
DRAFT STATUTORY INSTRUMENTS

2013 No.

**The Water Industry (Specified Infrastructure
Projects) (English Undertakers) Regulations 2013**

Citation, commencement, application and expiry

1.—(1) These Regulations—

- (a) may be cited as the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013;
- (b) come into force on the day after the day on which they are made; and
- (c) apply in relation to the provision of infrastructure for the use of one or more English undertakers in carrying out their duties under—
 - (i) section 37 of the Act (general duty to maintain water supply system etc.), or
 - (ii) section 94 of the Act⁽¹⁾ (general duty to provide sewerage system) as supplemented by paragraph (1) of regulation 4 of the Urban Waste Water Treatment Regulations 1994⁽²⁾ (duty to provide and maintain collecting systems and treatment plants),including those duties as modified by these Regulations.

(2) Subject to paragraph (4), regulations 4(1) and 8(1) cease to have effect at the end of the period of seven years beginning with the day on which these Regulations come into force.

(3) If the powers in regulations 4(1) and 8(1) have not been exercised before the end of that period, the other provisions in these Regulations also cease to have effect at the end of that period.

(4) Notices issued under regulations 4(1) and 8(1) that are in force at the end of that period continue to have effect despite revocation of those provisions, and regulations 4(7) and 8(6) have effect after that period in relation to such notices.

Interpretation

2. In these Regulations—

“the Act” means the Water Industry Act 1991;

“company” means a company, as defined in section 1(1) of the Companies Act 2006⁽³⁾, that is registered in England and Wales or Scotland and is limited by shares or guarantee;

“incumbent undertaker”, in relation to an infrastructure project, means the relevant undertaker whose ability to provide services for its customers could be threatened by that infrastructure project, but for the exercise of the powers of the Secretary of State or the Authority under or by virtue of these Regulations;

“infrastructure” means infrastructure relating to—

(1) Section 94 was amended by sections 88(2) and 97(1) and (3) of the Water Act 2003. There are other amendments but none is relevant. By virtue of section 36(2) of the Water Act 2003, each reference to the Director General of Water Services in the Act has effect as a reference to the Water Services Regulation Authority.

(2) S.I. 1994/2841, as amended by section 120 of, and paragraph 233 of Schedule 22 to, the Environment Act 1995 (c. 25), S.I.2003/1788, 2005/2035, 2010/675 and 2011/556.

(3) 2006 c. 46.

- (a) the provision of a system, or part of a system, of water supply, or the securing of supplies of water, or
- (b) the provision of a system, or part of a system, of sewers, or the provision of means for emptying, or dealing effectually with the contents of, sewers;

“infrastructure provider” means a company designated under regulation 8(1);

“licensed infrastructure provider” means an infrastructure provider which is the holder for the time being of a project licence;

“preparatory work” includes—

- (a) conducting surveys, including in relation to environmental matters, ground conditions, hazardous substances, heritage, the operation of existing infrastructure, ground and surface water quality and the general condition of a site,
- (b) arranging for the provision of electricity or other power,
- (c) diverting or protecting communications, electricity, gas, water and sewerage assets,
- (d) preparing designs and specifications for a specified infrastructure project,
- (e) preparing and submitting planning applications, including consulting the public in relation to those applications, and acquiring and protecting interests in land,
- (f) procuring goods, services or works,
- (g) preparing a site for works, including remediation of contamination, laying access roads and undertaking demolition and clearance works, and
- (h) undertaking associated works on the highway;

“project licence” means a licence granted by the Authority by virtue of its powers under section 17FA of the Act (see paragraph 3(2) of Schedule 1);

“specified infrastructure project” means an infrastructure project which has been specified under regulation 4(1).

Application of the Act

3.—(1) Schedule 1 (application of the Act and related provisions) has effect.

(2) Paragraphs (3) and (4) have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the powers and duties conferred or imposed on them by virtue of these Regulations.

