

**EXPLANATORY MEMORANDUM TO
THE WATER SUPPLY LICENCE (NEW CUSTOMER EXCEPTION)
REGULATIONS 2005**

2005 No. 3076

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. **Description**
 - 2.1 The Water Act 2003 (WA03) amends the Water Industry Act 1991 (WIA91) to permit a company that holds a water supply licence (licensee) to have access to a water undertaker's supply system to supply water to customers at eligible premises. Eligible premises are non-household premises at which water consumption is estimated to be not less than the amount determined as the threshold requirement, currently set at 50 million litres per year. Compliance with the threshold requirement has to be assessed whenever a customer first enters into an undertaking with a licensee for a supply.
 - 2.2 The Regulations provide for circumstances in which the licensee's existing customer is not to be regarded as entering into an undertaking with a new customer. In those circumstances, compliance with the threshold requirement does not have to be reassessed and the business in question can continue to be supplied by the licensee.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 The WA03 amends the WIA91 to extend opportunities for competition for water supply within England and Wales. Among other things, it provides a specific framework for access to the public water supply system, by permitting a licensee to have access to certain parts of a water undertaker's supply system, in certain circumstances, for the purpose of supplying water to customers' eligible premises.
 - 4.2 The WIA91 sets out the requirements that must be satisfied for a set of premises to be eligible to be supplied by a licensee. One of the requirements is that, at the time when the licensee first enters into an undertaking with a customer to give a supply of water to any premises, the total quantity of water estimated to be supplied to the premises annually is not less than 50 million litres of water (or such different quantity of water as may subsequently be substituted by regulations). This is known as the threshold requirement.
 - 4.3 The threshold requirement has to be assessed when the licensee first enters into an undertaking with a customer to give a supply. However, section 17D(7) WIA91 confers a power to make provision, by regulations, as to the circumstances in which the threshold will not have to be assessed, as the

licensee will not be regarded as entering into an undertaking with a new customer. These regulations provide for such circumstances and are the first use of this power.

- 4.4 These Regulations are one of a number of Statutory Instruments required to implement the new provisions of the WIA91 related to the new water supply licensing regime. However, legally, these Regulations stand alone.

5. Extent

- 5.1 This instrument has been made together with the National Assembly for Wales and it applies and extends to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

- 7.1 The new water supply licensing provisions were developed in the light of the responses received by Defra and the Welsh Assembly Government (the Assembly) to their joint public consultation on “Extending Opportunities for Competition in the Water Industry in England and Wales” (July 2002).
- 7.2 As part of the implementation of the water supply licensing provisions in the WIA91, Defra, the Assembly and Ofwat published a consultation paper on ‘Eligibility, licensing, customer transfer protocol and strategic supplies’ in October 2004. This consultation paper sought views on draft guidance and proposed statutory instruments to implement the new regime, including these Regulations. Thirty-four stakeholders responded to the consultation, of which seventeen commented on the proposals related to these Regulations.
- 7.3 The market in which licensees can operate has been limited by the WIA91 to non-household premises consuming a specified minimum quantity of water per year. The volume requirement has to be assessed when the licensee first enters into an undertaking with a customer to give a supply. This entails reassessing the volume requirement when changes in the business in question mean that the licensee is regarded as entering into an undertaking with a new customer.
- 7.4 The Regulations seek to encourage customers to save water by allowing certain businesses to maintain their supply arrangements with a licensee when their circumstances change in ways covered by the Regulations, even if their consumption has fallen below the eligibility threshold. The consultation paper sought views on the proposed circumstances in which a licensee should not be regarded as entering into an undertaking with a new customer for the purpose of reassessing compliance with the threshold requirement. The proposed circumstances included:
- change in the legal ownership of the customer, provided the entire set of premises is transferred to the new owner and the business carries on as before; and
 - structural reorganisation of the customer, provided the entire set of premises remains within the same organisation and the business otherwise carries on as before.

- 7.5 Most respondents supported the proposals, with only two respondents commenting on the policy proposals. Neither policy comment needed to be addressed by any changes to the Regulations. The first comment, in effect, supported the provision in the Regulations which focuses on asset transfers as opposed to share transfers. The second response related to eligibility requirements which are governed by other provisions in the WIA91. Two other respondents raised specific drafting comments, including seeking more clarity on what is meant by ‘carries on as before’.
- 7.6 In the light of other drafting comments, the Regulations have been strengthened to specify that ‘carries on as before’ includes an expectation that the volume of water expected to be supplied to the new customer is the same or more than that which was supplied to the old. This is consistent with the policy intention to provide for customers where the business is expected to continue as before, while avoiding penalising a customer for past water efficiency gains.
- 7.7 The consultation document is available on Ofwat’s website at www.ofwat.gov.uk. The Government’s response to the consultation on New Customer Exceptions will be published on Defra’s website at: <http://www.defra.gov.uk/environment/water/industry/wa03regs/competition.htm>
- 7.8 These Regulations are of interest to water undertakers, potential licensees and customers eligible for competition in water supply. There is no public or media interest in these Regulations.

8. Impact

- 8.1 No regulatory impact assessment has been prepared in respect of these Regulations. A regulatory impact assessment in respect of the WA03 was prepared and placed in the library of each House of Parliament during the passage of the Water Bill. This included an assessment of the water supply licensing regime. Copies can be obtained from Water Supply and Regulation Division, Department for Environment, Food and Rural Affairs (Defra), 55 Whitehall, London SW1A 2EY or from Defra’s website at www.defra.gov.uk/environment/water/legislation.
- 8.2 The impact on the public sector is negligible. Ofwat, the economic regulator for the water and sewerage industries, may receive formal applications for determinations under the Regulations in addition to those which it can receive under other water supply licensing provisions. However, Ofwat’s determinations on a case by case basis will provide precedents and give legal certainty.

9. Contact

Nieves Bottomley at the Department for Environment, Food and Rural Affairs (Tel: 020 7082 8337 or e-mail: Nieves.Bottomley@defra.gsi.gov.uk) can answer any queries regarding the instrument.