Draft Regulations laid before Parliament under section 36G of the Water Industry Act 1991, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2013 No. 0000

WATER INDUSTRY, ENGLAND AND WALES

The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013

Made - - - - ***
Coming into force in accordance with regulation 1(1)(b)

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 36A to 36F and 213(2)(a), (d), (e) and (f) of the Water Industry Act 1991(**1**) in relation to infrastructure which is provided or to be provided for the use of one of more English undertakers(**2**).

These Regulations make provision only in relation to projects or works that in the Secretary of State's opinion are of a size or complexity that threatens the undertaker's ability to provide services for its customers as required by section 36A(4)(a) of that Act.

The Secretary of State has consulted as required by section 36G(2) of that Act.

A draft of these Regulations has been laid before Parliament in accordance with section 36G(1)(a) of that Act(**3**) and approved by a resolution of each House of Parliament.

(**1**) 1991 c. 56; sections 36A to 36F were inserted by section 35(1) of the Flood and Water Management Act 2010 (c. 29). Section 213 was amended by section 35(2) of the Flood and Water Management Act 2010. There are other amendments, but none is relevant.

(**2**) See the definition of "English undertaker" in section 36E(2)(a) of the Water Industry Act 1991; section 36E was inserted by section 35(1) of the Flood and Water Management Act 2010. The powers to make regulations in relation to infrastructure which is provided or to be provided for the use of one or more Welsh undertakers are exercisable by the Welsh Ministers. See the definition of "Welsh undertaker" in section 36E(2)(b) of the Water Industry Act 1991. The functions of the Secretary of State under section 213 of the Water Industry Act 1991 were exercisable by the National Assembly for Wales ("the Assembly") to the same extent as the powers to which that section applies were exercisable by the Assembly by virtue of article 2 of the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672); see the entry in Schedule 1 for the Water Industry Act 1991 as substituted by paragraph (e) of Schedule 3 to the National Assembly for Wales (Transfer of Functions) Order 2000 (S.I. 2000/253) and amended by section 100(2) of the Water Act 2003 (c. 37); there are other amendments but none is relevant. By virtue of section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006 (c. 32), functions conferred on the Assembly are exercisable by the Welsh Ministers. An amendment by the Flood and Water Management Act 2010 of another enactment does not prevent the continued operation of any transfer of functions by or by virtue of the Government of Wales Act 1998 (c. 38) or 2006 irrespective of whether the amendment amends an existing function or confers a new function (see section 49(6) of the Flood and Water Management Act 2010).

(**3**) Section 36G was inserted by section 35(1) of the Flood and Water Management Act 2010.

Citation, commencement, application and expiry

1.—(1) These Regulations—

(a) may be cited as the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013;

(b) come into force on the day after the day on which they are made; and

(c) apply in relation to the provision of infrastructure for the use of one or more English undertakers in carrying out their duties under—

(i) section 37 of the Act (general duty to maintain water supply system etc.), or

(ii) section 94 of the Act(**4**) (general duty to provide sewerage system) as supplemented by paragraph (1) of regulation 4 of the Urban Waste Water Treatment Regulations 1994(**5**) (duty to provide and maintain collecting systems and treatment plants),

including those duties as modified by these Regulations.

(2) Subject to paragraph (4), regulations 4(1) and 8(1) cease to have effect at the end of the period of seven years beginning with the day on which these Regulations come into force.

(3) If the powers in regulations 4(1) and 8(1) have not been exercised before the end of that period, the other provisions in these Regulations also cease to have effect at the end of that period.

(4) Notices issued under regulations 4(1) and 8(1) that are in force at the end of that period continue to have effect despite revocation of those provisions, and regulations 4(7) and 8(6) have effect after that period in relation to such notices.

