the Agency's position, it would amount to misleading the court. Secondly the solicitors said that it was not viable for there to be a shared scheme on the weir. They said that they had discussed the possibility of a split scheme with the Earls but considered there were a number of fundamental obstacles to it.[20] The solicitors said the guidance also noted that split schemes depended on a measure of co-operation and agreement between the parties which was not available in this case. They said

[19] The Agency told us *'the two sets of drawings showed two different schemes in two different locations. It is not possible to determine an application on the basis of two alternate applications and also there were errors in the drawings and contradiction between the drawings and supporting text. It was not until 14 June 2012 that clarification sufficient to allow the redetermination to proceed was provided.'*

[20] A split scheme would: fail to properly assess the relative merits of the two schemes; be contrary to the Agency's good practice guidelines; apply draft guidance in preference to settled policy or the terms of the court order; result in both schemes becoming uneconomic and unviable.

the only option available to the Agency was to compare the merits of the schemes.

146. The Agency wrote to the Earls' solicitors on 19 July 2012. They said the solicitors had failed to provide any comments on the draft determination reports (this was because the Agency had marked them as *'without prejudice'* and the solicitors said this meant they should not comment). The Agency said that the Earls and the solicitors were well aware that the Agency had requested a full written response by 16 July 2012. They said it was highly regrettable that the solicitors had chosen to wait until after close of business on the final day of the consultation period to raise their alleged concerns about the status of the documents and had not provided any comments either. The Agency said the solicitors' letter re-hashed many issues already dealt with in correspondence between the Earls and the Agency. The Agency said they had already made clear that the redeterminations would be made on the basis of the Agency's best current assessment of the factual situation on the ground based on all the available evidence, which included evidence that post-dated the consent order. This applied to the factual question of whether there was sufficient water at the weir to allow both schemes to proceed. The Agency said that their provisional view was that there was now enough water to allow both schemes to proceed. They said that suggestions the Agency had misled the court were *'baseless and offensive'*. The Agency said they had decided to grant the Earls a non-extendable period of 21 days to provide comments (meaning the Earls had to comment by 9 August 2012).

August 2012

147. The Earls commented on the draft determination, through their solicitors, on 9 August 2012. They said they accepted the Agency were entitled to take into account new information in reconsidering the applications but it was not clear what new information had become available which had persuaded the Agency to change their position on the available water. The solicitors said that in order to move forward in a positive way, however, they were prepared to withdraw the allegation that the Agency misled the court. The Earls said they were disappointed the Agency wanted to grant licences to both parties and believed that the guidance and policy required the Agency to decide between the two schemes. In their view their scheme was more favourable and they set out their reasons for this. The Earls also said two separate schemes were not economically viable or consistent with the Agency's own policy or good practice guidelines. They said that taking all their points into account, they would be prepared to consider a scheme in which they had first call on the water, allowing Mr F to develop a similar scheme. Prioritising the water in this way would resolve a number of the concerns they had about the split scheme.

148. The Agency drafted a briefing on 14 August 2012. In the briefing they said that each party had made it clear they could not work with the other and had threatened to seek further judicial review if the Agency did not find in favour of

their respective applications. In assessing all the information available in accordance with the revised guidance, the Agency had concluded that there was sufficient water to enable them to licence both schemes, although each scheme would receive approximately 25% less water than if a single scheme was in operation. Both parties had said that if two schemes were licensed neither would be economically viable but the Agency said they had seen little evidence to support this claim. They had therefore asked for evidence which they would then consider.

September 2012

149. The Earls telephoned the Agency on 4 September 2012. They wanted to know what was happening with the redetermination and said the Agency had broken the law as they had exceeded the statutory period within which to redetermine. The Agency said the redetermination was not as straightforward as the Earls thought due to all the correspondence that needed to be taken into account. The Earls said they were angry the Agency were holding up their business and were trying to *'fix'* the determination. The Earls reiterated their belief that the court order required the Agency to licence only one scheme; the Agency said they maintained this was not the case and that they had to make a decision that would give the best outcome for the environment.

150. The Agency commissioned a report into the economic viability of the two competing schemes. A preliminary estimate was prepared by Duffin Associates in September 2012. In their report, Duffin Associates said that either scheme would be economically viable and capable of attracting investment. However, there was not enough detail to allow a detailed side-by-side comparison of the two schemes to draw robust conclusions about which scheme might be the better one. Duffin Associates said that following a late revision to the Earls' scheme, there was insufficient information from the applicant to draw any firm conclusions as to the electricity generating potential of that scheme. The report said that if a split scheme was favoured, it appeared that neither scheme would be sufficiently economically viable to attract investment. However, with more detailed information it might be possible to demonstrate that a shared scheme could be economic. Duffin Associates recommended the Agency got more information to complete a more thorough economic assessment of the competing schemes and assess the economic viability of the split scheme options.

151. On 19 September 2012 the Agency's external legal adviser (the adviser) said it would be very difficult for the Agency to justify as reasonable or rational a decision to knowingly grant licences for two schemes, neither of which was believed to be economically viable. The adviser said that the Agency should revisit their provisional view to issue licences to both parties. She said it would be difficult to defend issuing licences to both parties if there is expert advice that neither scheme would then be economically viable. After she had considered this point, the adviser then went on to consider the Earls' request for determination at 10.6 cumecs. She advised that the Agency should now proceed

on the basis of an application for 10.6 cumecs from the Earls. She advised that the Agency should obtain any further necessary information, and the Agency should seriously consider seeking expert advice as to which of the schemes would be preferred. She advised that an independent report would be useful as it seemed likely that the Agency would have to choose between the two applications on their merits.

