EXPLANATORY MEMORANDUM TO

THE WATER AND SEWERAGE UNDERTAKERS (EXIT FROM NON-HOUSEHOLD RETAIL MARKET) (CONSEQUENTIAL PROVISION) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Environment, Food and Rural Affairs ("Defra") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to amend the Water Industry Act 1991 to re-apply provisions to water and sewerage undertakers ("undertakers") operating in retail exit areas wholly or mainly in England, which were disapplied by the Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016. This is to address some unintended consequences on water and sewerage companies of the 2016 Regulations' disapplication of parts of the Water Industry Act 1991 on those undertakers.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The instrument does not have any minor or consequential effects outside England and Wales.

3.3 In the view of the Department, for the purposes of Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this entire instrument would be within:

- the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter;
- the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament; and
- the National Assembly for Wales if equivalent provision in relation to Wales were included in an Act of the National Assembly for Wales.
- The Department has reached this view because the instrument relates only to the operation of the water and sewerage industry and the retail market operating wholly or mainly in England.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

5.1 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement regarding Human Rights:

"In my view the provisions of the Water and Sewerage Undertakers (Exit from Non-household Retail Market) (Consequential Provision) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 The Water Industry Act 1991 is the principal piece of legislation which sets out the duties and functions of water and sewerage undertakers. It followed the Water Act 1989 which is the key piece of legislation which gave effect to the privatisation of the water and sewerage industry in England and Wales.

6.2 The Water Act 2014 enabled reform of the water sector by extending the scope for competition in the water and sewerage market for non-household retail (business) services wholly or mainly in England.

6.3 The Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016 put that reform in place by amending the Water Industry Act 1991 for water and sewerage undertakers ("undertakers") whose areas were wholly or mainly in England to establish a "non-household retail market" for the water and sewerage services supplied by undertakers to non-household (business) customers such as food retail companies or housing developers.

6.4 The 2016 Regulations enabled undertakers to apply to the Secretary of State for permission to exit the non-household retail market in their area of appointment. Subject to the approval of the Secretary of State, the undertaker would exit the retail market by transferring its non-household retail business to one or more water supply and/or sewerage licensees (generally known as "retailers") and would thereafter be prohibited from providing retail services to any new non-household customers that arose in its area of appointment ("the exit area").

7. Policy background

What is being done and why?

7.1 The water and sewerage industry operates through the Water Industry Act 1991 on a "wholly or mainly in England" and a "wholly or mainly in Wales" basis to take account of the cross border (England / Wales) operation of undertakers in water catchment which includes rivers which run cross border. Only two undertakers operate on a cross border basis (United Utilities is wholly or mainly in England and Welsh Water is wholly or mainly in Wales). United Utilities operates mainly in England but has a small area of operation in Wales which is why Wales will be affected by these 2021 Regulations but only in a minor way. However, the 2021 Regulations do not affect the operation of the water industry and retail market "wholly or mainly" in Wales, which is a devolved matter for Wales.

7.2 Following the 2016 Regulations it has come to light that there have been some unintended consequences arising from them and the consequential amendments they made to the Water Industry Act 1991. Defra therefore believes that we need to amend

The Water Industry Act 1991 to re-apply provisions to water and sewerage undertakers ("undertakers") operating in retail exit areas wholly or mainly in England, which were disapplied by The Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016. We will do this using power conferred by sections 42(1), 46(5) and 51 of the Water Act 2014, to address some of the consequences that have arisen.

7.3 The main retail services provided to non-household customers through the retail market are billing and administration services. However, with the opening of the market, it was designed so that retailers could also provide new water and sewerage connections services to business customers. These services primarily concern connections to water and sewerage services for new developments, involving predominately housing developers.

7.4 The 2016 Regulations enabled this through the removal of some Water Industry Act 1991 duties on undertakers (known in the retail market as "wholesalers") who had exited the retail market, to provide such services. This enabled developers to make new connection requests to their retailer.

7.5 If the developer approached the exited undertaker to provide the new connection services, the undertaker would have to inform the developer that they had exited the retail market and refer the developer to a retailer. Defra recognised that some developers might still wish to work with the undertaker for the new connection services and we anticipated that developers choosing this route would make their own contractual arrangements with the undertaker.