(3) Section 2 of the Act(4) (general duties with respect to the water industry) applies as if—

- (a) in subsection (1) (when the general duties of the Secretary of State and the Authority apply), in paragraph (a)—
 - (i) after “by virtue of”, there were inserted “the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 or”; and
 - (ii) for “and of licensed water suppliers” there were substituted “, of licensed water suppliers and of licensed infrastructure providers”;
- (b) in subsection (2A) (primary duties)—
 - (i) the “and” following paragraph (c) were repealed; and
 - (ii) after paragraph (d), there were inserted—

(4) Section 2 was amended by section 54 of, and Schedule 10 to, the Competition Act 1998 (c. 41), section 39 of the Water Act 2003 and by section 278 of, and Schedule 25 to, the Enterprise Act 2002 (c. 40).

- “(e) to secure that the functions of a licensed infrastructure provider are properly carried out; and
- (f) to secure that relevant licensed infrastructure providers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions.”;
- (c) in subsection (3) (secondary duties)—
 - (i) in paragraph (a) (promoting of economy and efficiency), after “relevant undertaker”, there were inserted “and companies that are licensed infrastructure providers in the carrying out of their functions”; and
 - (ii) in paragraph (d) (protecting consumers from non statutory activities)—
 - (aa) in the words preceding sub-paragraph (i), after “relevant undertaker”, there were inserted “or of a licensed infrastructure provider (as the case may be)”; and
 - (bb) in sub-paragraph (ii), after “relevant undertaker”, there were inserted “or as a licensed infrastructure provider (as the case may be)”; and
- (d) in subsection (5) (meaning of water and drainage charges)—
 - (i) in paragraph (a), after “relevant undertaker”, there were inserted “or a licensed infrastructure provider”; and
 - (ii) in paragraph (b), after “such an undertaker” there were inserted “or infrastructure provider”; and
- (e) in subsection (5A) (meaning of “consumers” and “interests of consumers”)—
 - (i) in the definition of “consumers”, after “future consumers”, there were inserted “and excludes relevant undertakers, so far as regards services provided by the licensed infrastructure provider for an infrastructure project to a relevant undertaker who is the incumbent undertaker in relation to the infrastructure project”;
 - (ii) the “and” following the definition of “consumers” were repealed; and
 - (iii) after the definition of “the interests of consumers” there were inserted—
 - “; and
 - “relevant licensed infrastructure provider” means a licensed infrastructure provider whose charges fixed under section 142 below are limited by or under a condition of its project licence.”
- (f) in subsection (6)(a) (meaning of reference in subsection (1)), for “and of licensed water suppliers” there were substituted “, of licensed water suppliers and of licensed infrastructure providers”.

(4) Section 219 of the Act(5) (general interpretation) applies with the modifications made by paragraph 16(2) of Schedule 1.

(5) Paragraphs (3)(b) to (e) and (4) have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the powers and duties mentioned in section 2(1)(a) of the Act (powers and duties conferred or imposed on them by virtue of the provisions of the Act relating to the regulation of relevant undertakers and of licensed water suppliers) in cases where the exercise or performance of the power or duty in question is capable of affecting a licensed infrastructure provider.

(5) Section 219(1) was amended by section 101(1) of, and Schedules 7 and 8 to, the Water Act 2003, and by [S.I. 2009/1947](#). There are other amendments, but none is relevant.

Specification of infrastructure projects

4.—(1) Subject to the following provisions of this regulation, the Secretary of State or the Authority may by notice specify an infrastructure project.

(2) The Secretary of State may by notice served on the Authority delegate the Secretary of State's power under paragraph (1) to the Authority.

