

EXPLANATORY MEMORANDUM TO
THE ISLES OF SCILLY (APPLICATION OF WATER LEGISLATION) ORDER
2019

2019 No. 1259

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 Order is to apply parts of the Water Act 1989 and the Water Industry Act 1991 in its entirety to the Isles of Scilly with modifications to provide for the specific circumstances on the Isles. The application of this legislation will enable water and sewerage services to be delivered by a statutory water and sewerage undertaker under the Water Industry Act 1991.
- 2.2 Additionally this Order revokes The Isles of Scilly (Water and Sewerage) Miscellaneous Provisions) Order 1990 (referred to as 1990 Order later in this document) which contains the provisions under which the Council of The Isles of Scilly currently provides water and sewerage services.

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 As this instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business.

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 the Isles of Scilly.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Water Act 1989 is the key piece of legislation that gave effect to the privatisation of the water and sewerage industry in England and Wales. The Water Industry Act 1991 is the principal piece of legislation which sets out the duties and functions of water and sewerage undertakers. The Isles of Scilly were excluded from privatisation

of the water industry and, as such, those Acts do not apply to the Isles of Scilly unless an order is made to apply them.

- 6.2 This Order applies parts of the Water Act 1989 and the Water Industry Act 1991 to the Isles of Scilly, with modifications to allow for the specific circumstances on the Isles.
- 6.3 Parts of the Water Act 1989 are being applied to the Isles of Scilly to allow for the transfer of water and sewerage related assets from the Council of the Isles of Scilly to the newly appointed statutory water and sewerage undertaker through the mechanism of a statutory transfer scheme.
- The sections of the Water Act 1989 to be applied to the Isles of Scilly under this Order are:
 - Section 4: the transfer of water authorities' functions;
 - Section 189: General interpretation (interpretation provisions);
 - Section 192: Application to the Crown etc.;
 - Section 194: Application to the Isles of Scilly;
 - Schedule 2: Schemes providing for the Initial Transfer.
- 6.4 The extension of the Water Industry Act 1991 to apply to the Isles of Scilly will allow for Ofwat (in accordance with a general authorisation given by the Secretary of State) to vary the area of appointment of an existing water and sewerage undertaker to include the Isles of Scilly. It will also provide the legislative underpinning for a water and sewerage undertaker appointed to the Isles to have the relevant functions there and to be subject to the relevant statutory duties.
- 6.5 This Order revokes the 1990 Order, which granted the Council of the Isles of Scilly various powers to provide water and sewerage services on the Isles of Scilly. This Order will be revoked in April 2020, at the same time that the appointment of a water and sewerage undertaker will take effect.

7. Policy background

What is being done and why

- 7.1 When water supply and sewerage services in England and Wales were privatised under the Water Act 1989, the corresponding Isles of Scilly services were excluded from privatisation and continued to be provided by:
- the Council of the Isles of Scilly on St Mary's (water supply and sewerage) and Bryher (water supply only);
 - the Duchy of Cornwall on St Agnes and St Martin's (where the Duchy manage a limited water supply system with around 65% of residents supplying water to themselves from boreholes, and there are no central sewers, with residents relying mainly on septic tanks); and
 - Tresco Estates supplying water supply and sewerage services on Tresco.
- 7.2 There is a total population of approximately 2,200 people on the main inhabited islands of the Isles of Scilly, however that number increases considerably during the spring and summer and the tourism season. Tourist numbers in 2014 were approximately 203,000.
- 7.3 This project of extending the application of current water industry legislation to the Isles of Scilly has a long history. It was originally intended to apply the water industry

legislation to the Isles of Scilly in order to allow the Council of the Isles of Scilly to act as water and sewerage undertaker on the Isles.

