EXPLANATORY MEMORANDUM TO

THE WATER INDUSTRY (SPECIFIED INFRASTRUCTURE PROJECTS) (ENGLISH UNDERTAKERS) (AMENDMENT) REGULATIONS 2020

2020 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 the instrument is to ensure Infrastructure Providers ("IPs") are able to continue to deliver large or complex water infrastructure projects with the benefits made available from application of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 ("the 2013 Regulations"). The instrument amends the 2013 Regulations by removing the provision that would cause them to expire (the 'sunsetting provision'), seven years from the date they came into force (i.e. 27 June 2020).

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 This entire instrument applies to England only because the regulations only apply to water undertakers in England (see regulation 1(1)(c) of the instrument).

3.3 The instrument may have effects outside of England which Defra considers to be minor or consequential. This is because some water and sewerage undertakers operate across the English/Welsh border. In such circumstances there could be some minor effects in Wales to the extent that the 2013 Regulations regulate a water or sewerage undertaker wholly or mainly in England, but which may have some customers in Wales. As this does not impose requirements on Welsh authorities, it is considered to be of minor effect outside England.

3.4 In the view of Defra, 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.

3.5 Defra has reached this view because the purpose of this instrument is to amend the 2013 Regulations which relate to facilitating the delivery of large or complex high-risk water or sewerage infrastructure projects. Water industry legislation is within the devolved competence of the Northern Ireland Assembly. The instrument does not relate to an excepted or reserved matter in Schedules 2 and 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act). The water industry is also within the devolved legislative competence of the Scottish Parliament. The instrument does not relate to a reserved matter in Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act). The water industry is within the devolved legislative competence of the National Assembly for Wales. The instrument therefore does not relate to a reserved matter in Schedule 7A, and it is not otherwise outside the competence of the National Assembly for Wales (see section 108A of that Act).

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 set out in Section 3 under "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)".

5. European Convention on Human Rights

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

"In my view the provisions of the Water Industry (Specified Infrastructure Projects) (English Undertakers) (Amendment) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The 2013 Regulations implement Part 2A of the Water Industry Act 1991 in relation to water and sewerage undertakers whose appointment areas are wholly or mainly in England.

6.2 The 2013 Regulations were introduced to facilitate the delivery of large or complex high-risk water or sewerage infrastructure projects while isolating, containing and minimising risk to undertakers, customers and UK taxpayers. The 2013 Regulations create an alternative regulatory regime by providing the Water Services Regulation Authority ("Ofwat") with the power to regulate water infrastructure providers via licence separately from their corresponding water undertakers.

6.3 Regulation 1(2) to 1(4) of the 2013 Regulations ensure that the 2013 Regulations cease to have effect seven years after they come into force and make related saving provision.

6.4 Following a Post Implementation Review ("PIR"), the Secretary of State has decided that the 2013 Regulations should continue in force. Accordingly, this instrument removes the sunsetting and related provision at regulation 1(2) to (4) of the 2013 Regulations so that they continue in force.

7. Policy background

What is being done and why?

7.1 The amendment made by this instrument removes the sunsetting provision from the 2013 Regulations.

7.2 The 2013 Regulations enable the creation of IPs regulated by Ofwat to finance and deliver large or complex high-risk water or sewerage infrastructure projects.

7.3 The 2013 Regulations provide for the procuring, licensing and regulating of an IP that is separate from a water or sewerage company (an undertaker). They also lay out how the Secretary of State and/or Ofwat 'specify' which projects should be subject to these rules and how they 'designate' the company that is to become an IP licensed by Ofwat.

7.4 The 2013 Regulations apply to all water and sewerage undertakers and large infrastructure projects in England that meet the criteria. To date, the 2013 Regulations have been used once to specify the Thames Tideway Tunnel project.

7.5 The 2013 Regulations create a parallel regulatory regime intended to help financially de-risk such projects, provide value for money for customers, and safeguard the ability of water and sewerage undertakers to continue to deliver their required level of existing services. They also seek to promote innovation in the financing and delivery of future water and sewerage infrastructure projects within the industry.

7.6 The 2013 Regulations stipulate a five-year review and a seven-year sunsetting provision. The sunsetting provision is due to take effect from 27 June 2020.

7.7 In November 2018 Defra published a PIR of the 2013 Regulations. It found that the 2013 Regulations had been successful in their policy objectives of: facilitating large or complex projects; minimising risk to undertakers; providing value for money to customers; and, promoting innovation in the sector. The review was based upon consultation with key stakeholders and concluded that there was clear support for retaining the 2013 Regulations. The review recommended that the 2013 Regulations be amended to this effect.

7.8 Water and sewerage undertakers are considering a small number of large or complex high-risk water infrastructure projects for development over the next ten years that may benefit from being specified in accordance with the 2013 Regulations. A decision would be made on a case by case basis at an appropriate time when schemes are brought forward as to whether the infrastructure projects could come within scope of the 2013 Regulations.

8. European Union (Withdrawal) Act 2018/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 There are no plans to consolidate the 2013 Regulations.

10. Consultation outcome

10.1 The 2013 Regulations stipulate a five-year PIR. The PIR was published in November 2018.[1] Eight key stakeholders were identified and invited to share their views and submit evidence as part of the review. Five stakeholders submitted a response in full: Ofwat, Thames Water, Bazalgette Tunnel Limited ("BTL"), BTL investors and the Consumer Council for Water.

10.2 The review found that the 2013 Regulations had been successful in their policy objectives of: facilitating large or complex projects; minimising risk to undertakers; providing value for money to customers; and, promoting innovation in the sector. The PIR concluded that the stakeholders that had been consulted clearly supported retaining the 2013 Regulations. The review recommended that the 2013 Regulations be amended to this effect.

10.3 Over three weeks in March 2020 Defra undertook a further targeted consultation on the proposal to remove the sunsetting provision from the 2013 Regulations. Given that a full consultation on the same question was conducted in 2018 this consultation was narrow and focussed.

10.4 Views were specifically sought from Ofwat, Water UK, Thames Water, BTL, the Environment Agency, the Drinking Water Inspectorate and the Consumer Council for Water. Water and sewerage companies and water only companies were informed via Water UK. BTL were given the option to inform their investors of the proposal at their request.

10.5 Four written responses were received from Ofwat, the Environment Agency, Thames Water and Affinity Water. All indicated that they were in favour of the proposed amendment.

11. Guidance

11.1 Guidance is not required. This is because the instrument simply removes the sunsetting provision and does not introduce any new regulation.

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 instrument ensures the maintenance of existing regulatory standards. The Regulatory Policy Committee ("RPC") confirmed that no Impact Assessment would be necessary.

13. Regulating small business

13.1 This instrument does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 Defra will continue to monitor and review the 2013 Regulations on an ongoing basis using information collected from its internal systems and processes as well as regular

[1] http://www.legislation.gov.uk/uksi/2013/1582/pdfs/uksiod_20131582_en_002.pdf

engagement with stakeholder groups. The statutory five-year review stipulated by the 2013 Regulations was fulfilled in November 2018 by the PIR.

15. Contact

15.1 Jonathan Biggs at the Department for Environment, Food and Rural Affairs Telephone: 0208 2257780 or email: jonathan.biggs@defra.gov.uk can be contacted with any queries regarding the instrument.

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

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