October 2012

152. Following legal advice, the Agency wrote to the Earls on 12 October 2012 to update them about how they intended to proceed. The Agency said that in response to the draft determination reports, they had considered comments and there were two further areas that needed their consideration. The first was the economic viability of having a split scheme on the weir. The second was whether the Earls wanted to apply for an increased flow of 10.6 cumecs. The Agency said that on the basis of the Duffin Associates report, they needed to look in more detail at the economic viability of a split scheme and would be requesting some further information from both parties to enable them to do this. The Agency said that the Earls had amended their flow requirements in March 2010 for economic reasons and the Agency had thereafter considered the Earls' application as being for 6.8 cumecs. The Earls had then said on 5 September 2012 they wanted the original flow of 10.6 cumecs. The Agency said they would usually refuse a request for an amendment to a licence application so late in the day, particularly as draft 'minded to' decisions had already been issued. However, they had decided to take a flexible approach in the circumstances and would allow the Earls to amend their application, provided that the Earls sent them an engineering drawing showing their new proposal with an increased flow. If the Agency issued a licence on that basis, the Earls would have to build a scheme that used 10.6 cumecs and not 6.8. Or the Agency might decide to licence the scheme at the lower flow or refuse the application outright. The Agency said they would be re-advertising both schemes. Once they had the necessary further information from the Earls and Mr F they would issue further draft determination reports and both parties would have the opportunity to comment on these. The Agency also wrote to Mr F about this.

December 2012

153. The Agency emailed the Earls on 3 December 2012. They said that at the time of the judicial review the Earls had proposed a scheme that required 6.8 cumecs and first call on the water. The Earls replied on the same day. They said it was clear in the refusal report of July 2010 that the Agency had determined the applications on the basis of 10.6 cumecs and therefore could not suggest that they had ever processed the applications on the basis of 6.8 cumecs. They said the Agency had failed to recognise that the 6.8 cumecs was only offered on the proviso that the Earls got first call on the water. The Earls said that they had not asked on 5 September 2012 to revert back to the original flow, but instead

pointed out that it was their understanding that this was what the consent order referred to, and the basis on which the judicial review had been fought.

154. The deadline for the Earls and Mr F to provide the additional information the Agency had requested was 12 December 2012. In an internal email on 13 December the Agency said the information provided by the Earls fell significantly short of what they had asked for.

February 2013

155. The Earls complained to the Agency on 6 February 2013. They said the Agency had wasted eight months of their time between April and December 2012 when the Agency tried to *'force through'* a minded to position which ignored the Earls' request for first call on the water for the amendment to 6.8 cumecs to be economically viable, and the consent order. The Earls said they had challenged the Agency to follow the consent order time and time again. The Earls said the offer of 6.8 cumecs was always with the proviso of first call on the water; without this there was no offer and the 10.6 cumecs stood. They said this was not a change to their application and was a fact. The Earls said the Agency's failure to understand this basic point was what had led to the delay. The Earls said that in the July 2010 determination report the Agency were using 10.6 cumecs as the basis for their scheme. The Earls also said it was clear in their letter of March 2010 that financial viability was a concern and that first call on the water was required. The Agency responded to the Earls' complaint on 13 February 2013. They said they had previously acknowledged errors in their first determination of the Earls' applications and had apologised for this. The Agency said there were issues they did not agree with the Earls on but this did not mean that they were incorrect or mistaken in their view. The Agency said they expected to be able to reach a second minded to decision in April 2013.

April 2013

156. The Agency sent the Earls and Mr F their 'minded-to' redetermination report on 13 April 2013. The Agency set out the information from both parties they had considered and said that, having conducted a comparison of the two schemes, they had concluded that Mr F's scheme had *'long term advantages and benefits significantly outweighing those'* of the Earls' scheme.

June 2013

157. On 6 June 2013 the Earls wrote to the Agency disputing the Agency's findings in their 'minded to' redetermination report. They said the Agency's conclusions were based on *'inaccurate information, incorrect data and biased assumptions*. They said Mr F had *'little or no opportunity'* to ever build his scheme because he had no agreement to the rights needed to use the weir. They said Mr F had not discussed his scheme with any outside agency or with his neighbour (whose land he would need to access to build the scheme). The Earls

said they were making a formal complaint and wanted the Agency to address a number of issues.

158. The Agency wrote to the Earls on 9 July 2013. They said the Earls should not expect a response to a number of issues they raised in their complaint until they received the Agency's final determination report. The letter said the Agency did not accept the Earls' comments about the 'minded to' determination report but that they were considering all the comments made to them about the report before making their final decision.

159. The Agency wrote to the Earls again on 12 September 2013. They said they would no longer be addressing matters relating to the decision about which applicant to grant the licence to as this would be covered in their final determination report.

160. In October 2013 Mr F put his property on the market. In response to email requests from the Agency about how this would affect his licence application Mr F said that he intended to continue with his application. Mr F said that he was in negotiations with a possible purchaser of his mill which included the purchaser granting him a 100 year lease to install and operate his scheme once the property was sold.

161. The Agency made their final determination on 14 February 2014. They granted the licence to Mr F on the basis that his scheme had the greatest public benefit.

The Earls' comments

162. In their original complaint, the Earls told us *'we are responsible citizens who applied for a simple licence by following the guidelines of the time and since then we have been subjected to threats, bullying, lies and deceit at the hands of the Environment Agency'*.

163. The Earls told us *'we have been successful developers for more than 25 years. We have never failed to achieve planning permission for a site. In 2008 we were really pleased to win a building award for our development of a site in Westwood. This nomination was made by the local planners and awarded by Wiltshire Council. Our involvement with the Environment Agency has dramatically altered our business. The timescale has created serious problems with continuity and contacts. It has affected our relationship with local suppliers, planners, our workforce and tradesmen and more importantly the Bank. Our accounts show that our previously thriving business is now running at a loss. This has and will affect our ability to raise money through the Bank as our track record is seriously impacted. Money that was to be used to develop the site has been spent. Furthermore we are now both five years older- Steve approaching 60 and Ewan 50. There is cost to all of this.'*

164. *'The effect of the continued time delay has created the situation where we are two projects behind where we should be. Even if we started work at the Mill today there is two years of work left to do. This increased timescale is due to the fact that some work will need to be removed and started again- e.g. the heating system in the cottages and Mill is currently set for electricity, without the generation this will need to be changed; The landscaping has over grown; The electrical work will have to be re done by a new electrician in order for it to be signed off; similarly the sprinkler system and plumbing. This cuts into the new projects which we should be doing'.*

165. Mr Earl told us that the stress of the events of the last few years have severely affected him, his wife, his brother and his brother's wife. They have been angry and frustrated and now *'have little confidence in the Environment Agency's ability to resolve this matter or to make the future changes to avoid this happening again'*. His brother is no longer interested in working with him and his brother's wife has become very stressed by the whole episode. Mr Earl feels that the opportunities to create a really exciting scheme, which would have benefitted the environment, have been lost, and that it is a *'shame'* there will be no hydropower. He is angry that Mr F did not start the project, but sold up and moved 20 miles away. There is now a new owner at the other mill.

