

Restoring Sustainable Abstraction: Section 52 mandatory licence changes

Instruction: 400_12

Published: [21/10/2019]

This document describes how to change water abstraction and impounding licences that are in the Restoring Sustainable Abstraction (RSA) programme, using section 52 of the Water Resources Act 1991 (WRA91).

Audience:

- Area RSA Leads (IEP teams) and Permitting & Support Centre (P&SC) staff,

with support from:

- Sustainable Abstraction Team, Operations Catchment Services

Contents

Introduction.....	2
Changing a licence using section 52.....	2
To begin.....	3
Discussing possible compensation.....	3
Stage 1 – Preparing a Licence Change Proposal Report (LCPR)	4
Who is responsible?.....	5
What is a LCPR?	5
Proposed licence documents	5
Delayed effective dates (Upfront Permitting).....	6
Stage 2 – Quality Review and sign-off.....	7
Stage 3 – Preparing notice documents.....	7
Stage 4 – Advertising and serving notice	7
How to advertise (OCS)	8
Before serving notice	8
Serving notice	9
Advertising date	10

Stage 4 – Licence holder objections and representations	10
Stage 5 – Referring the case to Secretary of State	11
Determination by the Secretary of State	12
Receive direction from the Secretary of State	13
Stage 6 – Compensation Claims and Negotiation	14
Eligibility of the claim	14
Principles of compensation	15
Components of a claim	15
Negotiating compensation	16
Agreement reached and payment	16
Lands Chamber of the Upper Tribunal	17
Related documents	18

Introduction

We protect the environment through various aspects of water resources legislation and can make changes to abstraction and impounding licences using sections 51 and 52 of the WRA91.

Using section 51, the licence holder applies for the changes voluntarily. Section 52 changes are proposed by the Environment Agency and referred to the Secretary of State (SoS) for a decision.

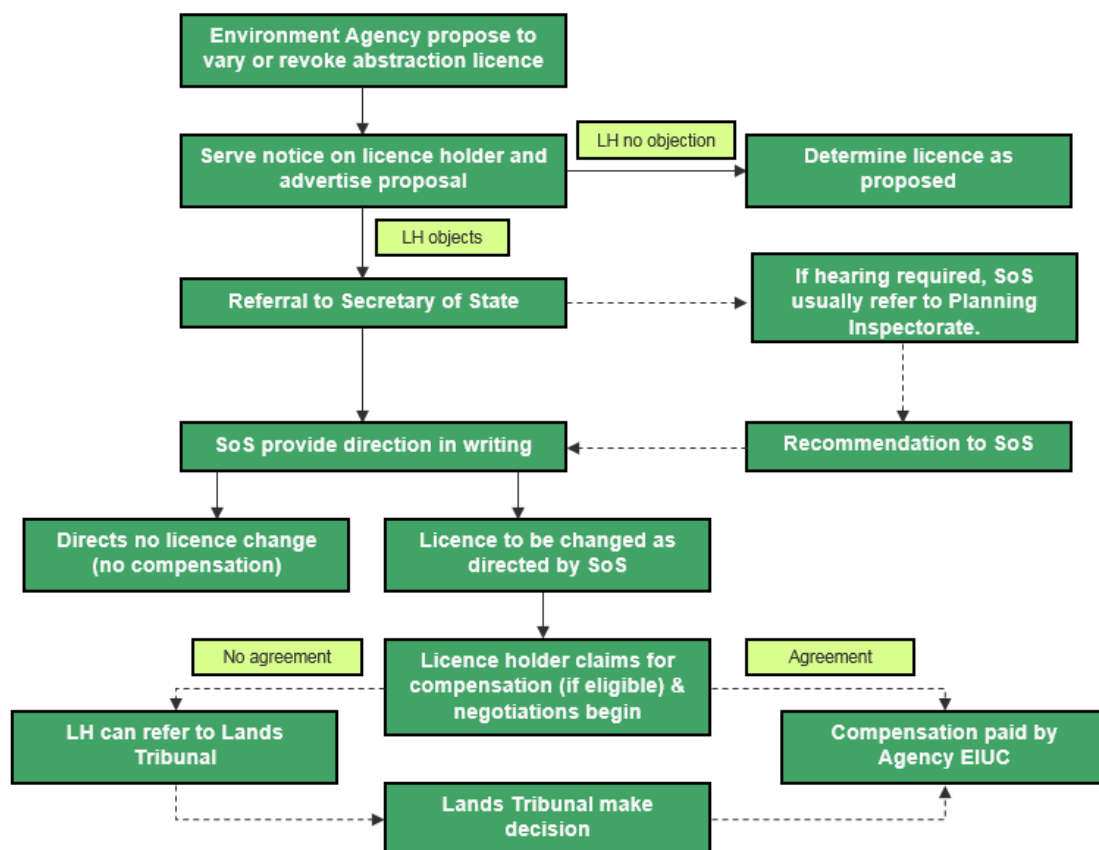
This document outlines the process for section 52 changes. We must be fair and transparent to the licence holder about the two options and their potential right to compensation.