(3) The Secretary of State or the Authority may exercise the power under paragraph (1) only if the Secretary of State or the Authority respectively is of the opinion that—

- (a) the infrastructure project is of a size or complexity that threatens the incumbent undertaker's ability to provide services for its customers; and
- (b) specifying the infrastructure project is likely to result in better value for money than would be the case if the infrastructure project were not specified, including taking into account—
 - (i) the charges fixed or likely to be fixed under Chapter 1 of Part 5 of the Act⁽⁶⁾ (financial provisions, charges); and
 - (ii) the powers of the Secretary of State under section 154B of the Act⁽⁷⁾ (financial assistance for major works).

(4) The Secretary of State must—

- (a) subject to paragraph (6), before exercising the power under paragraph (1), prepare draft reasons for exercising the power and consult—
 - (i) the incumbent undertaker;
 - (ii) the Authority;
 - (iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and
 - (iv) any other person the Secretary of State thinks appropriate;
- (b) include in any notice issued by the Secretary of State under paragraph (1) a description of the scope of the infrastructure project; and
- (c) serve any such notice on the persons mentioned in sub-paragraph (a).

(5) The Authority must—

- (a) subject to paragraph (6), before exercising the power under paragraph (1), prepare draft reasons for exercising the power and consult—
 - (i) the incumbent undertaker;
 - (ii) the Secretary of State;
 - (iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and
 - (iv) any other person the Authority thinks appropriate;
- (b) include in any notice issued by it under paragraph (1) a description of the scope of the infrastructure project; and
- (c) serve any such notice on the persons mentioned in sub-paragraph (a).

(6) Paragraphs (4)(a) and (5)(a) do not apply to the extent that the Secretary of State or the Authority (as the case may be) has prepared draft reasons and consulted the persons specified in those paragraphs before these Regulations come into force.

⁽⁶⁾ The provisions in Chapter 1 of Part 5 were amended by sections 36 and 53 of the Competition and Service (Utilities) Act 1992 (c. 43), section 120 of, and Schedule 22 to, the Environment Act 1995, sections 3 to 9 and 15 of, and Schedule 3 to, the Water Industry Act 1999 (c. 9), sections 59 and 101(1) of, and Schedule 8 to, the Water Act 2003 and section 45 of the Flood and Water Management Act 2010. There are other amendments, but none is relevant.

⁽⁷⁾ Section 154B was inserted by section 2 of the Water Industry (Financial Assistance) Act 2012 (c. 8).

- (7) Where the Secretary of State or the Authority is of the opinion—
- (a) that the conditions in paragraph (3) continue to be satisfied, the Secretary of State or the Authority respectively may by notice vary the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (1); or
 - (b) that either condition in paragraph (3) is no longer satisfied, the Secretary of State or the Authority respectively may, having regard to any subsisting project licence, by notice revoke the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (1).
- (8) Paragraphs (4) and (5) apply to a notice issued under paragraph (7) as they apply to a notice issued under paragraph (1).
- (9) Subject to paragraph (10), the Authority must publish guidance to be followed by it in determining whether to exercise its powers under paragraph (1) or (7).
- (10) Paragraph (9) does not apply where the Authority has published such guidance before these Regulations come into force.

Work done by the incumbent undertaker in relation to a specified infrastructure project

5.—(1) Subject to paragraph (3), the incumbent undertaker must not undertake a specified infrastructure project.

(2) Section 102 of the Act⁽⁸⁾ (adoption of sewers and disposal works) does not apply to any sewer owned by a licensed infrastructure provider.

(3) Subject to paragraphs (4) and (5), the Secretary of State or the Authority may by notice permit or require the incumbent undertaker to undertake such preparatory work of such kind and for such purpose in relation to a specified infrastructure project as they may set out in the notice.

- (4) The Secretary of State must—
- (a) subject to paragraph (6), before exercising the power under paragraph (3), prepare draft reasons for exercising the power and consult—
 - (i) the incumbent undertaker;
 - (ii) the Authority;
 - (iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and
 - (iv) any other person the Secretary of State thinks appropriate; and
 - (b) serve on the persons mentioned in sub-paragraph (a) any notice issued by the Secretary of State under paragraph (3).
- (5) The Authority must—
- (a) subject to paragraph (6), before exercising the power under paragraph (3), prepare draft reasons for exercising the power and consult—
 - (i) the incumbent undertaker;
 - (ii) the Secretary of State;
 - (iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and
 - (iv) any other person the Authority thinks appropriate; and
 - (b) serve on the persons mentioned in sub-paragraph (a) any notice issued by it under paragraph (3).

