

WATER ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Supplementary

Sections 100 to 105

427. These sections deal with devolution and the transfer of functions under the Act to the National Assembly for Wales, consequential amendments, transitional provisions and powers to make orders and regulations, including providing for Schedule 7 and 8 to have effect. They also cite the name of this Act as the Water Act 2003 and set out its extent.

428.

Section 102: Specific transitional and transitory provisions.

Section 102(1) provides that existing abstraction licences are treated as a full licence (see section 1). Section 102(2) provides that where an abstraction is no longer required to be licensed by virtue of the introduction of the new threshold in section 6, then a licence ceases to have effect for that abstraction.

429. **Section 102(3)** provides that where an abstraction licence is no longer required by virtue of section 102(2) then the protected right associated with the abstraction continues. However, the protected right will lapse, under section 102(4), if no abstraction has been made for four years, unless the abstraction is planned to occur over longer intervals and the Agency agrees to a different period.

430. **Section 102(5)** allows the Agency to grant a licence to those abstractors being brought into the licensing regime for the first time even if that could derogate from the rights of other abstractors. It also allows the Secretary of State to make regulations to set aside provisions of other legislation that may preclude the grant of a licence to such abstractors.

431. Provisions in this section are devolved to the Assembly.

432.

Section 103: Powers to make further supplementary, consequential and transitional provision, etc.

This provision enables the Secretary of State to make such supplementary, incidental, consequential, transitory, transitional or saving provision as she considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to any provision of this Act. This includes a power to amend primary legislation.

433. This power is necessary because the Act is complex. A wide range of consequential amendments to existing legislation and other supplementary, incidental and transitional provisions may be needed.

434. Provisions in this section are devolved to the Assembly.

435.

Section 104: Regulations and orders.

This section relates to the general form of instruments may be made under the Act, and purposes for which they may be exercised. For example, it provides that any power to make any order or regulations includes powers to make "such incidental, supplementary, consequential, saving or transitional provision (including provision amending, repealing or revoking enactments...)" as the authority doing so considers to be expedient. Instruments are generally subject to the negative procedure (section 103(3)).

436. Provisions in this section are devolved to the Assembly.

437.

Section 105: Interpretation, commencement, short title, and extent.

This section provides for most of the Act to come into force on such days as may be appointed. Different provisions may come into force on different days, and details of the authority with the power to commence the Act (for example, the Secretary of State or the National Assembly for Wales) are set out.

Schedule 7 Minor and consequential amendments

438. **Part 1** of this Schedule makes a number of minor changes to the abstraction and impounding licensing regime. These include provision in paragraph 2 for the EA to require reports, such as an environmental report, to accompany a licence application. Provision is also made by paragraph 10 to end the current exemption from charges for groundwater abstractions for agricultural use (other than spray irrigation) of less than 20m³ per day (generally such abstractions will become exempt from licence control and hence also from charges). Paragraph 14 replaces Schedule 6 of the WRA, and by doing so allows only the Environment Agency to apply for Orders to vary abstraction thresholds (section 6) and to establish Registers of Protected rights (section 18). The revised Schedule retains the structure and consultation requirements of the original Schedule 6, and adds the nature conservation authorities and the Broads Authority (where appropriate) to the list of consultees.

439. Various provisions amended by this schedule are devolved to the Assembly.

Schedule 8 Minor and consequential amendments: licensing of water suppliers etc

440. **Schedule 8** sets out minor and consequential amendments regarding licensing of water suppliers etc.

441. Section 174 of the Water Act 1989 applies a general restriction on disclosure of information obtained under that Act. The section is amended so that the restriction does not apply to disclosure for purposes of facilitating the carrying out of the duties of licensed water suppliers and in other limited circumstances.

442. **Insection 6** of the WIA new subsection (5A) prevents a licensed water supplier from also holding an appointment as a water undertaker. This has the effect of not allowing undertakers to act as licensed water suppliers at the same time.