Changing a licence using section 52

If a licence holder is not willing to volunteer to change their licence(s) using section 51, we use section 52 and issue the licence holder with a notice proposing the change.

Where we propose to change a licence under section 52, we apply a time limit to the whole licence.

If the licence holder objects to our proposal, it is referred to the Secretary of State (SoS) who makes the final decision. In this case, the licence holder may be entitled to compensation.



To begin

The Area RSA Lead must have

- completed the options identification, appraisal and agreement for Review of Consents (RoC) Stage 4 (**for HD sites**);
- signed a closure report or Site Action Plan (**for HD sites**);
- identified the best and most cost-effective/cost-beneficial option to implement;
- discussed the process and methods available to the licence holder; including section 51 and potential eligibility for compensation.

Discussing possible compensation

Prior to serving a section 52 notice, the Area RSA Lead may discuss with the licence holder whether they are eligible for compensation. Licence holders are not eligible for compensation if:

- they are a water company;
- no abstraction has taken place for a period of four years (ending on the date on which notice of our proposals is served);
- the licence change is to protect from serious damage (see appendix to Licence Change Proposal Report);
- the licence was granted after 2006.

The Area RSA lead must tell the licence holder about the compensation process, eligibility and their entitlement to professional advice (land agent, solicitor) whose reasonable costs may be included within any potential compensation claim.

Ensure the licence holder is aware that there is no guarantee that the licence change will go ahead as proposed.

We have an [external leaflet](#) which is available to the licence holder and explains the process. Do not enter into formal negotiations about compensation as we can only do this once the change has taken place and the licence holder has submitted a formal claim.

In some circumstances, our National Estates team will require the assistance of external consultants who will become part of our team. The Area RSA Lead will need to consider budgets to pay for this external work. National Estates may need to discuss aspects of the business with the licence holder to help produce a compensation estimate.

Stage 1 – Preparing a Licence Change Proposal Report (LCPR)

Only produce a LCPR for licences which are to be changed using Section 52.

For expected section 52 changes, the OCS Sustainable Abstraction Team should receive a draft LCPR as soon as possible to enable us enough time to prepare to serve notice by the deadline of 31 March 2020.

It is possible to combine a number of licence changes within one LCPR if the site and characteristics are similar.

Who is responsible?

The Area RSA Lead is responsible for:

- preparing the LCPR;
- working with the OCS Sustainable Abstraction Team to gain the relevant approval;
- obtaining approval from the Area Deputy Director.

The OCS Sustainable Abstraction Team is responsible for:

- working with the Area RSA Lead to review and finalise the LCPR;
- seeking help from National Estates to obtain compensation estimates (where appropriate);
- seeking help from P&SC or NPS to obtain draft licence documents (where appropriate). If these are needed well in advance of a draft LCPR being produced, please see the process below.
- obtaining approval from Deputy Director, Water Resources.

What is a LCPR?

Always use the LCPR [template](#).

The LCPR provides a compelling, succinct case for changing the licence and for our serious damage recommendations. It is a stand-alone document and needs to provide enough information for a quality review to be undertaken.

The report should reflect the views of the organisation, rather than an individual and will be approved by the Area Deputy Director and Deputy Director, Water Resources (National).

This report will be sent to the Secretary of State if we receive an objection and will help them make a decision. It may also be disclosable to the licence holder.

Proposed licence documents

Upon receipt of a draft LCPR, the OCS Sustainable Abstraction Team will liaise with NPC or P&SC as part of the reviewing process. However, in some cases, a draft licence may have already been produced using the pre-application section of the Section 51 voluntary licence change guidance. If a draft licence has not been produced, OCS will use the process below:

Step	Who	Action
1	OCS	Contact P&SC using the template email .