⁽⁸⁾ Section 102 was amended by section 96(1) of the Water Act 2003.

(6) Paragraphs (4)(a) and (5)(a) do not apply to the extent that the Secretary of State or the Authority (as the case may be) has prepared draft reasons and consulted the persons specified in those paragraphs before these Regulations come into force.

(7) The Secretary of State or Authority may, having regard to any costs already incurred in pursuance of the notice, by notice vary or revoke the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (3).

(8) Paragraphs (4) and (5) apply to a notice issued under paragraph (7) as they apply to a notice issued under paragraph (3).

Tender requirements and procedure

6.—(1) The incumbent undertaker must put a specified infrastructure project (including the financing of such a project) out to tender.

- (2) Subject to paragraphs (3) and (4), where in relation to the specified infrastructure project—
- (a) neither the Public Contracts Regulations 2006⁽⁹⁾ nor the Utilities Contracts Regulations 2006⁽¹⁰⁾ apply,
 - (b) the incumbent undertaker relies on an exemption under the Utilities Contracts Regulations 2006,
 - (c) the incumbent undertaker seeks offers without a call for competition pursuant to—
 - (i) regulation 5(1A) and (2) of the Public Contracts Regulations 2006, or
 - (ii) regulation 5(2) or 17(1)(b) to (l) of the Utilities Contracts Regulations 2006, or
 - (d) the incumbent undertaker uses the negotiated procedure without the prior publication of a contract notice under regulation 14 of the Public Contracts Regulations 2006,

the provisions of the Utilities Contracts Regulations 2006 mentioned in the first column of the table in Part 1 of Schedule 2 (application of the Utilities Contracts Regulations 2006) apply in relation to that project.

- (3) Those provisions of the Utilities Contracts Regulations 2006 apply—
- (a) subject to the modifications specified in the second column of the table in Part 1 of Schedule 2; and
 - (b) as if—
 - (i) references to “the utility” were references to “the incumbent undertaker” within the meaning of these Regulations; and
 - (ii) for Part 9 of the Utilities Contracts Regulations 2006 (applications to the Court), there were substituted the Part 9 set out in Part 2 of Schedule 2.

- (4) Paragraphs (2) and (3) do not apply to—
- (a) preparatory work undertaken by the incumbent undertaker pursuant to a notice issued under regulation 5(3); or
 - (b) any part of a specified infrastructure project which has been put out to tender in accordance with the Public Contracts Regulations 2006 or the Utilities Contracts Regulations 2006, where any part of the tender process has been commenced before these Regulations come into force.

(5) The incumbent undertaker must consult the following concerning the terms on which the specified infrastructure project is to be put out to tender—

- (a) the Secretary of State;

⁽⁹⁾ S.I. 2006/5, as amended by S.I. 2007/3542, 2008/2256, 2009/2992, 2011/1043, 1848, 2053 and 3058.

⁽¹⁰⁾ S.I. 2006/6, as amended by S.I. 2007/3542, 2008/2256, 2848, 2009/3100, 2011/1043, 1848 and 2053.

- (b) the Authority; and
- (c) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers.
- (6) The incumbent undertaker must determine which bid to accept (if any).
- (7) Section 112 of the Act⁽¹¹⁾ (requirement that proposed drain or sewer be constructed so as to form part of the general system) does not apply to any sewer or drain to be constructed by a licensed infrastructure provider.
- (8) In relation to any licensed infrastructure provider, unless the Authority otherwise allows by notice, paragraphs (2) and (3) and Schedule 2 apply as if—
 - (a) in paragraph (2)—
 - (i) for “Subject to paragraphs (3) and (4), where in relation to the specified infrastructure project”, there were substituted “Subject to paragraph (3), where in relation to a specified infrastructure project”; and
 - (ii) after “to that project”, there were inserted “or any part of it”; and
 - (b) for “incumbent undertaker”, in each place it occurs, there were substituted “licensed infrastructure provider”.