443. **Section 18** of the WIA is amended to include licensed water suppliers in orders for securing compliance. Amendment to subsection (1) means that breach of conditions of licence and other enforceable requirements will leave the licensee subject to enforcement action. The insertion of new subsection (1A) will provide for action where either an undertaker has caused or contributed, or is likely to cause or contribute, to a contravention by a licensee or vice versa. This allows enforcement action to be taken against undertakers which cause, or are likely to cause, licensed water suppliers to breach their licence conditions or statutory duties which are made subject

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to enforcement, or against licensed suppliers where they cause, or are likely to cause, an undertaker to breach its appointment conditions or statutory duties subject to enforcement.

444. Further minor amendments in this section achieve the same purpose as above; including licensed suppliers in the framework for provisional enforcement orders (subsection (4)) and explaining how enforcement orders operate (subsections (6) and (8)).
445. *Section 19* of the WIA: *Exceptions to the duty to enforce*; minor and consequential amendments to make provision for licensed water suppliers. This not only allows for the same exceptions for licensed water suppliers as undertakers where the contravention is trivial or the company is already complying etc. but will also make an exception where the extent of the contribution to the contravention was trivial.
446. *Section 20* of the WIA: *Procedure for making final enforcement orders*; minor and consequential amendments to make provision for licensed water suppliers and contributing to contravention. These ensure the new elements of enforcement are included in the Secretary of State's or Authority's notices.
447. *Section 22* of the WIA: Minor and consequential amendments to make provision for licensed water suppliers.
448. *Section 23* of the WIA: is amended and has insertions of subsections (2A) and (6). At present, there are various circumstances under which an undertaker may be placed in special administration. These include: becoming insolvent or being in contravention of a requirement so that it would be inappropriate for it to continue to hold an appointment. This amendment extends the existing special administration provisions to licensed water suppliers. The aim of a special administration order is to enable the activities of a licensed water supplier (holding a combined licence) to carry on in respect of its strategic supplies (as defined in section 66G/66H). When a licensed water supplier is put into special administration, the special administration order would make the continued input of water into the supply system one of its purposes. The order allows the input of water to carry on whilst arranging for transfer of those activities to another company or companies through the appointment of a special administrator.
449. *Section 24* is amended to explain the grounds on which special administration procedures can be invoked in relation to qualifying licensed water suppliers. These grounds include a breach of licence conditions or causing an undertaker to breach its duties (in both cases if this was serious enough to make it inappropriate for the licence holder to continue to hold its licence). The grounds to invoke special administration will also include serious financial difficulty or the company being about to be wound up.
450. *Section 27* of the WIA is amended so that, in addition to keeping the activities of undertakers under review, the Authority will also keep authorised activities of licensed water suppliers under review. This allows the Authority to gather information about licensed suppliers and to pass on relevant information and assistance to the Secretary of State and the Office of Fair Trading.
451. *Section 39A* of the WIA: Undertakers are already obliged to inform their customers about their standards of performance. The amendment of 39A ensures that the Authority can also direct undertakers to pass this information on to licensed suppliers who are using their systems to supply customers. In addition, the Authority can direct licensed suppliers to pass on the undertakers' information on standards of performance to their customers. This will enable customers to continue to be supplied with this information whether the undertaker or licensee is their supplier.
452. *Section 43*: Customers who requisition a new main in order to make a connection to their premises have to pay an amount known as the relevant deficit. This is defined in this section as the annual borrowing costs of the loan of the amount required to lay that main, minus the water charges payable in respect of that main. The latter amount is the charges paid by the undertaker's customer(s) supplied by that main. If one or more of the

customers supplied by that main are subsequently supplied by a licensed water supplier, this amount will reduce and the relevant deficit will then not reflect the revenue received by the undertaker in respect of that main. To correct this, the amendment modifies the calculation of the water charges payable so that it includes the amount received by the undertaker from the licensed water supplier for giving wholesale supplies and permitting the introduction of water into its supply system which can be attributed to the licensed water supplier's customers supplied by that main.