7.6 The 2016 Regulations amended the following sections of the Water Industry Act 1991:

- section 41 (duty to comply with water main requisition) and section 45 (duty to make connections with main) – these no longer apply in relation to premises in a retail exit area that are not household premises. We consider that "non-household premises" includes new housing developments which are under construction before anyone is using the premises as their home. Section 17C of the Water Industry Act 1991 defines "household premises" as premises in which, or in any part of which, a person has his home. Until people move in, we consider that a development does not fit that definition.
- section 52 (domestic supply duty) **-** the duty to provide a domestic supply of water and maintain the connection between the water main and service pipe, no longer applies in relation to premises in a retail exit area that are not household premises. The duty applies in relation to premises connected under a section 45 connection notice.
- section 98 (duty to comply with sewer requisition). The duty to provide a public sewer or lateral drain does not apply in relation to premises in a retail exit area that are not household premises.

7.7 There are several unintended consequences of the 2016 Regulations' amendments. These concern new connection services, the laying, inspecting, maintaining, adjusting, repairing, etc. of lateral drains in a street or on private land, service pipes and provisions, the Ofwat process for dealing with disputes between undertakers and developers; and time limits for certain services.

7.8 This instrument therefore seeks to reinstate the following duty on undertakers to provide connection services, on request, in retail exit areas under the Water Industry

Act 1991: section 41 (provision of water main); section 45 (connection to water main); section 98 (provision of public sewer or lateral drain). They will also have the indirect effect of reinstating the duty under section 101B (requisition of lateral drains for domestic purposes) simultaneously with the provision of a sewer under section 98. This will mean that developers will be able to require an undertaker to connect premises in a retail exit area before they become occupied. However, developers still retain the option of requesting the connection service through the retailer: maintaining the market in these services.

7.9 We are making consequential changes to sections 52 (Domestic Supply Duty), 66A Use of water undertaker's supply system), 158 (powers to lay pipes in streets), 159 (power to lay pipes in other land) and 117A of the Water Industry Act 1991 to ensure that there are no overlapping duties on retailers or undertakers, if a developer approaches a retailer first for a connection and then switches to make an application to an undertaker and vice versa.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This instrument does not consolidate any legislation.

10. Consultation outcome

10.1 Section 53(1) (Procedure) of the Water Act 2014 requires that "before making exit regulations, the Secretary of State is to consult: (a) the Welsh Ministers; (b) the Water Services Regulation Authority ("Ofwat"); (c) the Competition and Markets Authority (CMA); (d) the Consumer Council for Water (CCWater); (e) relevant undertakers whose areas are wholly or mainly in England; (f) water supply licensees and sewerage licensees; (g) persons whom the Secretary of State considers to represent the interests of investors in the water industry".

10.2 Defra therefore consulted all these statutory consultees between 29 April to 25 May 2021 for views on the issues identified and Defra's intention to make amending regulations and the approach we proposed taking to do so. We also consulted WaterUK (the water industry representative body) and Mosl (the retail market operator) as they also have an interest in these 2021 Regulations.

10.3 The consultation was undertaken by letter sent via email to each of the consultees. We received seventeen consultation responses, and all agreed with Defra making regulations on these matters.

11. Guidance

11.1 No specific guidance in relation to these 2021 Regulations will be produced. The 2021 Regulations will reapply previous legislation for which guidance already exists. Defra will however write to all statutory consultees when the instrument is laid in Parliament to advise them that the changes are being made and to confirm their effect.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the SI relates to maintenance of intended regulatory regime.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses. This is because the legislation re-applies the original regulatory regime to water and sewerage undertakers only and aims to retain the original policy intent for retail competition. It therefore does not create new regulatory burdens for small business.

14. Monitoring & review

14.1 The approach to monitoring of this legislation will be consistent with the process for monitoring the original 2016 Regulations, which this instrument amends, and in which a review clause was included.

14.2 The legislation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP has made the following statement.

"This instrument does not include a statutory review clause because the operation of water industry legislation to which is applies undergoes on-going monitoring and review through the regulator's (Ofwat) roles and functions. The Government continues to monitor closely the operation of the water and sewerage retail market."

15. Contact

15.1 Policy contacts: Jackie Sullens at the Department for Environment, Food and Rural Affairs: Telephone: 0208 026 3295 or email: Jackie.Sullens@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sophie Broadfield, Deputy Director for Water Services, Department for Environment, Food and Rural Affairs; can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Parliamentary Under Secretary of State for the Environment, Rebecca Pow MP can confirm that this Explanatory Memorandum meets the required standard.