166. Mr Earl's wife became very ill in 2009. The after-effects of that illness, Mr Earl said, have been exacerbated by the constant stress and distress they have been living with, particularly as the business is run from their home - she has had to *'live and breathe'* stress for the last few years. Mr Earl feels that the Agency have been *'unjust and shouldn't be allowed to behave as they did'*. He said he has worked with many different government departments and he has never encountered anything like it.

167. The Earls told us that they have suffered significant financial losses and they have provided us with provisional figures. These fall broadly into three categories: the cost (and associated costs) of their applications; the lost revenue incurred through not having the licence and the lost revenue incurred because of the time taken by the Agency to reach a decision, including lost business opportunities.

The Earls comments following receipt of the draft report

168. The Earls provided many detailed comments on the draft report. They strongly believe that the Agency should have applied a first come, first served approach to the applications, and had they done so, the Earls do not believe that there was any valid reason not to award the licence to them. They said that their licence was ready and complete by March 2010. The Earls say that the Agency, when asking them for an extension of determination time in 2010, did not tell them the real reason. The Earls had been under the impression the extension was simply to check some legal formalities and they feel angry that the situation was not clearly explained to them. The Earls told us that they would not have signed

the consent order if they had understood that the Agency still intended to pursue split or shared schemes and that they felt that in December 2012 they had still not been told of the merits based approach. They remain deeply distrustful of a merits based approach believing that it can only work if it is applied without bias; the Earls continue to feel that the whole process has been biased against them. They believe that the Agency, once it had developed a policy, wrongly applied it retrospectively to their application which they viewed as unfair.

169. The Earls have raised concerns about the lack, as they see it, of an appeals process. They believe they were denied the right of appeal because their application was 'deemed refused' and they could therefore not appeal on grounds of non-determination. They believe that the current system will deprive applicants of the right of appeal.

170. The Earls said they are unaware of any steps the Agency took to put their complaint right other than an apology in 2012.

The Earls' agent's comments

171. The Earls' agent told us he had lots of experience applying for hydropower licences and that the pre-application form the Agency introduced was poor and he would only complete one if the Agency were completely unaware of a proposed hydropower scheme. As the Agency had been aware of the Earls' scheme in advance of them submitting an application, he had not completed a pre-application form (paragraph 16). The agent also said there was no legal requirement to complete the pre-application form.

172. The Earls' agent said that his understanding of how applications were prioritised was that the first application in the queue should be decided first and this was standard practice. The agent said that when he helped the Earls with their application he believed this first come, first served principle applied.

173. The agent said that in the Earls' case, the application process had gone as normal up until the Earls received the draft licences. After that the Agency had started using delaying tactics. He said their application had only gone wrong because the Agency wanted to follow a different process.

The Agency's comments

174. The Agency accepts there were failings in how they handled the original determination and they say they have apologised for this and sought to make amends. They accept that they have caused delay to the Earls. They do not accept there were failings in the redetermination where they had been *'extraordinarily careful'* to be fair to both parties under the court order driven process. The Agency said this had been one of the most challenging and difficult cases they had ever faced, which involved a race for limited resources and two applications with only modest application fees.

175. The Agency told us they had always encouraged pre-application, even before the introduction of the good practice guidelines in 2010 (paragraph 17). The guidelines were the first set of standards for licensing that were for use both internally and externally; before this there had been a hydropower handbook, produced in 2003 and for Agency staff only.

176. The Agency said that even if it was the case that Agency staff were confused about when the first come, first served principle applied, the helpdesk response had clarified that it only applied once a formal licence had been granted. They said they told the Earls this in April 2010. The Agency said they were aware of one external document which mistakenly referred to the principle applying to licence applications generally.

177. The Agency told us that it was very rare for a formal licence not to be issued once a draft licence had been shared with an applicant. They said that in the Earls' case, the draft licences had been sent prior to them completing a peer review. They said their subsequent peer review clearly identified the issue of the Earls not having applied for an impoundment licence; this would normally have been addressed before the draft licence was sent out.

178. The Agency said there was no audit trail relating to the hydropower specialist's development of the position on dealing with competing schemes. They said that he would have consulted other staff during the period between March and June 2010. The Agency said they had been keen to avoid a race for water when developing the new position. In describing the race for water, the Agency said this was a general statement about the difficulty a race for water could create and there was no evidence that such a race existed.

179. The Agency said they believed they had been meticulous and fair to both parties in the redetermination. They said they had shared their communications in writing with both parties, put special account management arrangements in place and paid the Earls' reasonable costs to ensure they did not incur further costs in the redetermination. The Agency believes the reasons for the delay from 2012 lie largely with the applicants. They accept the Earls suspect their motives but say they have been responsible for much of the delay.

180. The Agency said they had already apologised for their failings in writing and by visiting the Earls. They had paid reasonable costs incurred by the Earls during the redetermination and £110,000 in legal costs. They had also paid £53,000 to the Earls' agent so that the Earls could receive reasonable additional advice.

