

EXPLANATORY MEMORANDUM TO
THE ISLES OF SCILLY (APPLICATION OF WATER LEGISLATION) ORDER
2020

2020 No. 214

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.
- 1.2 This explanatory memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The main purpose of this Order is to apply certain provisions of the Environment Act 1995 and Water Resources Act 1991 to the Isles of Scilly with modifications to provide for the specific circumstances on the Isles. This Order also applies certain secondary legislation to the Isles of Scilly.
- 2.2 The application of this legislation to the Isles of Scilly will enable environmental regulation of water and sewerage services and water and waste activities, and for the water and sewerage undertaker to provide both household and non-household services on the Isles.
- 2.3 This Order also amends the Isles of Scilly (Application of Water Legislation) Order 2019 S.I. 2019/1259 (the “2019 Order”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Joint Committee on Statutory Instruments reported Defra in their Report of 3rd session 2019 dated November 2019¹ for defective drafting of Article 4(9) of the 2019 Order (S.I. 2019/1259). Defra has now amended the drafting of that Article accordingly.

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 (in relation to article 3 except paragraphs (b), so far as it relates to Part 3 of the Environment Act 1995, and (p)) - Scotland.

¹ JCSI Report of 3rd session 2019 - <https://publications.parliament.uk/pa/jt201919/jtselect/jtstatin/13/13.pdf>

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 Industry Act 1991 is the principal piece of legislation that 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 did not apply to the Isles of Scilly until an order was made to apply them.

6.2 The 2019 Order applied parts of the Water Industry Act 1991 to the Isles of Scilly, with modifications to allow for the specific circumstances on the Isles.

6.3 This Order makes a further modification to enable The Water Services Regulation Authority (“Ofwat”) to extend South West Waters’ area of operation to the Isles of Scilly through a provision which will also enable South West Water to provide services to “non-household” (business) customers on the Isles.

6.4 The Joint Committee on Statutory Instruments reported the 2019 Order for defective drafting in its November 2019 first report of the third session. This concerned Article 4 of the 2019 Order, which created a grace period during which the new water and sewerage undertaker would not have to meet statutory deadlines, in order that needed improvements may first be made to the relevant infrastructure on the Isles of Scilly. The grace period was to end on 1 April 2025. Under the Water Industry Act 1991, a sewerage undertaker may propose (or refuse) to make a declaration to the effect that it will adopt a sewer from a future date (section 102). An aggrieved person may appeal the sewerage undertaker’s decision, but the appeal must be issued within a two-month time limit (section 105). These provisions would apply to the Isles of Scilly from 1 November 2019. Article 4(9) modified section 105 so that no appeal may be made before 1 April 2025, but it did not alter the two-month time limit for making the appeal. This Order therefore amends the date from which a person can make an application for a declaration to 1 April 2025.

6.5 Other modifications made in the 2019 Order to the application of the legislation was because there is a need for significant work to improve the infrastructure on the Isles to increase 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 certain statutory deadlines until April 2025. The Order now makes a further modification to the Water Industry Act 1991 to create a new subsection 7(2A) under which Ofwat will vary South West Water’s area of operation. This will disapply the prohibition on South West Water providing both household and non-household services on the Isles that would otherwise apply under the Water and Sewerage Undertakers (Exit from Non-household Retail Market) Regulations 2016. The reason for this further modification is because it is necessary for the infrastructure on the Isles to be improved before the Isles is subject to retail competition.