Associated companies

7.—(1) Subject to the following provisions of this regulation, an associated company of the incumbent undertaker is not permitted to bid in a tender process for a specified infrastructure project which relates to infrastructure for the use of that undertaker without the consent of the Secretary of State or the Authority issued by notice.

(2) The Secretary of State or the Authority may exercise the power under paragraph (1) only if the Secretary of State or the Authority respectively is of the opinion that the participation of the associated company in the tender process will not have the effect of distorting competition or breaching the principles of non-discrimination or transparency in the process.

- (3) The Secretary of State must—
 - (a) subject to paragraph (5), before exercising the power under paragraph (1), prepare draft reasons for exercising the power and consult—
 - (i) the incumbent undertaker;
 - (ii) the Authority;
 - (iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and
 - (iv) any other person the Secretary of State thinks appropriate; and
 - (b) serve on the persons mentioned in sub-paragraph (a) any notice issued by the Secretary of State under paragraph (1).
- (4) The Authority must—
 - (a) subject to paragraph (5), before exercising the power under paragraph (1), prepare draft reasons for exercising the power and consult—
 - (i) the incumbent undertaker;
 - (ii) the Secretary of State;
 - (iii) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and

⁽¹¹⁾ Section 112 was amended by section 36(2) of the Water Act 2003 and by section 42(4) of the Flood and Water Management Act 2010, although the latter provision is not yet in force.

- (iv) any other person the Authority thinks appropriate; and
 - (b) serve on the persons mentioned in sub-paragraph (a) any notice issued by it under paragraph (1).
- (5) Paragraphs (3)(a) and (4)(a) do not apply to the extent that the Secretary of State or the Authority (as the case may be) has prepared draft reasons and consulted the persons specified in those paragraphs before these Regulations come into force.
- (6) The Secretary of State or Authority may by notice vary or revoke the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (1).
- (7) Paragraphs (3) and (4) apply to a notice issued under paragraph (6) as they apply to a notice issued under paragraph (1).
- (8) In this regulation “an associated company” means either of the following—
- (a) a group company;
 - (b) a related company.
- (9) In paragraph (8)—
- (a) a “group company” means, in relation to a relevant undertaker—
 - (i) any holding company or subsidiary of that undertaker, or
 - (ii) any subsidiary of any holding company of that undertaker,and for this purpose “subsidiary” and “holding company” have the meanings given in section 1159 of the Companies Act 2006⁽¹²⁾ (meaning of “subsidiary” etc) as supplemented by Schedule 6 to that Act (provisions supplementary to section 1159); and
 - (b) a “related company” means, in relation to a relevant undertaker, any undertaking in which that undertaker has a participating interest, and for this purpose—
 - (i) “undertaking” has the meaning given in section 1161 of the Companies Act 2006, and
 - (ii) “participating interest” has the meaning given in paragraph 8 of Schedule 8 (general interpretation) to the Small Companies and Groups (Accounts and Directors’ Report) Regulations 2008⁽¹³⁾.

Designation of an infrastructure provider

8.—(1) Subject to paragraphs (2) to (5), the Secretary of State or the Authority may by notice designate as an “infrastructure provider” a company which appears to the Secretary of State or the Authority respectively to be wholly or partly responsible for a specified infrastructure project that was put out to tender in accordance with these Regulations.

(2) Any notice issued under paragraph (1) may be subject to such conditions as the Secretary of State or the Authority considers appropriate.