CONTROLLED CONTENT

		We're happy for areas to use local, NPS RSA Leads as long as they have the capacity but P&SC need to be informed to enable us to log and track this work. Consult with them directly if necessary but ensure they inform P&SC. RSA NPS Leads: 1. Bethany Lamb (Ipswich) 2. Stephen Smith and Laura Mitchell (Exeter) 3. Lauren Cater (Nottingham) 4. Hannah Williams (Solihull) 5. Elizabeth Dean and Polly Booth (Warrington)
2	P&SC	Create a log and track record and EDM folder. Prioritise if possible. Depending on complexity, decide who will be assigned with this pre-application.
3	P&SC	Inform OCS which NPS RSA Lead will help draft a proposed licence document. Take note of any specific requests from area.
4	OCS	Discuss the details of the licence change with assigned NPS contact.
5	P&SC or NPC	Draft the proposed licence document and map. Use template and conditions as per day job applications. Send to OCS.
6	OCS	Review proposed licence, check with Area RSA Lead if required and discuss any changes with P&SC or NPC.
7	P&SC or NPC	Once approved, record end of pre-application decision (If NPC, inform P&SC to update log and track and to close pre-app). Clearly mark the proposed licence document with a draft watermark.
8	OCS	Add proposed licence to LCPR appendix.

Delayed effective dates (Upfront Permitting)

We may use dates in the future for licence changes or conditions to come into effect. We are committed to making these changes at the earliest possible date but can allow licence holders sufficient time for any appropriate mitigation.

The date for the new conditions should be agreed on a case-by-case basis with some key considerations. Try to use as short a timescale as reasonably practicable and think about including potential slippage time.

Stage 2 – Quality Review and sign-off

The OCS Sustainable Abstraction Team will

- review the technical, legal and economic aspects of the proposal;
 - ensure the case for change is compelling, succinct and clearly made;
 - consult National Estates teams to obtain a compensation estimate (where appropriate);
 - consult with P&SC and NPS to produce a proposed licence document (where appropriate);
 - grammar and spell-check the report;
 - ensure the charging region has sufficient EIUC funds;
 - inform the Area RSA Lead when the LCPR is ready for sign-off.
-

Stage 3 – Preparing notice documents

The OCS Sustainable Abstraction Team drafts the section 52 notices and letter and sends them to the Area RSA Lead to check and approve.

Area and OCS should discuss the date when notice will be served.

Stage 4 – Advertising and serving notice

The OCS Sustainable Abstraction Team advertises our proposals to seek external views on the proposed licence change. This ensures there is adequate open publicity and all parties are aware of our proposals.

Local area teams are responsible for paying for the advertisement and for any re-advertisement that are required due to errors and will need to provide OCS with a relevant cost-code (OCS will ask for this when appropriate).

How to advertise (OCS)

The advertisement will need to appear once in a local newspaper and on GOV.UK for 28 days. The first day of publication on GOV.UK must be the same day the advert appears in the local newspaper. It is best to arrange for advertising to take place a day or two after the Area RSA Lead plans to serve notice.

Use the Advertising User Guide for details of how to arrange advertising in the local newspaper.

OCS Sustainable Abstraction Team should raise a requisition and get a purchase order number using the Single Operating Platform system. Approve order request and obtain date of publication.

Insert the closing date for representations to the notices and include details of the publication in the letter to the licence holder.

Before serving notice (OCS)

The OCS Sustainable Abstraction Team will draft the relevant documents and send an email to the Area RSA Lead with all the required information. This should include:

- a letter to the licence holder;
- a copy of the section 52 notice;
- proposed licence documents (if required);
- [RSA Compensation](#) leaflet
- [Changing Water Abstraction Licences](#) leaflet

The OCS Sustainable Abstraction Team should also:

- send a final copy of the [press notice](#) to P&SC-Water Resources to publish on GOV.UK and confirm date of publication.
 - [inform Defra](#) before the notice is issued.
 - inform [Natural England](#) (if the scheme is related to a HD or SSSI site)
 - inform any Internal Drainage Board (IDB), navigation or harbour authority in the locality of the abstraction. These can be checked via Easimap.
-

Serving notice (Area)

The Area RSA Lead should serve notice as outlined below. Serving notice is preferably done in person but can be done via Royal Mail Special Delivery Guaranteed.