Interpretation

2. In these Regulations—

"the Act" means the Water Industry Act 1991;

"company" means a company, as defined in section 1(1) of the Companies Act 2006(**6**), that is registered in England and Wales or Scotland and is limited by shares or guarantee;

"incumbent undertaker", in relation to an infrastructure project, means the relevant undertaker whose ability to provide services for its customers could be threatened by that infrastructure project, but for the exercise of the powers of the Secretary of State or the Authority under or by virtue of these Regulations;

"infrastructure" means infrastructure relating to—

(a) the provision of a system, or part of a system, of water supply, or the securing of supplies of water, or

(b) the provision of a system, or part of a system, of sewers, or the provision of means for emptying, or dealing effectually with the contents of, sewers;

"infrastructure provider" means a company designated under regulation 8(1);

"licensed infrastructure provider" means an infrastructure provider which is the holder for the time being of a project licence;

"preparatory work" includes—

(**4**) Section 94 was amended by sections 88(2) and 97(1) and (3) of the Water Act 2003. There are other amendments but none is relevant. By virtue of section 36(2) of the Water Act 2003, each reference to the Director General of Water Services in the Act has effect as a reference to the Water Services Regulation Authority.

(**5**) S.I. 1994/2841, as amended by section 120 of, and paragraph 233 of Schedule 22 to, the Environment Act 1995 (c. 25), S.I.2003/1788, 2005/2035, 2010/675 and 2011/556.

(**6**) 2006 c. 46.

(a) conducting surveys, including in relation to environmental matters, ground conditions, hazardous substances, heritage, the operation of existing infrastructure, ground and surface water quality and the general condition of a site,

(b) arranging for the provision of electricity or other power,

(c) diverting or protecting communications, electricity, gas, water and sewerage assets,

(d) preparing designs and specifications for a specified infrastructure project,

(e) preparing and submitting planning applications, including consulting the public in relation to those applications, and acquiring and protecting interests in land,

(f) procuring goods, services or works,

(g) preparing a site for works, including remediation of contamination, laying access roads and undertaking demolition and clearance works, and

(h) undertaking associated works on the highway;

"project licence" means a licence granted by the Authority by virtue of its powers under section 17FA of the Act (see paragraph 3(2) of Schedule 1);

"specified infrastructure project" means an infrastructure project which has been specified under regulation 4(1).

Application of the Act

3.—(1) Schedule 1 (application of the Act and related provisions) has effect.

(2) Paragraphs (3) and (4) have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the powers and duties conferred or imposed on them by virtue of these Regulations.

(3) Section 2 of the Act(**7**) (general duties with respect to the water industry) applies as if—

(a) in subsection (1) (when the general duties of the Secretary of State and the Authority apply), in paragraph (a)—

(i) after "by virtue of", there were inserted "the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 or"; and

(ii) for "and of licensed water suppliers" there were substituted ", of licensed water suppliers and of licensed infrastructure providers";

(b) in subsection (2A) (primary duties)—

(i) the "and" following paragraph (c) were repealed; and

(ii) after paragraph (d), there were inserted—

"(e) to secure that the functions of a licensed infrastructure provider are properly carried out; and

(f) to secure that relevant licensed infrastructure providers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions.";

(c) in subsection (3) (secondary duties)—

(i) in paragraph (a) (promoting of economy and efficiency), after "relevant undertaker", there were inserted "and companies that are licensed infrastructure providers in the carrying out of their functions"; and

(ii) in paragraph (d) (protecting consumers from non statutory activities)—

(**7**) Section 2 was amended by section 54 of, and Schedule 10 to, the Competition Act 1998 (c. 41), section 39 of the Water Act 2003 and by section 278 of, and Schedule 25 to, the Enterprise Act 2002 (c. 40).

(aa) in the words preceding sub-paragraph (i), after "relevant undertaker", there were inserted "or of a licensed infrastructure provider (as the case may be)"; and

(bb) in sub-paragraph (ii), after "relevant undertaker", there were inserted "or as a licensed infrastructure provider (as the case may be)";

(d) in subsection (5) (meaning of water and drainage charges)—

(i) in paragraph (a), after "relevant undertaker", there were inserted "or a licensed infrastructure provider"; and

(ii) in paragraph (b), after "such an undertaker" there were inserted "or infrastructure provider"; and

(e) in subsection (5A) (meaning of "consumers" and "interests of consumers")—

(i) in the definition of "consumers", after "future consumers", there were inserted "and excludes relevant undertakers, so far as regards services provided by the licensed infrastructure provider for an infrastructure project to a relevant undertaker who is the incumbent undertaker in relation to the infrastructure project";

(ii) the "and" following the definition of "consumers" were repealed; and

(iii) after the definition of "the interests of consumers" there were inserted—

"; and

"relevant licensed infrastructure provider" means a licensed infrastructure provider whose charges fixed under section 142 below are limited by or under a condition of its project licence."