The hydropower specialist's comments (made in a personal capacity)

181. In our interview with the hydropower specialist he explained that the national permitting service set up around 2009 aimed to streamline the process of licensing hydropower applications. Four (eventually five) centres took over the

work previously undertaken in 26 areas. He said that the early days of the service (which coincided with the Earls' application) experienced *'teething problems'*; there was a loss of expertise because existing staff did not want to move to the new centres. Permitting officers worked the applications in the order they came in but no account was taken of where they were in the country, so in the Earls' case, one permitting officer was in Ipswich and the other in Solihull, which did not help communication.

182. He said that no process was in place to look at two competing hydropower applications and there was no mechanism in place to pick up what pre-application discussions might be taking place in the different centres. He said it was perfectly possible that the national permitting service might not be aware of the local discussions.

183. He explained the Agency's reluctance to consider a merits-based approach in 2009 was because of the possible wider repercussions in the 'merits' of water abstraction for different uses, for example, irrigation of a golf course versus industrial use; the difficulty of the range of environmental and sociological factors that would need to be considered in a merits based approach and the likely need and cost of specialist input from outside the Agency. The Agency wanted to avoid making a judgement about which use was the most valuable for those reasons.

184. He said that he would have liked to have refused both applications and to have *'stopped the clock'* but the legal team did not want it to stop; they felt that decisions had to be made. He felt that therefore the Agency perhaps did not sufficiently explore a way of stopping the process.

185. In relation to the guidance that he produced, the hydropower specialist said that he had tried to make it generic, but that it was informed by the case. He said *'policy development and guidance is always developed against a background of a need. It is wasted effort if there is no requirement ... this work* [of developing guidance] *had to be undertaken alongside the day to day consideration of permitting new schemes'*.

186. In relation to the report by the senior manager, the hydropower specialist said that he had not been interviewed by the senior manager as part of his investigation (he had left the Agency by this point) so had no opportunity to put forward his point of view. He believed that there were *'unwarranted criticisms'* of him in that report.

The Agency's comments following receipt of the draft report

187. The Agency made many comments on the draft report. They emphasised that they were faced with a novel situation with competing applications and the determination of live applications having to be developed in parallel with policy and process. The Agency also emphasised that they were obliged to determine

the applications under the statutory process unless both were withdrawn. The Agency say that they accept that there were failings in how they handled the original determination and say that they have already apologised for those failings and sought to make amends to the Earls. They said *'it was been one of the most challenging and difficult cases of its kind that we have ever faced. It involved a race for limited resources and two applications with only modest application fees'*.

Findings of maladministration

188. The Earls complained to us about six separate issues (paragraph 1). Our approach in these findings is to focus on broader themes and consider the Agency's approach to these. This prevents overlap in our findings and has enabled us to reach over-arching findings which encompass the Earls' complaint.

The Agency's process for determining the competing applications for hydropower licences

189. There was a lack of clarity in the Agency's application process at the time the Earls and Mr F applied. Applicants could either submit an application formally, or engage in the pre-application process. Whilst the latter was the Agency's preferred approach this was by no means clear to applicants given it had no statutory basis and the lack of published guidance about how it worked.

190. In addition, there was ambiguity in how applications should be treated when they were received by the Agency. The Agency's approach at the time the Earls made their application was to determine formal applications on a first come, first served basis. This is evidenced in internal Agency correspondence (paragraphs 40, 44, 46, 47 and 48), in external publications (paragraph 25), and in an email to Mr F (paragraph 42). The Agency's senior environmental planning officer considered the first come, first served approach to be the way in which applications were dealt with (paragraph 47), and it was put to the helpdesk as the Agency's 'agreed policy' (paragraph 48). The legal team also acknowledged that the Agency usually dealt with applications on a first come, first served basis (paragraph 80). However, it emerged in January 2010 that this approach had no legal basis and as such, was not considered by the Agency to be useful in deciding which of the two competing applications was granted the licence. In short, the Agency had no method of determining the order in which applications should be dealt with when the competing parties had applied, a situation made worse by the fact that each party applied using a different method.

191. What the Agency needed was one route for applying for hydropower licences that was communicated consistently both within the organisation and externally. Instead, they had created a process which lacked clarity and contained no provision for what would happen if two parties decided to apply for a licence at the same time, each choosing a different, but essentially valid, method to do so.

192. The lack of clarity was made worse by the re-organisation of the national permitting system (paragraphs 181 and 182). Whilst we accept that any new system has *'wrinkles'* that need ironing out, the *'teething problems'* referred to by the hydropower specialist led to the two applications being considered separately in different parts of the country which led to an increased risk of poor co-ordination between the offices.

What the Agency should have done when they received two applications for the same stretch of water

193. Whilst we recognise that no policy can cover every eventuality, the Agency needed to deal with this novel situation. As soon as the Agency became aware that both Mr F and the Earls had applied to use the same water it should have been obvious to them that they had created a process that did not work. When they realised this, the Agency should have paused and acknowledged that the process was not fit for purpose and not capable of dealing with two competing applications. We note that the hydropower specialist said that he wanted to *'stop the clock'* at this point but was advised by the Agency's legal advisers that they could not do so (paragraph 184). Had they paused, they would then have had the opportunity to consider their options; if necessary they could have requested an extension to give them time to agree a mutually acceptable solution (as they did in March 2010). These options included attempting to mediate an agreed approach where both parties agreed a way forward, accepting and taking responsibility for their mistake (prior to Mr F submitting his formal application) and remedying any injustice caused by their maladministration at that time. A further option was for both parties to agree that a team of people external to the Agency, or independent from the team who had so far been considering the licences, make a decision based on merits. Whilst any one of these options would have undoubtedly caused the Agency to incur costs, they would have given themselves the opportunity to avoid what turned into a protracted and expensive dispute with the Earls. Instead of doing this, they continued to try and make the process fit the situation. In our view, this approach was always destined to fail because it failed to acknowledge that both parties had legitimate expectations having both followed genuine application routes and both had reasonable, albeit differing, understandings about how the process would work.