Step	Who	Action
1	Area	Deliver the following documents (to arrive on date agreed with OCS Sustainable Abstraction Team) • a letter to the licence holder; • a copy of the section 52 notice; • proposed licence documents (if required); • RSA Compensation leaflet • Changing Water Abstraction Licences leaflet
2	Area	Ensure that the licence holder fully understands the procedure and the next steps. (Serving notice in person helps with this understanding). Inform the licence holder that they must respond in writing to our proposals in one of the following three ways: • No objection - They accept our proposal and do not wish to claim compensation. We will go ahead and change their licence. • Compensation objection - They accept our proposal but wish to submit a compensation objection (with the intention to submit a formal claim once the licence has been changed). • Technical objection - They disagree with our proposal and/or serious damage recommendation. They must explain why. • Note - the licence holder cannot submit a compensation objection if they are not eligible for compensation (for example, if the licence change is to protect from serious damage, if the licence has not been used for a period of four years, or if they are a water undertaker). If any of these apply, explain this in the letter and remove the compensation objection option if appropriate. Advise the licence holder: • that they must respond within 28 days; • that they have to object to be eligible for compensation (if eligible); or

CONTROLLED CONTENT

		that they are not eligible for compensation and explain the reasons why.
3	Area	Inform the OCS Sustainable Abstraction Team when you have served notice.

OCS Sustainable Abstraction Team should ensure the Area RSA Lead makes the following documents available at the agreed local office for the entire 28 day advertising period:

- [a copy of the section 52 notice](#);
- proposed licence documents (if required);
- [RSA Compensation](#) leaflet
- [Changing Water Abstraction Licences](#) leaflet

Advertising date

On the date the press notice is to appear in the local newspaper and on GOV.UK, the OCS Sustainable Abstraction Team should check the website and obtain evidence of publication. The advertising agent will confirm that the press notice has been placed in the local newspaper and will send evidence via email.

Stage 4 – Licence holder objections and representations

The OCS Sustainable Abstraction Team manages all objections and representations and will inform the Area RSA Lead upon receipt. All objections and representations should be acknowledged within three working days of receipt.

At the end of the 28 day period, the licence holder will have responded in one of three ways:

Type of objection	Next steps
No objection or no response	We don't refer the proposal to the SoS and proceed with the licence change. No compensation is payable.

CONTROLLED CONTENT

Compensation objection	We refer these cases to the SoS for a decision on whether to proceed with the licence change. If they affirm our proposals, the licence holder will be entitled to claim compensation.
Technical objection	We refer these cases to the SoS for a decision on whether to proceed with the licence change. SoS will look at both technical cases and may call a hearing. If they affirm our proposals, the licence holder may be entitled to claim compensation.

Third-party representations should be acknowledged by the OCS Sustainable Abstraction Team and copied to the Area RSA Lead.

If we don't receive a response, or the licence holder confirms they have no objection to the licence change, we need to:

Step	Who	Action
1	OCS	Inform P&SC that no objection was received and that the proposed licence or revocation letter can be signed and issued to the licence holder.
2	P&SC	Once the licence / revocation letter has been signed and issued, inform the OCS Sustainable Abstraction Team. Update NALD, area teams and save all relevant documents on EDM.
3	OCS	Co-ordinate local or national communications (if appropriate).
4	OCS	Inform representors of final decision.
5	OCS	Inform finance, E&B and other relevant colleagues that the licence change / notice of revocation has been confirmed (or otherwise) and of the effective date.

Stage 5 – Referring the case to Secretary of State

If we received an objection from the licence holder, the OCS Sustainable Abstraction Team refers the case to the SoS formally and in writing.

The OCS Sustainable Abstraction Team must submit the following documents to the SoS within 28 days of the end of the objection period:

- the section 52 notice served on the licence holder;

- the relevant page of the local newspaper containing the press notice;
 - the relevant page of GOV.UK containing the press notice;
 - the LCPR (including appendices);
 - the letter to the licence holder;
 - the proposed licence document (if applicable);
 - the licence holders objection;
 - any written third party representations.
-

Determination by the Secretary of State

If the licence holder has objected to our proposals, the SoS considers the case and makes a final determination decision under section 52 WRA91.

If it's decided that a hearing is required, the SoS may ask the Planning Inspectorate (PINS) for support. PINS will then respond to the SoS, who will make the final decision.