453. *Sections 52 and 55* of the WIA are amended to remove the duty for undertakers to supply water to customers *eligible* for competition outside their areas of appointment whilst ensuring that they do have a duty to supply *ineligible* customers, out of area, whether for domestic or non-domestic purposes. This has been done so that undertakers are not competing for customers with their associated companies outside their area boundaries. The changes will also remove some ambiguity as to duties with respect to domestic and non-domestic supplies when an undertaker supplies water out of area. The only distinction will now be between eligible and ineligible customers.
454. Insertion of new subsection (6A) to *section 52* of the WIA removes undertakers' domestic supply duty to any premises where a customer has served notice that they wish to discontinue being supplied by the undertaker (a request made under new section 63AA; see below) on transfer to a licensed water supplier.
455. *New sections 63AA and 63AB* of the WIA allow undertakers' (domestic and non-domestic supply) customers to notify them that they no longer want to be supplied by the undertaker and instead are to be supplied by a licensed supplier. The notice will specify the time at which the transfer will occur and must allow at least 2 working days notice for metered premises (so that the undertaker can arrange for the meter to be read). Once the undertaker no longer supplies customers, its domestic or non-domestic (as relevant) supply duty to them is interrupted until they re-apply to the undertaker for a supply. Domestic customers wishing to return to the undertaker will re-apply under section 52 of the Act. Non-domestic customers wishing to return will re-apply for a supply under section 55 of the Act. In the latter case, unlike an application under section 52, the undertaker will have ensure that it can meet other current and future supply obligations before it is required to re-supply.
456. *Section 63AC*. The insertion of section 63AC caters for instances where the customer ceases to be supplied by the licensed water supplier but has not notified the undertaker that he has made other arrangements or otherwise does not want a supply. Where the licensee has ceased to supply, an interim supply needs to be available until proper arrangements for re-supply (by the undertaker or another supplier) can be made by the customer.
457. Subsections (2) to (4) provide for the undertaker, as long as it does not put at risk its duties under the Act, to continue supplying the customer with the water as the supplier was previously doing. This supply will continue for a period of at least three months whilst the customer is making other arrangements.
458. Subsections (5) and (6). Where the customer seeks re-supply for non-domestic purposes (under section 55 of the Act) the undertaker will consider this a request for 'new' supply and will first have to ensure certain other obligations can be fulfilled before agreeing to supply. Under subsection 8, the normal provisions regarding disconnections for non-payment or at the request of the customer (under sections 60 to 63 of the Water Industry Act) will apply.
459. Subsection (7). If the undertaker unreasonably fails to make a supply under new section 63AC, the customer will be able to sue it for any loss or damage.
460. *Section 68* of the WIA is amended to include licensed water suppliers in the water quality provisions of the Act. Several amendments in subsection (1) ensure that the undertaker's duty to provide wholesome water under this section exists whether the

water is supplied by the undertaker or by a licensed water supplier. This duty applies to water supplied for domestic or food production purposes through the water undertaker's supply system.