194. Whilst acknowledging that the Agency faced a novel situation, their lack of clarity and planning about the process for dealing with hydropower applications meant that neither party understood the implications of it. In this way the Agency failed to be customer focussed. Their flawed process meant they were not able to account for their decisions and actions because there was no clarity about what these should be. As such, it was impossible to determine their criteria for decision making when they received two competing applications because they did not have a process to deal with them. The Agency had put itself in a position where any solution they came up with would fail. The legal team

queried the pre-application process (paragraph 56), asking why one applicant was required to go down that route and the other not. They acknowledged there would be legitimate grounds for challenging the hydropower specialist's approach at judicial review (paragraphs 61, 80), not least because applications were normally determined on a first come, first served basis, and because it could be argued they had acted irrationally in granting one licence at the expense of the other. They also considered that it would be difficult to defend an approach which saw them refusing both applications (paragraph 58). And they said that the Earls would be able to argue that the Agency's approach showed at least a perception of bias (paragraph 89). The Earls then successfully overturned the Agency's decision following their judicial review (paragraph 106), further undermining their approach. Taken together, this evidence demonstrates the Agency were not in a position where they could make a sustainable decision about who to grant the licences to. In the circumstances, their only solution was to attempt to agree a mediated approach between the competing parties. This was suggested in January 2010 (paragraph 47) but no further action was taken to expedite this. It is noticeable that all parties agreed to a merits-based approach in the consent order. The Agency did attempt to mediate but only to achieve an agreed outcome such as a shared scheme, rather than to agree an approach.

195. We consider that the Agency failed to be open and accountable when determining the competing applications. These failings were serious and we consider they amounted to maladministration.

Maladministration arising from the Agency's decision to pursue the competing applications

196. By continuing to consider both applications and attempt to make a decision based on a flawed, undear process, the Agency were responsible for further maladministration.

Communication with the Earls

197. In 2010 once the Agency had abandoned the first come, first served approach that they had relied on (paragraph 50), they should have communicated this to both parties. Instead, they proceeded with both applications on this basis, with neither party aware of the implications of the change - a failure by either party to supply information promptly could have resulted in the other receiving the licence almost by default. It was not until 6 April 2010 that the Agency told the Earls the first come, first served principle had no legal basis and even then, they only hinted at the possible implications of this. This meant the Earls were unclear what their entitlements and responsibilities were.

198. The Agency then sent the Earls draft licences, which the Earls reasonably understood to mean that they would be granted the licences formally. The Agency told us they had sent the draft licences in error because they had not yet

been quality assured (paragraph 177). It was particularly poor of the Agency to send draft licences that had not exhausted their internal quality procedures. Added to this was the fact it was highly unusual for the Agency to issue draft licences without then issuing formal ones (paragraph 177), something the Earls were also aware of. The Agency told us that the licences were sent *'too early under pressure'* but this was not the information given to the Earls at the time. We find that the Agency were unclear in their communication with the Earls; they led them to believe, when they issued them with draft licences, that there was no problem and they failed to subsequently manage their expectations.

The absence of a rigorous process for developing new policy and procedure

199. The hydropower specialist shared his policy paper on dealing with multiple hydropower applications on 10 June 2010[21]. There is no evidence to demonstrate how this policy was developed; the Agency themselves acknowledged that it was developed on the hoof (paragraph 61). We are concerned at the absence of an audit trail and any evidence of consultation with Agency staff. We are led to the conclusion that the new policy was developed primarily by the hydropower specialist operating under time pressure. Given the significance of the proposed policy, we consider that the process of developing and consulting on this policy was flawed.

Did the Agency's proposed policy and processes show bias?

200. The Agency's actions and decisions should be free from any personal bias or interests that could prejudice those actions or decisions, and any conflict of interest should be declared. In considering whether there has been bias, or a lack of balance, shown we do not seek to lay the responsibility for that bias on any individual. Our remit is to consider organisational maladministration; the actions and decisions made in the case were not made by one person but by staff within the organisation itself and if we were to find a lack of balance or bias, it would be a finding about the Agency as a whole. We have also taken into account, when making these findings, the general point that those involved in developing guidance (that is, specialist officers) might (or should) be involved in decision-making. It is not for this office to determine when and who should be involved in decision-making in an organisation; however in those circumstances it becomes even more important to ensure that the policy developed and decisions made are even-handed and fair with adequate checks and balances to ensure that the adoption of a policy does not intrinsically favour one party over another.

[21] The Environment Agency told us that there continued to be 'iterations' of the policy after 10 June 2010 although the date on the final version remained 10 June *'by mistake'*. They said that the Agency's legal services and *'at least two other'* water resources staff commented prior to it being finalised on 24 June 2010 but we have seen nothing in the files. The hydropower specialist told us that *'some of the audit trail was missing. There was consultation/discussion with appropriate staff ... the timescale for decision making limited the planning'*.

201. We consider that, of the three proposals put forward by the hydropower specialist in the June 2010 position statement, the only one which had the potential to result in a licence application solely to the Earls was option two, which proposed basing the decision on consideration of the environmental benefits of each scheme. But this option was subsequently dropped. The Agency said *'it was not favoured'* although it ended up being the approach the Agency and the parties agreed to adopt as a result of the Earls' judicial review. But the Agency only took forward for consideration option one, which was to refuse both applications, and option three, which was to grant the licence on the basis of pre-application discussions. By 25 June 2010 the Agency had decided their preferred option was granting the licence to Mr F on the basis he had undertaken pre-application discussions. This, as much as the first come, first served approach, was flawed and had no basis in law. The hydropower specialist also asserted the Earls' application had a poor level of detail and should not have been accepted as valid. This ignored the fact that in February 2010 the Agency had been satisfied enough with the information in the application to issue draft licences to the Earls.

202. The hydropower specialist made clear that he hoped the outcome of the competing schemes would support the pre-application process and that his preferred option was the one which took account of this (paragraph 78). He was responsible for developing the pre-application process and the good practice guidance which accompanied it (paragraph 72). It should therefore have been apparent to the Agency that he had a conflict of interest, and they should have taken this into account and tried to rectify it during their consideration of the position statement. However, the advice from the legal team focused only on refusing both applications or granting the licence to Mr F. They too failed to consider granting the licence to the Earls, although we acknowledge this was never an option put to them to consider.