- 6.6 The Water Resources Act 1991 and Environment Act 1995 are the key pieces of legislation which regulate water abstraction and pollution activities and provide the Environment Agency with its regulatory and charging powers.
- 6.7 The sections of the Water Resources Act 1991 being applied to the Isles of Scilly concern mainly water resources and drought management and activities around these. This includes applying for and holding water abstraction licences (including charging and appealing against licence changes), powers of entry for the Environment Agency for investigating abstractions, data registers, drought orders and compensation payable as a result of them, and general Crown application of the provisions in the Water Resources Act 1991.
- 6.8 The sections of the Environment Act 1995 to be applied to the Isles of Scilly under this Order concern the principal aim and objectives of the Environment Agency (“the Agency”), the Agency’s general functions with respect to pollution control, ministerial directions to the Agency, charging and enforcement of the Agency with regards to the control of pollution activities, powers of the agency, the service of documents, and the application of the 1995 Act to the Crown.
- 6.9 There are twenty-seven pieces of secondary legislation being applied to the Isles of Scilly. This legislation is that which has been made under the Water Resources Act 1991, the Water Industry Act 1991 and the Environment Act 1995 on the English mainland.
- 6.10 This legislation covers regulation under:
- the Water Resources Act 1991 related to water abstraction and impounding licensing; spray irrigation;
 - the Water Industry Act 1991 related to water resources, drought, water industry regulation; standards for water fittings; charging provisions for vulnerable customers; and
 - The Environment Act 1995 related to licensing and charging of pollution control activities such as the storage of oil.

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. The original intention was 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 of the Isles of Scilly, 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 of Scilly 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 The results of the DWI audit led to 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 of Scilly. However, progress has been limited as the regulatory regime covering the English mainland does not apply to the Isles of Scilly.
- 7.9 Defra concluded that, even with the support of the DWI, there remained considerable risks to the Isles and to the residents from its existing 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 of Scilly.
- 7.11 The Isles of Scilly need both improved water supply and sewerage services. The Isles also need the latest expertise in the planning for (and management of) these services and to know 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 The 2019 Order enabled 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. The Order now makes a further modification to the Water Industry Act 1991 to create a new subsection 7(2A) under which Ofwat will vary South West Water's area of operation for the Isles of Scilly only.
- 7.16 Since April 2017, some element of competition has been introduced into water and sewerage services for "non-household" customers on the English mainland. Legislation allows that the monopoly water and sewerage company in an area can exit the "non-household market". This "market" is effectively the provision of billing and other services to business (non-household) customers.
- 7.17 When competition was introduced, most water companies formed separate retailers to which business customers were transferred. Retailers operate separately from the main company and are licensed independently by Ofwat.
- 7.18 In practice, the water and sewerage company still physically provides the water and sewerage services to the business customer, but a "retailer" bills the business customer for the water and sewerage services. The retailer also provides other services, for example, being the organisation to which a business customer complains if their water supply is interrupted.
- 7.19 A main aspect of competition is that business customers can subsequently decide to switch retailers to obtain better services for their business. In the case of national businesses such as supermarket chains, they can move all the billing services for their branches to a single retailer to provide a consolidated billing service.
- 7.20 When a water and sewerage company exits the market, they can no longer legally provide these administrative services to any business customers in any part of their area of operation and cannot reverse that decision. South West Water has exited the non-household market, meaning therefore that they can no longer legally provide retail services to non-household customers, including Isles of Scilly business customers when they take over the operation of service on the Isle of Scilly.
- 7.21 Arrangements were being made as part of the South West Water takeover on the Isles of Scilly for a retailer to take over the services to business customers. This was explained in Ofwat's consultation last year on South West Water's application to take over the Isles of Scilly. The retailer subsequently explained that it would not be able

to provide those services to the Isles of Scilly, and no other retailers were able to do so.

- 7.22 No retailer to take on those services, would mean that there would be no retailer operating on the Isles of Scilly, and no support for business customers. Defra, Ofwat and South West Water has agreed a way forward by which South West Water will provide “non-household” services for a transition period, with the aim of a retailer taking over those services by April 2025.
- 7.23 This Order constitutes one of the statutory instruments needed for phase 2 of the Isles of Scilly project. Phase 3 will provide for additional statutory instruments to apply some further secondary legislation concerning additional environment standards.

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 Industry Act 1991, the Water Resources Act 1991, the Environment Act 1995 or the secondary legislation being applied. The Order applies parts of these pieces of legislation 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 of Scilly’s 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 residents of 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 of Scilly.
- 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 of Scilly, 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. 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 being extended until 31 March 2021 and Government is currently considering any next steps after 2021. The subsidy is not being extended to the Isles of Scilly.
- 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 and Ofwat will update guidance 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 guidance², 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 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 This Order does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Rebecca Pow MP has made the following statement:

“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

² <https://www.gov.uk/government/publications/better-regulation-framework>

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 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, 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.