- 7.4 The intention now, with the agreement of the Council, the Duchy of Cornwall and Tresco Estates is to extend an English mainland water and sewerage undertaker's area of appointment to the Isles and for the water and sewerage undertaker to provide water and sewerage services for all of the Isles.
- 7.5 Since 1989, due to lack of access to the investment options that water and sewerage undertakers have had on the mainland since privatisation, there has been limited investment in water supply and sewerage services on the Isles.
- 7.6 As a result, its infrastructure has lagged behind the mainland in terms of improvements, including actions to ensure more resilient systems to address the challenges of a changing climate.
- 7.7 In August 2006, the Drinking Water Inspectorate (DWI) for England carried out a non-statutory audit of the water supplies on the Isles which revealed a number of concerns including the risk of faecal contamination of water supply, and maintenance and operational practices regarding water supplies.
- 7.8 This started discussions about water supply and sewerage services on the Isles. Since 2006 the DWI has been working with the Council of the Isles of Scilly, the Duchy of Cornwall and Tresco Estates to improve the quality and safety of water supplies on the Isles. However, progress has been limited when the regulatory regime covering the English mainland does not apply to the Isles.
- 7.9 Defra concluded that, even with the support of the DWI, there remained considerable risks to the Isles and to the residents in terms of its continuing water supply and water quality standards. In addition, there are considerable risks to the environment in terms of over-abstraction of water resources, sewerage treatment and resulting pollution.
- 7.10 After a 2014 Defra consultation and much discussion, it was agreed that the most effective, long-term solution was to apply the legislation so as to enable a water and sewerage undertaker on the English mainland to provide the water and sewerage services on the Isles.
- 7.11 The Isles have a need for both improved water supply and sewerage services as well as the latest expertise in the planning for and management of these services and how to maximise resilience and limit adverse environmental impact. The cost of this would be prohibitive for the Council and residents on the Isles. Mainland water and sewerage undertakers have the expertise and investment frameworks needed for this.
- 7.12 In 2016, Defra issued an invitation to all water companies to gauge interest in upgrading and running the water and sewerage services on the Isles of Scilly. South West Water expressed interest, and the company has been working with the Council of the Isles of Scilly, the Duchy of Cornwall and Tresco Estates to conclude how best to do this. South West Water has already provided considerable support to the Isles in terms of advice and in 2018, during the extreme dry weather, took a number of actions to ensure that water supplies were maintained.
- 7.13 Water and sewerage undertakers are required by the Water Industry Act 1991 to develop a business plan every five years as part of Ofwat's Price Review process. This sets out the undertaker's proposals for investment and improvement of its services as well as to set out its proposed customer charges for the five year period. In developing its 2020-25 business plan South West Water consulted its customers on

extending its area of operation to remote areas of England to ensure that those areas benefitted from the same standards as other areas of its operation. Customers were generally supportive, but did caveat their support in terms of the cost that such an extension would have on customer bills.

- 7.14 In 2018, South West Water applied to Ofwat to extend their area of operation to the Isles of Scilly. In February 2019, Ofwat consulted on South West Water's application. Ofwat received broad support for the application and in July 2019 published its 'minded to' decision to proceed if legislation could be passed to enable this to take place.
- 7.15 Once this Order is made it will enable Ofwat to determine South West Water's application to extend its area of operation to the Isles of Scilly and give the company the relevant powers to operate there. Some modifications have been made to the application of the legislation. This is because there is a need for significant work to improve the infrastructure on the Isles to improve its resilience, before South West Water will be able to make new water supply and sewerage connections to the networks. Making connections before the Isles' water supply and sewerage networks have been improved and capacity been assured could result in network failures. For that reason South West Water will not be obliged to meet statutory deadlines until April 2025. For example, the timescales in which new customers must be connected to central water supply and sewerage networks will not apply until April 2025, although South West Water will make these connections sooner where feasible.
- 7.16 This Order constitutes only the first phase of this project. Phase 2 will provide for additional Statutory Instruments to apply some further primary and secondary legislation concerning drinking water, water abstraction and environment protection provisions to the Isles.

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/trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 This Order does not amend the Water Act 1989 and Water Industry Act 1991. The Order applies parts of the Water Act 1989, and the Water Industry Act 1991 to the Isles of Scilly with certain modifications to cater for specific circumstances on the Isles. There are, therefore, no plans to consolidate this legislation.

10. Consultation outcome

- 10.1 There have been a number of consultations as part of this project undertaken by Defra, South West Water and Ofwat.

Defra consultation

- 10.2 From 20 November 2014 to 12 February 2015 the Government consulted on applying pieces of legislation that it considered important to the Council of the Isles of Scilly, and the Duchy of Cornwall, and Tresco Estates. Government officials also visited the Isles of Scilly during the consultation to address any concerns regarding the consultation: <https://consult.defra.gov.uk/water/isles-of-scilly-water-legislation-consultation/>.