461. New subsection (1A) requires that the licensed water supplier will be responsible for ensuring the water it supplies is wholesome at the time of supply. This will be irrespective of the source from which the water originates; the potential sources being its own abstraction and treatment works, where relevant, or treated water from an undertaker supplied under a wholesale agreement. For example, a licensed water supplier with a retail authorisation may be in receipt of information (from their customers) that, if it was passed on to the relevant undertaker, could alert the undertaker to a water quality problem.
462. Subsection (2) is amended so that, as for the undertaker, the licensed supplier will not be responsible for instances where the water has ceased to be wholesome after having left the undertaker's pipes. However the undertaker (subsection (3)) does have a responsibility to ensure certain steps are taken to reduce the risk of water deteriorating after leaving the undertaker's pipes. Subsection (3A) extends this duty to licensees.
463. *Section 69* of the WIA is amended to ensure licensed water suppliers are included in the provisions for preserving water quality through the supply system. These provisions describe the general steps an undertaker should ensure are taken, such as monitoring, analysis, recording etc, to ensure that the water it supplies meets the wholesomeness requirements set out in section 68. In the case of the undertaker, the 'steps' described in subsection (2) will need to cover all of the supplies made using the undertaker's system. In the case of licensed water suppliers the steps taken to ensure water quality in subsection (2) will apply only to supplies made by them using the undertaker's system.
464. The section is amended to allow inclusion of licensed suppliers in various regulations including those regarding the use of approved substances and processes in treating water intended for domestic supply or food production purposes, and those regarding publication of information to customers and other interested parties about water quality in the supply system.
465. *Section 70* of the WIA is amended to ensure that anyone concerned in the supply of water unfit for human consumption will be liable to prosecution. This will allow licensed water suppliers and their contractors (or those of undertakers) to be prosecuted for any incidents of such supply. The effect of new subsection (1A) is to include undertakers and any other employer or self-employed persons concerned in the supply as relevant persons to which the section applies. Any of these parties would have to show, in the case of an incident, that they had no reasonable grounds for suspecting that the water would be used for human consumption or that they took all reasonable steps and all due diligence to avoid the incident. The undertaker in granting access to a licensed water supplier must ensure that it puts in place arrangements to ensure water is fit.
466. *Section 72* of the WIA: Minor and consequential amendment extends the application of the section to the pipes and conduits of licensed water suppliers. It will be an offence to contaminate water in the pipes of licensed water suppliers as well as those of an undertaker.
467. *Section 73* of the WIA: Minor and consequential amendment extends to the supply of water by licensed suppliers the protection against contamination and waste of water currently afforded to undertakers.
468. *Section 74* of the WIA: Minor and consequential amendment extends to licensed suppliers the protection by regulations preventing contamination and waste of water and safety of water fittings currently afforded to undertakers.
469. *Section 75* of the WIA: Minor and consequential amendment to make provision for premises supplied by licensed water suppliers to remain within the provisions which

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enable undertakers to prevent damage to property, contamination or misuse of water in their systems.

470. *Section 76* of the WIA is amended to include premises supplied by licensed water suppliers within those that will be affected by temporary hosepipe bans. Since undertakers issue public notices about hosepipe bans, they will remain responsible for informing all customers on their networks, irrespective of the supplier.
471. *Section 78* of the WIA is amended to ensure that when local authorities inform undertakers of water quality or supply problems at a customer's premises, they do this whether the supplier is the undertaker or a licensed supplier.
472. Amendment of *sections 93A to 93D* of the WIA extends to licensed water suppliers the existing duty for undertakers to promote efficient use of water by their customers. Efficiency services offered to customers can, for example, advise them of ways of reducing their water consumption and adapting their seasonal water requirements.
473. *Section 148* of the WIA is amended to clarify that access arrangements with licensed water suppliers are not affected by the restriction on undertakers' charging for metering works. *Section 150* of the WIA is amended to ensure that the effect of the section, to impose a cap on charges on water resellers, does not affect licensed water suppliers supplying their customers.
474. *Section 152* of the WIA is amended to allow licensed water suppliers to obtain grants in order to comply with national security directions (section 208) where this is appropriate.
475. *Section 158* of the WIA, *powers to lay pipes in streets*, is amended to include certain pipes laid in order to introduce water at the request of a licensed water supplier (subject to exclusions). The powers to lay these pipes will also apply across third party land under section 159. This power will not apply to pipes laid for the purpose of connecting to a non-potable network.
476. *Section 174* of the WIA: Minor and consequential amendments extend the offence of interference with works, from the pipes and fittings etc vested in or belonging to undertakers, to those vested in or belonging to licensed water suppliers or used by them to supply customers.
477. *Section 175* of the WIA: Minor and consequential amendments extend the offence of tampering with a meter used by undertakers in supplying a customer to meters used in supplying customers of licensed water suppliers.
478. Amendment of *section 179* of the WIA requires undertakers to own any pipes laid by themselves between the licensed water supplier's treatment works and the undertaker's supply system, or between the secondary undertakers' distribution network and the undertaker's supply system in accordance with sections 66B and 66C respectively.
479. Amendment of *section 195* of the WIA requires the Authority to add information on licensed water suppliers to the register that it keeps on undertakers' appointments. The register will include information on licences, variations and revocations. It will also include any direction, consent or determination made by the Secretary of State, Environment Agency or the Assembly.
480. Amendment of *section 201* of the WIA extends the right of the Secretary of State or the Authority to publish information in the public interest on the activities of a licensed supplier.
481. Amendment of *section 202* of the WIA extends to licensed water suppliers the duty to supply to the Secretary of State information related to their licensed activities that the Secretary of State might reasonably require.
482. Amendment of *section 203* of the WIA extends the power of the Secretary of State or the Authority in order that they may acquire information from any person if they

