EXPLANATORY MEMORANDUM TO

THE WATER SUPPLY LICENCE AND SEWERAGE LICENCE (MODIFICATION OF STANDARD CONDITIONS) ORDER 2017

2017 No. 449

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 Ofwat (the Water Services Regulation Authority), the economic regulator for the water sector, grants water supply licences or sewerage licences to persons that provide services to businesses, charities and public sector bodies in England and Wales. Individual licences include standard licence conditions published by the Secretary of State that deal with matters relating to the licensees' obligations in relation to their customers and the procedures for terminating the licence, etc. This order sets the percentage of licensees (by market share) that must agree to Ofwat's decisions to amend standard licence conditions before the proposed change may be imposed in all licences. If more than twenty per cent disagree to such a change the matter can be referred to the Competition and Markets Authority (CMA).

2.2 The order introduces for the first time the percentages relating to sewerage licences and incorporates existing provisions relating to new water supply licences.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 This entire instrument applies only to England and Wales.

3.3 The instrument applies only to England and Wales because it applies only to the water industry in those areas. The instrument does not have minor or consequential effects outside England and Wales.

3.4 In the view of the Department, for the purposes of House of Commons Standing Order 83P 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 and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.5 The Department has reached this view because it considers that the primary purpose of the instrument relates to the regulation of the water industry and the water environment which is within the devolved legislative competence of two of the three devolved legislatures; the primary purpose of the subject matter of the instrument is not within 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 primary purpose of the subject matter of the instrument is not within Schedules 2 or 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).

4. Legislative Context

4.1 Under section 17J (*Modification by order under other enactments*) of the Water Industry Act 1991 (c.56) (the "1991 Act") as amended by Schedule 7 (*Further amendments*) to the Water Act 2014 (c.21) (the "2014 Act") the Secretary of State may, by affirmative order, provide for circumstances where Ofwat may change water supply and sewerage licences without obtaining the agreement of all relevant licensees where there is a certain percentage (by market share) that agree to the proposed change. The 2014 Act introduced for the first time a sewerage licensing regime alongside a reformed water supply licensing regime. This order covers both regimes and revokes the Water Supply Licence (Modification of Standard Conditions) Order 2005 (No. 2033).

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is set out in Section 3 under "Other matters of interest to the House of Commons".

6. European Convention on Human Rights

6.1 Thérèse Coffey, the Parliamentary Under Secretary of State for Environment and Rural Life Opportunities has made the following statement regarding Human Rights:

"In my view the provisions of the Water Supply Licence and Sewerage Licence (Modification of Standard Conditions) Order 2017 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 The 2014 Act will reform the water industry to help us face the future challenges arising from a growing population and changing climate. These reforms include greater competition in retail and upstream services for businesses, charities and the public sector. Within the new retail market all eligible customers will be able to switch water and or sewerage providers, and organisations with more than one premise will be able to have a single water bill.

7.2 Any person wishing to provide water or sewerage services in the competitive market must apply to Ofwat for a water supply licence, a sewerage licence or both. These licences include different authorisations which provide rights to use undertakers' networks to provide retail services to non-household customers or to input water or withdraw wastewater from networks on behalf of those customers. There are, or will be, different standard conditions associated with each authorisation as well as common conditions across all licences.

7.3 The policy objective is to provide a means for Ofwat to be able to make changes to standard licence conditions in water supply and sewerage licences where a qualified

majority of those granted licences with relevant authorisations agree to those changes. This is primarily to prevent a minority of licensees blocking such changes, but it also ensures that such a minority could not launch appeals against Ofwat's decisions to the CMA for the purpose of delaying implementation of Ofwat's proposals.

Consolidation

7.4 This Order revokes the Water Supply Licence (Modifications of Standard Conditions) Order 2005 and consolidates those provisions.

8. Consultation outcome

8.1 In December 2015 the Government consulted on *Water supply and sewerage licensing regime: Standard licence conditions and the approach to secondary legislation*. In total 14 responses were received: 11 from incumbent undertakers, two from new entrants and one from a government body. In March 2016 the Government published a summary of responses and its response.

8.2 The majority of respondents agreed with the Government proposal to base market share for sewerage licensees on the amount of water supplied to premises they served. Whilst this is not a perfect way to measure a sewerage licensee's share of the market it was agreed that it was the most pragmatic and logical route ahead of market opening in April 2017. Details of water-use to all premises will be available to market participants when the market opens. Most non-household premises are metered for their water-use but there is very little metering of wastewater output from premises. Therefore most sewerage service charges are based on the amount of water taken rather than wastewater discharged.

9. Guidance

9.1 There is no guidance to accompany this Order.

10. Impact

10.1 There is no impact on charities or voluntary bodies. This Order will have a direct impact on businesses that operate as licensees within these markets.

10.2 The impact on the public sector is small. Ofwat, as the economic regulator, has a role to ensure that the market operates effectively and that licensees' licences are correct and up to date. This includes, as and when required, making modifications to the licences standard conditions. Should 80 per cent or more of licensees agree to a modification then it may impose the change otherwise the matter may be referred to the CMA for determination.

10.3 An Impact Assessment has not been prepared for this instrument but one was produced covering these reforms in advance of the Water Bill entering Parliament in June 2013 and updated and re-published following Royal Assent in May 2014. All the impact assessments are available on legislation.gov.uk alongside the 2014 Act.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses; in so much as they are a licensee and have been issued with a licence by Ofwat.

11.2 No steps have been taken to minimise the impact of the requirements on small businesses (employing up to 50 people). This Order safeguards all licensees, regardless of size, should they disagree with a proposed licence modification.

12. Monitoring & review

12.1 The provisions of the 2014 Act and, by extension, the provisions of this instrument, will be subject to the normal post-legislative review three to five years after Royal Assent.

13. Contact

13.1 David Jones at the Department for Environment, Food and Rural Affairs Telephone: 020 802 63003 or email: david.jones@defra.gsi.gov.uk can answer any queries regarding the instrument.