(3) For the purposes of paragraph (1), the Secretary of State or the Authority must regard a specified infrastructure project as having been put out to tender in accordance with these Regulations where—

- (a) a tender process for an infrastructure project which was subsequently specified has been conducted in accordance with the Public Contracts Regulations 2006 or the Utilities Contracts Regulations 2006; and
- (b) any part of that tender process has been commenced before these Regulations come into force.

⁽¹²⁾ 2006 c. 46.

⁽¹³⁾ S.I. 2008/409.

(4) The Secretary of State must serve on the persons mentioned in paragraph (8)(a) any notice issued by the Secretary of State under paragraph (1) and include any conditions imposed under paragraph (2).

(5) The Authority must serve on the persons mentioned in paragraph (9)(a) any notice issued by it under paragraph (1) and include any conditions imposed under paragraph (2).

(6) Subject to paragraphs (8) and (9), the Secretary of State or Authority may, having regard to any subsisting project licence, by notice vary or revoke the notice issued by the Secretary of State or the Authority (as the case may be) under paragraph (1).

(7) Paragraph (2) applies to any notice issued under paragraph (6) as it does to a notice issued under paragraph (1).

(8) The Secretary of State must—

(a) before exercising the power under paragraph (6), prepare draft reasons for exercising the power and consult—

(i) the person whom the Secretary of State has designated in relation to a specified infrastructure project;

(ii) the incumbent undertaker;

(iii) the Authority;

(iv) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and

(v) any other person the Secretary of State thinks appropriate;

(b) include in any notice issued by the Secretary of State under paragraph (6) any conditions imposed under paragraph (2), as applied by paragraph (7); and

(c) serve any such notice on the persons mentioned in sub-paragraph (a).

(9) The Authority must—

(a) before exercising the power under paragraph (6), prepare draft reasons for exercising the power and consult—

(i) the person whom the Authority has designated in relation to the specified infrastructure project in question;

(ii) the incumbent undertaker;

(iii) the Secretary of State;

(iv) where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and

(v) any other person the Authority thinks appropriate;

(b) include in any notice issued by it under paragraph (6) any conditions imposed under paragraph (2), as applied by paragraph (7); and

(c) serve any such notice on the persons mentioned in sub-paragraph (a).

Provision of information by a relevant undertaker or infrastructure provider

9.—(1) A relevant undertaker or infrastructure provider must provide to the Secretary of State or the Authority such information connected with the carrying out by that company of its functions as the Secretary of State or the Authority respectively may by notice reasonably require for the purpose of carrying out the Secretary of State's or the Authority's functions under these Regulations.

(2) Information required under paragraph (1) must be provided in such form and manner, at such time and place, and be accompanied or supplemented by such explanations, as the Secretary of State or the Authority may reasonably require.

(3) A relevant undertaker or infrastructure provider must not be required under this regulation to provide any information which would be protected from disclosure or production in proceedings in the High Court on grounds of legal professional privilege.

(4) In paragraph (1), “functions” has the meaning given in section 219(1) of the Act, as modified by paragraph 16(2) of Schedule 1.

Enforcement

10. The duties under these Regulations of a relevant undertaker or licensed infrastructure provider are enforceable under section 18 of the Act(**14**) (as applied by Schedule 1) by the Secretary of State or the Authority.

Review

11.—(1) Before the end of the review period, the Secretary of State must—

- (a) carry out a review of these Regulations;
- (b) set out the conclusions of the review in a report; and
- (c) publish the report.

(2) The report must in particular—

- (a) set out the objectives intended to be achieved by the scheme established by these Regulations;
- (b) assess the extent to which those objectives are achieved; and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved in a less burdensome way.

(3) “Review period” means the period of five years beginning with the day on which these Regulations come into force.

Date

Name
Parliamentary Under Secretary of State
Department for Environment, Food and Rural
Affairs

(14) Section 18 was amended by sections 49 and 101(1) of, and Schedule 8 to, the Water Act 2003.