(f) in subsection (6)(a) (meaning of reference in subsection (1)), for "and of licensed water suppliers" there were substituted ", of licensed water suppliers and of licensed infrastructure providers".

(4) Section 219 of the Act(**8**) (general interpretation) applies with the modifications made by paragraph 16(2) of Schedule 1.

(5) Paragraphs (3)(b) to (e) and (4) have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the powers and duties mentioned in section 2(1)(a) of the Act (powers and duties conferred or imposed on them by virtue of the provisions of the Act relating to the regulation of relevant undertakers and of licensed water suppliers) in cases where the exercise or performance of the power or duty in question is capable of affecting a licensed infrastructure provider.

Specification of infrastructure projects

4.—(1) Subject to the following provisions of this regulation, the Secretary of State or the Authority may by notice specify an infrastructure project.

(2) The Secretary of State may by notice served on the Authority delegate the Secretary of State's power under paragraph (1) to the Authority.

(3) The Secretary of State or the Authority may exercise the power under paragraph (1) only if the Secretary of State or the Authority respectively is of the opinion that—

(a) the infrastructure project is of a size or complexity that threatens the incumbent undertaker's ability to provide services for its customers; and

(**8**) Section 219(1) was amended by section 101(1) of, and Schedules 7 and 8 to, the Water Act 2003, and by S.I. 2009/1947. There are other amendments, but none is relevant.

(b) specifying the infrastructure project is likely to result in better value for money than would be the case if the infrastructure project were not specified, including taking into account—

(i) the charges fixed or likely to be fixed under Chapter 1 of Part 5 of the Act(**9**) (financial provisions, charges); and

(ii) the powers of the Secretary of State under section 154B of the Act(**10**) (financial assistance for major works).

(4) The Secretary of State must—

(a) subject to paragraph (6), before exercising the power under paragraph (1), prepare draft reasons for exercising the power and consult—

(i) the incumbent undertaker;

(ii) the Authority;

(iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and

(iv) any other person the Secretary of State thinks appropriate;

(b) include in any notice issued by the Secretary of State under paragraph (1) a description of the scope of the infrastructure project; and

(c) serve any such notice on the persons mentioned in sub-paragraph (a).

(5) The Authority must—

(a) subject to paragraph (6), before exercising the power under paragraph (1), prepare draft reasons for exercising the power and consult—

(i) the incumbent undertaker;

(ii) the Secretary of State;

(iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and

(iv) any other person the Authority thinks appropriate;

(b) include in any notice issued by it under paragraph (1) a description of the scope of the infrastructure project; and

(c) serve any such notice on the persons mentioned in sub-paragraph (a).

(6) Paragraphs (4)(a) and (5)(a) do not apply to the extent that the Secretary of State or the Authority (as the case may be) has prepared draft reasons and consulted the persons specified in those paragraphs before these Regulations come into force.

(7) Where the Secretary of State or the Authority is of the opinion—

(a) that the conditions in paragraph (3) continue to be satisfied, the Secretary of State or the Authority respectively may by notice vary the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (1); or

(b) that either condition in paragraph (3) is no longer satisfied, the Secretary of State or the Authority respectively may, having regard to any subsisting project licence, by notice revoke the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (1).

(**9**) The provisions in Chapter 1 of Part 5 were amended by sections 36 and 53 of the Competition and Service (Utilities) Act 1992 (c. 43), section 120 of, and Schedule 22 to, the Environment Act 1995, sections 3 to 9 and 15 of, and Schedule 3 to, the Water Industry Act 1999 (c. 9), sections 59 and 101(1) of, and Schedule 8 to, the Water Act 2003 and section 45 of the Flood and Water Management Act 2010. There are other amendments, but none is relevant.

(**10**) Section 154B was inserted by section 2 of the Water Industry (Financial Assistance) Act 2012 (c. 8).