- 10.3 The consultation explained that various key pieces of water legislation within England that protected public and environmental health did not apply to the Isles of Scilly (or had only been applied in part). It explained that such legislative gaps meant that the DWI and Environment Agency (EA) had no enforcement powers in relation to water on the islands. This meant that residents and visitors to the Isles of Scilly may not enjoy the same level of public health and environmental protection as has been available elsewhere in England. It went on to explain that the Government intended to introduce legislation applying the provisions of relevant primary legislation to the Isles of Scilly.
- 10.4 The consultation consulted specifically on: drinking water; sewerage; EA powers; environmental directives; and on the Isles' water resources.
- 10.5 Defra received 45 responses from private individuals, businesses, trade bodies, conservation organisations, tenants, landlords and governmental bodies.
- 10.6 Not all respondents responded to all questions. However, where respondents did respond, over 50% of them supported the application of the legislation to the Isles of Scilly. The Council of the Isles of Scilly, given its duty to ensure the long term sustainability and viability of the islands community, economy and environment, wanted further consideration given to their comments when applying legislative changes. Comments included issues of affordability for the Isles.
- 10.7 In November 2015 the Government published its response to the consultation which explained that it would implement the legislation, taking into account points raised in the consultation.
- 10.8 Since that time, Defra has been working closely with the Council of the Isles of Scilly, the Duchy of Cornwall, Tresco Estates, DWI, the EA and Ofwat to see how best to achieve this.
- 10.9 After much discussion, it was agreed that the most effective, long-term solution was to apply the legislation to enable a water and sewerage undertaker on the English mainland to undertake the water and sewerage services on the Isles.
- 10.10 In a Defra run expressions of interest exercise, one water and sewerage undertaker, South West Water, expressed interest in taking over the services on the Isles, and the company has been working with the Isles of Scilly Council, the Duchy of Cornwall, and Tresco Estates to conclude how best to do this.
- South West Water consultation
- 10.11 As part of the development of its 2020-25 business plan South West Water consulted its existing customers on extending its area of operation to remote areas of England to ensure that those areas benefitted from the same standards as other areas of its operation.
- 10.12 The engagement assessed customers' appetite as bill-payers to contribute to upgrades to "remote places". This was assessed both with and without the current £50 Government contribution to South West Water's customer bills. This contribution is effectively paid by government as a subsidy given the higher than average customer bills compared to the rest of England. Current bill levels are relatively high in this area as a result of the significant investment in infrastructure that was required in the South West following privatisation of the water authority in 1989. The subsidy is currently due to end on 31 March 2020 and Government is currently considering any next steps.

- 10.13 Customers were generally supportive of such an extension, although their appetite for it was slightly higher with the subsidy than if it were not to continue past 2020.
- 10.14 In 2018, South West Water applied to Ofwat to extend their area of operation to the Isles of Scilly.
Ofwat consultation
- 10.15 In February 2019, Ofwat consulted on South West Water's application. The consultation was available on both Ofwat and the Council of the Isles of Scilly's websites and ran for 10 weeks. <https://www.ofwat.gov.uk/wp-content/uploads/2019/02/2019-02-26-Isles-of-Scilly-consultation-updated-20190320-1.pdf>
- 10.16 In January 2019, in advance of the consultation, officials from the EA, Ofwat, the DWI, the Consumer Council for Water, and South West Water visited the Isles of Scilly and undertook public engagement on each of the five affected isles to talk through the issues on which Ofwat would be consulting.
- 10.17 Ofwat received 31 responses and broad support for the proposal. 18 respondents were private residents from the Isles of Scilly, a further six were also business owners on the Isles of Scilly, six were other organisations (Natural England, Council of the Isles of Scilly, Isles of Scilly Wildlife Trust, Consumer Council for Water, the EA and the DWI), and one was from a water retailer. Two respondents requested their responses not be shared further or published. No respondents objected to the proposal to extend South West Water's area of operation, although some raised questions about the practical arrangements for operation, such as metering.
- 10.18 In July 2019, Ofwat published its 'minded to' decision to extend the area of operation if legislation could be passed to enable this to take place.

11. Guidance

- 11.1 No specific guidance in relation to this Order will be produced. The Order will apply existing legislation for which guidance already exists. Defra will consider whether such guidance needs to be updated in relation to the Isles of Scilly.

12. Impact

- 12.1 There is no, or no significant, impacts 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 in line with Better Regulation Framework guidance¹, the net impact on businesses has been assessed as being below the +/- £5 million equivalent annual net direct cost to business which requires the completion of an Impact Assessment. A Regulatory Triage Assessment has been carried out.

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 applies the existing regime to a part of England where

¹ <https://www.gov.uk/government/publications/better-regulation-framework>

it does not currently apply but 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 legislation as it operates currently on mainland England.
- 14.2 The Order does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Dr Thérèse Coffey MP has made the following statement:
- 14.3 “This Order does not include a statutory review clause because the impact of the legislation is less than +/- £5million (net annualised) on business and a review would be disproportionate when taking into account the economic impact of the regulatory provision on the qualifying activity. In addition, the operation of water industry legislation undergoes on-going monitoring and review through regulators’ (Ofwat, DWI and EA) roles and functions. The Government will monitor closely the progress made on the Isles in improving water supply and sewerage services.”

15. Contact

- 15.1 Policy contacts: Christian Wadey at the Department for Environment, Food and Rural Affairs: Telephone: 0208 026 2903 or email: Christian.wadey@defra.gov.uk; and 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 Margaret Read, Deputy Director for Water Services, Department for Environment, Food and Rural Affairs; can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Rebecca Pow MP, Parliamentary Under-Secretary of State for Environment and Rural Opportunities, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.