203. There was a lack of balance in the information given to the Innovations Panel to consider. Not only did the position paper provide a clear steer towards Mr F's application before it had even been fully considered by the Agency, the permitting manager also told the Panel that neither a joint scheme nor deciding the applications on their merits was viable. The permitting manager also contacted a member of the Panel who suggested determining the Earls' application. He told the Panel member his suggestion went against what the Agency were proposing to do, which was to grant the licence to Mr F. In addition the permitting manager claimed the Agency had taken every possible step to get the Earls and Mr F to work together (paragraph 85)[22]. We can see that the Agency did try several times to get agreement on their proposed split scheme, but we have seen no evidence of the Agency involving the parties in attempting to reach a solution.

204. In his paper of 28 February 2010 the hydropower specialist referred to the need to be fair and even-handed. We can see that the Agency were concerned

22 The hydropower specialist reiterated that they had tried to get both parties together.

about being fair to Mr F (paragraph 86) but we have not found evidence that they considered whether they were being fair to the Earls. For example the Agency's director of environment and business said, in June 2010 (paragraph 86) that they would not determine the Earls' application first unless they were satisfied there was no other option. But the judge, in March 2011, said that there were arguably never two competing applications and the Agency could only ever consider the two applications together by breaching their duty to determine the first one (the Earls') within four months (paragraph 100). And, as we have found above, the paper to the Innovations Panel was not even-handed, a failing that the Agency have acknowledged.

205. We find that the Agency failed to take reasonable steps to make sure their position was free from bias towards the pre-application process (and by extension, Mr F). They did not consider any potential problems with the lack of a balanced approach in allowing the position statement on competing schemes and deciding their approach to the two schemes to be developed by the individual who was responsible for writing the Agency's good practice guidelines which promoted pre-application. There was no evidence of an effective checks and balances system whereby that might have prevented such a lack of balance. The Agency's briefing of the Panel lacked balance and failed to treat the Earls and Mr F even-handedly and impartially.

The retrospective application of the hydropower specialist's policy

206. Once the approach had been agreed by the Innovations Panel, the Agency then set about applying it retrospectively to the two competing applications. In their decision letter to the Earls on 20 July 2010, the Agency said they would only licence one scheme on the weir and had taken account of the pre-application discussions they had with Mr F and their position statement. This was not the policy which had been in place at the time the Earls applied for the licence. In the absence of a clear written policy in 2009, Agency staff had been working on the assumption that applications needed to be decided on a first come, first served basis. Whilst we accept this approach was not a legal requirement, we consider it reasonable to conclude it was the agreed method for dealing with applications at the time the Earls and Mr F applied for their licences. To substitute this approach for a new one, based on the hydropower specialist's position statement meant that the Agency were retrospectively applying new policy to the applications.

207. The Agency allowed someone with detailed knowledge of the two competing applications to develop policy to be applied to those applications to make a decision on them. Because he was not independent of the applications, the hydropower specialist was both developing policy and heavily influencing the decision on the licences.

The Agency's handling of the Earls' complaint

208. The Earls complained to the Agency on 20 December 2011. We acknowledge that the investigation by the senior manager in January and February 2012 remained a draft but even so the Agency failed to take steps to put things right until December 2013. We acknowledge that the programme director conducted a review of the senior manager's findings, but this review remained in draft format only and there is no evidence the Agency were actively looking for additional ways to remedy some of the issues the senior manager's draft report identified. We recognise that the police investigation into the Earls' allegations may have been reason for the Agency not to actively pursue alternative remedies but we have seen no evidence to show the Agency were keeping themselves informed of the progress of the police investigation and were unaware it had concluded when we first contacted them about the Earls' complaint.

209. The senior manager's remit was limited to only considering those issues the Earls had complained about (paragraph 110), rather than a wholesale review of everything that had happened since the applications were first received in 2009. This suggests the Agency were only interested in resolving the Earls' complaint rather than identifying areas where their service had been poor or where they might do things differently in future. Even so, the senior manager's report raised a number of issues about the Agency's handling of the Earls' case (paragraph 113). In spite of this, the Agency took only limited action to review these findings, including failing to consider the wider implications of the findings about the hydropower specialist's involvement in the case, or the lack of balance in their approach. They stopped their investigation at the point at which they had answered the specific elements of the Earls' complaint, without considering the wider issues about potential bias their handling of the case had identified. We therefore cannot be satisfied that the Agency have at present taken all the necessary steps to put things right but we note the Agency's offer of redress at the end of the process.

The redetermination

210. The Earls complained that the Agency delayed redetermining the licences once the court had ordered the original decision to be quashed. It took the Agency 21 months to reach a final determination. In considering whether this delay was maladministrative, we have considered the actions of both the Agency and the Earls.

211. The court ordered the Agency to redetermine the applications based on which better served the public interest (paragraph 106). The Earls reminded the Agency of this on a number of occasions (paragraphs 130, 143 and 145), only to be told by the Agency that this was not what the court had said (paragraph 143). It is clear the Agency considered that the court order allowed them the capacity to make a decision to split the water if they considered they were able to do so. The Agency's draft guidance in March 2012 said that they had three options: to

split the water, to share it, or to make a merits-based decision. The guidance said that where applicants were unable to reach agreement, a merits-based decision would be taken (paragraph 127).

212. From the beginning of the formal redetermination in April 2012 to September 2012 the Agency worked on the basis that they would licence a split scheme on the weir. But at the time the consent order was being agreed, the Earls made clear they would only agree to split or share the water on the weir if they were given first call on it. They refused to agree to a share or split on any other terms (paragraph 103).