The determination options are as follows:

Option	Next steps
Written determination	The SoS can issue a written decision/determination where the reasons for licence changes are agreed and there is no factual or technical dispute between the licence holder and the Agency. This is usually when the licence holder has made a compensation objection or a non-complex technical objection.
Hearing	A hearing is less formal than an inquiry. It usually takes the form of a discussion led by an inspector from PINS followed by a site visit. The Area RSA Lead, a member of OCS Sustainable Abstraction Team and a member of Legal Services will need to be present at the hearing and a sub-team of experts can be on standby and contacted if needed. Before a hearing, the OCS Sustainable Abstraction Team and Area RSA Lead will produce a statement of case. This is a more technical version of the LCPR and provides the basis for discussion within a hearing. A hearing usually takes place at an Agency office local to the licensed abstraction point.
Inquiry	The SoS may use an inquiry if written determination or a hearing is not appropriate and there is substantial third party

	interest. It is a public hearing, led by PINS and held at a venue local to the licensed abstraction point.
--	--

Although SoS usually decides whether to apply the hearing or inquiry route, they must allow either party to appear before them if they specifically request this.

We could request to be heard if an issue of principle needs resolving or it is an issue where the resolution will provide answers for subsequent cases. If we want to be heard, we have to make a formal request and submit it at the time we refer the proposals to the SoS.

If the licence holder wants to be heard, they must say so in writing.

Receive direction from the Secretary of State

The outcome of referring our proposals to the SoS will be a final direction received following written determination, hearing or an inquiry. It sets out whether or not our proposals are to be implemented.

The SoS makes the final decision and gives us direction about how we should follow up that decision. We must comply with the direction as soon as possible.

If the direction is to uphold our proposal, we can go ahead and make the licence change. The SoS can also direct us to make no change or to make a different change.

After we receive direction, we need to:

Step	Who	Action
1	OCS	Inform the Area RSA Lead that we've received direction and inform them of the next steps.
2	OCS	Inform P&SC that we've received direction and that the proposed licence or revocation letter can be signed and issued to the licence holder. If we are directed to amend the licence in another way, inform P&SC immediately.
3	P&SC	Once the licence document and issue letter / revocation letter has been signed and issued, inform the OCS Sustainable Abstraction Team. Update NALD, area teams and save all relevant documents on EDRM.
4	OCS	Co-ordinate local or national communications (if appropriate).

5	OCS	Inform representors of final decision.
6	OCS	Inform finance, E&B and other relevant colleagues that the licence change / notice of revocation has been confirmed (or otherwise) and of the effective date.

Stage 6 – Compensation Claims and Negotiation

When the licence is changed or revoked, the accompanying letter informs the licence holder of their entitlement to make a compensation claim. The licence holder has six years from the date of the amended licence or notice of revocation to claim compensation.

Once a claim's received, the OCS Sustainable Abstraction Team will involve National Estates who will negotiate compensation with the licence holder.

If we reach an agreement on compensation with the licence holder, the OCS Sustainable Abstraction Team will work with National Estates to confirm all the details with the licence holder and pay the agreed compensation.

This payment can be either a full settlement of compensation or a partial settlement. Partial settlements can help the licence holder continue to mitigate against the licence change whilst negotiations over a final settlement continue. National Estates will ensure that partial settlements are never more than our compensation estimate.

If we cannot reach an agreement on compensation, either party can refer the case to the Lands Chamber of the Upper Tribunal (UT).

Eligibility of the claim

The licence holder is not eligible for compensation in the following cases:

- No abstraction has taken place for a period of four years ending on the date of the notice of our proposals was served on the licence under.
- The abstraction is causing, or has the potential to cause, serious damage. This applies to non-time limited licences which meet serious damage criteria.
- The licence was granted after 1 April 2006.
- The licence holder is the Environment Agency.
- The proposed recipient of compensation is not the holder of the changed or revoked licence.

- The licence holder is a water or sewage undertaker (section 58 Water Act 2014).
-

Principles of compensation

All parts of a compensation claim must meet the following conditions:

- **Equivalence:** The claim must restore the licence holder to the same financial position as before the licence change, not give them extra money or leave them out of pocket.
 - **Causation:** Any loss must be directly attributable to the licence change. For example, loss of profit must be as a direct result of the difference in water availability due to the licence change. It may not take into account factors such as national or local economic trends.
 - **Remoteness:** Damage or loss should be directly related to, or arising from, the licence change and be foreseeable (not too remote from the licence change).
 - **Reasonableness:** The impacts and the mitigation measures that the licence holder claim relates to must be reasonable. In other words, similar to that incurred by a reasonable person in the same position.
 - **We must not 'double count' any loss:** For example, the licence holder cannot claim for loss in land value if they are claiming a loss in productivity for the same land.
-

Components of a claim

In principle, anything can be included in a claim, as long as it is relevant to one of the following categories:

- **Mitigation measures:** The licence holder can claim for the cost of adapting their business or interests to minimise the impact of the changed or revoked licence. These costs must be reasonable and proportionate and agreed with us. This may include cost of a surveyor for related investigation work and for preparing and negotiating a claim.
- **Loss of profit:** If it is not possible to minimise or overcome the effect of the licence change, the licence holder may claim compensation for any proven loss of business related to the reduction in water compared to that available under the terms of the abstraction licence before the change.
- **Loss of land value:** This may be an additional element of the claim if they own the land and can prove a reduction in property value beyond the loss of profit stated above.