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suspect a licensed water supplier has breached its licence conditions or caused an undertaker to breach its appointment conditions; and also conversely, if they suspect that an undertaker has caused a licensed water supplier to breach the conditions of its licence. This is to ensure that the Secretary of State or Authority is able to gather all relevant information that they might reasonably need relating to the supply of water by a licensed water supplier.

483. *Section 205* is amended to allow any party; water undertaker, licensed water supplier or sewerage undertaker, subject to paying a suitable fee, to demand meter readings from the other party if it has that information.
484. This amendment ensures relevant data is available to all parties involved in providing water and sewerage services. The aim is to prevent all three parties being obliged to visit the customer's premises (with the possible disruption to the customer) to take meter readings.
485. Amendment of *section 206* of the WIA makes consequential amendments in respect restrictions on disclosure of information. Amongst other things, this extends powers to disclose information for the purpose of facilitating the performance of the duties of licensed water suppliers.
486. Amendment of *section 208* of the WIA includes licensed water suppliers within the power to make directions with regard to issues of national security and emergency planning. This draws in licensed water suppliers so that their water sources can if necessary be taken into account in preparations made to deal with civil emergencies.
487. *Schedule 2* of the WIA is amended in order to apply the provisions relating to the making of transfer schemes to circumstances where a special administration order is made in respect of a licensed water supplier which provides one or more designated strategic supplies. They entitle a special administrator to make a scheme to transfer all or part of the property, rights, and liabilities of the licensed water supplier related to the strategic supply or collective strategic supply to one or more other parties, namely a new licensed water supplier together with, if the special administrator so determines, one or more of the undertakers in whose areas the strategic supplies are located. The new paragraph 4A, however, prohibits the special administrator from including in the scheme provisions to transfer the licence itself to the new licensed water supplier, which must go through an appropriate licensing process if it does not already hold a licence.
488. *Schedule 3* of the WIA governs the application of certain provisions of the Insolvency Act 1986 in the specific circumstances of special administration. The amendments provide that the Insolvency Act will be applied where a licensed water supplier is the subject of a special administration order in the same way as it applies where an undertaker is the subject of a special administration order.
489. Amendment of *section 203* of the Water Resources Act 1991 includes the licensed water suppliers in the reciprocal duties (which undertakers are currently under) to exchange information with the Environment Agency with respect to pollution incidents.
490. Amendment of *section 204* of the Water Resources Act 1991; minor and consequential amendments in respect of restrictions on disclosure of information concerning licensed water suppliers.
491. Minor and consequential amendments will be made to paragraph 19A(9) of Schedule 7 to the Competition Act 1998 to make provision for the new arrangements for licensed water suppliers.
492. Minor and consequential amendments will be made to section 168 and section 249 of the Enterprise Act 2002 to make provision for licensed water suppliers.