213. Despite the fact the Earls would only agree to a split scheme if they got first call on the water, as amply evidenced in the meeting of 23 May 2012, and knowing this was not a condition they could accept, the Agency still decided to attempt to redetermine the licences on the basis the water could be split. Whilst the Agency had to consider this option, it was clear at an early stage that the applicants would not reach agreement. So according to their own guidance a merits-based approach was needed. It was only in October 2012, at least five months after they had begun to redetermine the licences on this basis, that the Agency acknowledged that such an approach would not work. This was only after they had sought external legal and economic advice on the viability of the split scheme (paragraph 151).

214. It was reasonable for the Agency to consider a split scheme, following the consent order. However it was clear, based on their own guidance that agreement was needed, that they needed to move to a merits-based approach. We consider that had they taken account of the fact that the Earls only agreed to the consent order on the basis that a fresh decision would be made based on merits, and that their flow requirements were only to be reduced if they had first call on the water, they could have ruled out the feasibility of a split scheme much sooner. The process should have happened much more quickly. This was a failure to act fairly and proportionately which was so serious it was maladministrative.

215. The Agency consider that the Earls were responsible for delaying the redetermination. Whilst we acknowledge the Earls did not always co-operate fully with the redetermination process, we do not consider they are primarily responsible for the Agency's delay as we have described in the paragraphs above.

216. We recognise there were occasions when the Earls did not provide information, failed to provide sufficient information, or did not co-operate fully with the Agency's requests. However, this must be considered in the context of the Agency's overall inadequate handling of the Earls' licence applications. We therefore consider the Agency should have anticipated a degree of reticence and suspicion on the part of the Earls to engage openly with them during the redetermination period and taken account of this in planning their management of the process. Instead, the evidence suggests the Agency blamed the Earls for

being obstructive and failed to fully recognise the Earls' position when they began the redetermination process and as a result defensively held the Earls responsible for delays which we consider emerged from the Agency's overall poor handling of the Earls' case. This was a failure to act fairly and proportionately and we consider it was so serious it was maladministrative.

The Agency missed opportunities to put things right

217. We acknowledge that the Agency was in a new and difficult position once it became clear that there were two competing applications. But we consider that, virtually from their realisation of the nature of the problem, the Agency missed opportunities to resolve the situation.

- There was an opportunity right at the beginning, before Mr F submitted his formal application, for the Agency to recognise that they were faced with an unresolvable situation and invite all parties to meet to consider next steps but they did not do so.
- As early as January 2010 proposals for external mediation were being discussed but went nowhere (paragraph 47). Whilst the Agency attempted to get agreement to an agreed outcome, they did not attempt to get an agreed approach.
- In February and March 2010 the hydropower specialist proposed refusing both applications to allow time to develop a policy to cover competing applications (paragraph 57); this was overruled by the Agency's legal team who nonetheless expressed concern that *'we are making up policy on the hoof'* (paragraph 61).
- In June 2010 the Agency could have considered all options proposed by the hydropower specialist including option two - the merits-based approach. The arguments that it was too close to call or involved too many judgements should not have prevented the Agency from properly considering option two.
- In the discussions in July 2011 leading up to the consent order the Agency told the Earls that if the previous decision was quashed their approach to resolving the problem would be *'judging the two competing applications on their merits'* but they did not take this approach until December 2012 (paragraph 104).
- In March 2012 the Agency's draft competing hydropower schemes guidance said that where applicants were unable to reach agreement, the Agency would consider applications on their merits (paragraph 127). It had long been clear that the Earls and Mr F would not be able to agree so the Agency should have immediately dropped their proposals for a shared scheme and turned to a merits-based consideration but they did not do so for a further ten months.
- At the meeting of 23 May 2012 it was evident that the Earls would not agree to a split scheme where they were licenced for a flow of 6.8 cumecs without first call on the water, but the Agency continued to pursue this option until they received legal advice in September 2012 that said the

Agency should proceed on the basis of an application for 10.6 cumecs from the Earls.

We find that the Agency failed to take opportunities to put things right for the parties and that amounted to maladministration.

Findings of injustice

218. Once the Agency became aware of the competing applications (October 2009) and recognised that they had no system in place to deal with that (by January 2010), they should have taken different steps to resolve the problem. The Agency should have recognised that none of the four options they considered (refuse both applications, split or share the water, grant the licence to Mr F or Mr Earl) were going to go unchallenged. At that point they should have considered mediating to achieve an agreed way forward with the Earls and Mr F. This would have resulted in one or other party either withdrawing their application or adopting a merits-based approach to deciding who received the licence. We note that this latter outcome was the one all parties agreed to when the consent order was signed.

219. Had the Agency paused in January 2010 and engaged with both applicants to explain the issues and the difficulties, it would have started work on considering their options to resolve this unusual situation. We consider that a fair estimate of completion of this task would be by July 2010 - a period of six months. Had there been no maladministration and the Agency had made a balanced and fair decision, it is reasonable to conclude they would have agreed a merits-based approach. We acknowledge that that may have led to the Agency requesting an extension of time to determine.

220. There would then have followed a period of time consulting the applicants and preparing the necessary guidance to implement this approach. By the end of 2010 the Agency would have finalised its guidance. By January 2011 the Agency would have been in a position to implement its merits-based approach.

221. In fact the Agency reached this position in September 2012, 21 months later. We have found that the Agency delayed by 21 months in arriving at the point of going ahead with a merits-based approach. We have no reason to believe that the events after September 2012 would not have happened but they would have happened 21 months earlier.

222. We consider that the Earls have suffered a significant injustice by the delay. Had there been no maladministration, the events that happened after September 2012 would have occurred 21 months earlier. Of course, we cannot know exactly what would have transpired. However it is reasonable to conclude that an earlier, balanced and properly made decision would have prevented the need for the Earls to seek judicial review (although we acknowledge that they may still have gone to judicial review to challenge a decision against them as

they are clearly of the view they should have been granted the licence). It would have also led to less ill-feeling and stress, less long running paperwork, phone calls, meetings which the Earls say have blighted their lives since 2009. Their plans would now be 21 months further advanced. The Earls have told us that they have been deeply frustrated and angered by the Agency's actions. Those actions have caused stress and profound anxiety to the Earls and their wives (paragraphs 165 and 166) and we can see that the effects have worsened over time. They have been stuck in limbo for several years because they have needed a decision but have no confidence in the Agency's ability to make one. Even when this complaint is concluded, the Earls will continue to be frustrated and angry because they feel so wronged by the approach the Agency took from 2009 onwards. We consider the Earls should never have been put in that position and that they have suffered a significant personal injustice in dealing with the delay caused by the Agency's maladministration.