- Asset value losses: The residual value (taking into account the age and condition) of any asset which is made redundant as a direct result of the licence change may be claimed. Such claims cannot be made for any equipment or asset purchased before the start date of the original abstraction licence.

Negotiating compensation

The National Estates Team will review the claim for compensation and will negotiate with the licence holder or their agents to try and reach an agreement. Compensation should ensure that the licence holder suffers no change in their financial circumstances compared to if the licence was unchanged.

Agreement reached and payment

If we reach an agreement on compensation with the licence holder, the OCS Sustainable Abstraction Team will work with the Area RSA Lead and National Estates to confirm all the details with the licence holder and pay the agreed compensation.

Step	Who	Action
1	Estates	Complete a Form L with full justification for the payment. Obtain the licence holder's bank account name, number and sort code.
2	OCS	Review, approve and co-ordinate sign off in line with FSoD. For payments up to £1m this will be the Deputy Director of Water Resources and the Director of Operations.
3	OCS	Once the Form L is signed, complete a Payment Request Form and co-ordinate sign off with Head Office Finance, Senior Business Partner.
4	OCS	Forward the signed Payment Request Form to the FSC-ProcureToPay mailbox who will process the payment via BACS.
5	OCS	Send the licence holder a covering letter to explain the terms of the payment.

If no agreement is reached, either party can refer the case to the Lands Chamber of the Upper Tribunal (UT).

Lands Chamber of the Upper Tribunal

OCS Sustainable Abstraction Team co-ordinates this process alongside the Area RSA Lead, Legal Services and National Estates.

The objective of the UT is to resolve our disagreement with the licence holder and the amount of compensation payable. It is a statutory process and is governed by UT rules. The case is likely to be classed as a Land Compensation Reference.

- The claimant (which can be either party but will normally be the licence holder) submits written notice of reference to the UT, with a fee.
- The registrar registers the reference and sends copies of the notice to the other parties.
- There is one expert witness on each side unless the UT grants permission for more. Each expert witness produces a report.
- After the expert witnesses' reports have been exchanged, the UT will usually require them to meet at a hearing and agree on the relevant facts and issues for resolution.
- The UT might also require the expert witnesses to prepare a statement summarising areas of agreement and disagreement and the reasons for these.
- The UT hearing is usually held at the local office in London and is on a date that suits both parties. It usually has each party represented by a solicitor or counsel and requires each party to present evidence on oath and be cross-examined by the other side.
- The UT's decision is final. The UT is a court of law. If we want to appeal against the decision, we can seek permission to do so in the court of appeal.
- UT decisions are regarded as legal precedents and can be referred to in other decisions.
- The general rule is that the claimant is awarded their costs but this doesn't apply if:
 - the acquiring authority, that is, the Environment Agency, has made a sealed offer of compensation which isn't exceeded by the UT award. In this case the claimant is likely to be ordered to pay the authorities costs.
 - or the claimant's conduct has unnecessarily increased the costs for the acquiring authority.
- For more information on the UT service, visit their website <https://www.gov.uk/courts-tribunals/upper-tribunal-lands-chamber>

Related documents

- [532 10 SD02 RSA Section 52 notice template](#)
- [532 10 SD03 Restoring Sustainable Abstraction \(RSA\) - Licence Change Proposal Report](#)
- [532 10 SD05 RSA representation response template](#)
- [532 10 SD09 RSA s52 representation acknowledgement in time](#)
- [532 10 SD10 RSA s52 representation acknowledgement out of time](#)
- [532 10 SD11 RSA inform Defra of s52 notice](#)
- [532 10 SD12 RSA submission of documents to SoS for s52](#)
- [532 10 SD13 RSA Letter to licence holder](#)
- [532 10 SD15 RSA inform Natural England of s.52 notice](#)
- [532 10 SD16 RSA s52 issue letter \(variation\)](#)
- [532 10 SD17 RSA s52 issue letter \(revocation\)](#)