223. But can we say that the Earls would have been awarded the licences had there been no maladministration? As we found maladministration, we are able to consider whether there was enough evidence to be able to say that the Earls would have been awarded the licences. But we have come to the conclusion that, on the balance of probabilities, even if the Earls could have been issued with the licence, we cannot make a finding on whether that the Earls *would* have been granted the licence in 2010 had there been no maladministration. Whilst the Agency did send the Earls draft licences in February 2010, this was, in our view, not a sign that they had determined that the Earls' application was satisfactory but a consequence of a combination of administrative errors (the draft licences had not been peer checked when they were sent) and an indication of the lack of direction and decision-making on how to deal with the two competing applications. Such was the lack of clarity and lack of criteria on which to base a judgement at the time that there are no standards that we can apply to consider this issue. And even if the Agency had adopted a different approach at the outset and sought a mediated outcome or taken a merits-based approach to the application, we still cannot say that this would have resulted in the Earls being awarded the licences.

224. The Earls have told us that they have also suffered financial losses (paragraph 167). We cannot make a finding about the injustice the Earls have claimed from not having the licence as we cannot say they would have been awarded the licence if there had been no maladministration. However we consider that their claims of financial loss (including lost business opportunities) through the Agency's delay in coming to a decision, along with any costs they have incurred in applying for the licence are a potential injustice and should be considered.

225. It is not this Office's expertise to make an assessment of the Earls' complex financial and business affairs. We are of the view that an independent expert assessment of the financial losses claimed by the Earls should be carried out and that the Agency are best placed to organise such a review. The Earls have told us

that they have now withdrawn their appeal; we consider that this review can now take place as the current legal process is exhausted. As a decision has been reached the Earls and the Agency will be in a realistic position to assess any possible financial and non-financial loss.

Recommendations

226. Under the Ombudsman's Principles, 'putting things right' entails considering forms of remedy, such as an apology, an explanation or compensation. It means returning the complainant to the position they would have been in if the maladministration had not occurred. If that is not possible, it means compensating the complainant appropriately. In order to remedy the injustice caused by their maladministration, we recommend:

- Within four weeks of the final report, the Agency apologise to the Earls for the injustice resulting from the maladministration we have identified.

- The Agency should pay the Mr Steven Earl and his wife and Mr Ewan Earl and his wife £4,000 per couple as a consolatory payment for their distress, frustration, and collapse of trust in the impartiality of the Agency.

- The Agency draw up an action plan, setting out how they will conduct an independent review and assess the financial injustice caused to the Earls as a result of their maladministration. The action plan will set out a process to gather all necessary information from the Earls and other relevant sources and will include an assessment of the Earls' losses attributable to the Agency's maladministration. The action plan will include an assessment of the impact the maladministration has had on the Earls. The Agency will include a time frame and reporting date of its review.

- Once the review is completed the Agency should pay the Earls compensation for the losses that their review has identified as appropriate and which remedies the injustice caused them by the Agency's maladministration.

Conclusion

227. This has been a long and complex investigation. We have partly upheld the Earls' complaint about the Environment Agency. We are pleased that the Agency have agreed to the recommendations outlined in paragraph 226. We are satisfied that the action that the Agency have agreed to take will provide an appropriate remedy for the injustice that the Earls have suffered.

16 December 2015

Annex A

Our role and approach

228. Our role is formally set out in the *Parliamentary Commissioner Act 1967*. It is to consider complaints about the way certain public organisations in jurisdiction have carried out their administrative functions. We start by considering whether there has been maladministration by the organisation. We then consider whether that has led to an injustice that has not been put right. If we find an injustice that has not been put right, we will recommend action. Our recommendations might include asking the organisation to apologise or to pay for any financial loss, inconvenience or worry caused. We might also recommend that the organisation takes action to stop the same mistakes happening again.

Annex B

How we consider complaints

229. When considering a complaint we begin by comparing what happened with what should have happened. We consider the general principles of good administration that we think all organisations should follow. We also consider the relevant law and policies that the organisation should have followed at the time.

230. If the organisation's actions, or lack of them, were not in line with what they should have been doing, we decide whether that was serious enough to be maladministration or service failure.

The Ombudsman's Principles

231. The Principles of Good Administration, Principles of Good Complaint Handling and Principles for Remedy are broad statements of what the Ombudsman thinks public organisations should do to deliver good administration and customer service, and how they should respond when things go wrong.[23]

232. The same six key Principles apply to each of the three documents. These six Principles are:

- Getting it right
- Being customer focused
- Being open and accountable
- Acting fairly and proportionately
- Putting things right, and
- Seeking continuous improvement.

233. The Principles of Good Administration that are particularly relevant to this complaint are:

- *Getting it right* - providing effective services with appropriately trained and competent staff, and taking reasonable decisions, based on all relevant considerations.
- *Being customer focused* - behaving helpfully, dealing with people promptly, within reasonable timescales and within any published time limits. They should tell people if things take longer than the organisation has stated, or than people can reasonably expect them to take;
- *Being open and accountable* - being open and clear about policies and procedures, stating criteria for decision making and giving reasons for decisions; and
- *Putting things right* - acknowledging and apologising for mistakes, explaining what went wrong and putting things right quickly and effectively, including reviewing decisions found to be incorrect and reviewing and amending any policies found to be unworkable or unfair.

[23] The *Ombudsman's Principles* is available at www.ombudsman.org.uk.

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