



The Sizewell C Project

9.104 Written Submissions Responding to Actions Arising from Issue Specific Hearing 11: Flooding, Water and Coastal Processes (14 September 2021)

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SIZEWELL C PROJECT –
WRITTEN SUBMISSIONS ARISING FROM
ISSUE SPECIFIC HEARING 11

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Management Planning for Sizewell C

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1 ISSUE SPECIFIC HEARING 11: FLOODING, WATER AND COASTAL PROCESSES

1.1 Introduction

1.1.1 This document contains the Applicant's written submissions responding to actions arising from Issue Specific Hearing 11 (ISH11) held on 14 September 2021.

1.1.2 This document corresponds to the Applicant's **Written Summaries of Oral Submissions made at ISH11** (Doc Ref. 9.100) submitted at Deadline 8.

1.2 Phase 1 Water Tankering & Its Implications

1.2.1 As explained in Section 3.2 of the SZC **Water Supply Strategy** Revision 2 [[REP7-036](#)] the demand for potable water during the initial 9-12 months of construction would increase gradually to a maximum of approximately 1,110m³ per day (equivalent to 1.1MI/day). This represents the total Project demand taking account of the Main Development Site (MDS) and the Associated Development (AD). Following this initial period the construction demand for potable water would be supplied by temporary desalination, the only potential exception being at some of the AD sites, where it may be more appropriate to continue a small number tanker deliveries from filling points provided by water companies, or through other local supplies, for example exploiting non-potable water. See Section 1.3 for further details.

1.2.2 It has been assumed for assessment purposes that all of this initial demand would be supplied by water tankers, as Northumbrian Water Limited (NWL) has confirmed there is no spare mains capacity within the local Blyth Water Resource Zone (WRZ). As set out in Section 3.2 of the Strategy [[REP7-036](#)] the capacity of water tankers is typically up to 30m³, meaning that up to approximately 40 water tanker deliveries per day would be required.

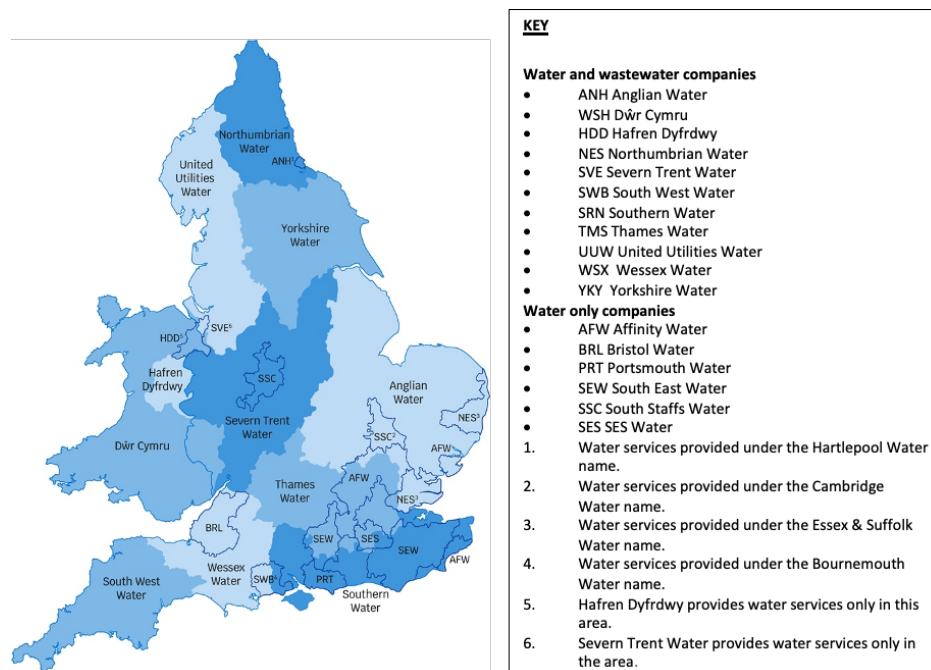
1.2.3 Whilst this assumed reliance on water tankers in the early years holds for the MDS, there may be opportunities for some or all of the demand at AD sites to be met through other means, for example through on-site recycling and licence trading (see Section 2.2 of this submission for further details).

1.2.4 The water tankers would need to be filled outside the local Blyth WRZ, where sufficient licensed headroom exists. SZC Co. is not in a position to confirm the specific filling locations to be used, although a number of viable options have been identified in discussions with various water companies. These initial options are considered below.

1.2.5 NWL has indicated that the water tankers cannot be filled from its Suffolk network, irrespective of the outcome of the ongoing abstraction sustainability ('WINEP') modelling. It is currently assessing whether it can offer tanker fill points in its Essex Supply Area.

1.2.6 Further water source options have been identified within Anglian Water's neighbouring East Suffolk and Essex WRZs. Anglian Water have indicated likely availability of water from its Alton Water and Ardleigh Reservoirs, subject to detailed capacity checks by Anglian Water. Additional potable water sources have also been identified further afield with the Anglian Water region, and also with other water companies, including Affinity Water and South Staffordshire Water. These water regions are shown on Figure 2-1.

Figure 2-1 Water Company Areas (by OFWAT)



1.2.7 The various options that have been identified would mean that water tankers are most likely to be routed along the A14/A12 corridor for deliveries to both the MDS and AD sites. All water tanker movements and routing sit within the existing traffic assessment and proposed Heavy Goods Vehicle (HGV) caps as shown in Tables 3-1 and 3-2 of the Site Water Supply Strategy [REP7-036]. More than one filling location may be used for capacity or logistical reasons.

- 1.2.8 SZC Co intends to utilise water sources as near to site as possible to minimise distance travelled. SZC Co. will provide appropriate storage on-site to minimise vehicle movements and mitigate any interruptions/delays to water tanker deliveries. Section 3.3.5 of [REP7-036] details the potable water storage within the MDS. A similar approach will be used at the AD sites.
- 1.2.9 Where possible, tanker deliveries will be made direct to the location(s) where water is required to minimise HGV movements; as such, not all deliveries will travel via the MDS as a proportion will travel direct to the off-site ADs.

Figure 2-2 Transport Routes



1.3 Associated Development

- 1.3.1 Water will need to be supplied to the Associated Development sites during their construction for activities such as dust suppression, wheel washes,

plant washdowns, road sweeping and welfare facilities, as identified in Section 2.2.2.4 of the Site Water Supply Strategy Revision 2 [REP7-036].

1.3.2 For those Associated Development sites located within or in close proximity to the Main Development Site (MDS), such as the campus, caravan accommodation within the Land East of Eastlands Industrial Estate (LEEIE) and Green Rail Route, water would be supplied by water tankers that serve the MDS. They are not therefore considered further in this section, whose focus is the off-site Associated Development including the Park and Ride Facilities, Freight Management Facility and the Major Road Schemes (Sizewell Link Road, Two Village Bypass and Yoxford Roundabout).

1.3.3 Table 1 below sets out the estimated water demand for all of these AD sites combined, over the estimated two-year construction period during 2023 and 2024. As indicated in this table the total estimated water demand will range between <100 m³/day and approximately 323 m³/day. This would correspond with up to approximately 11 water tanker deliveries per day in the aggregate, i.e. serving all of the off-site AD sites combined. This represents a small proportion of the maximum 40 tanker deliveries per day that will be needed to deliver the peak water demand of the Sizewell C Project as a whole during the early years, as explained in Section 1.2.

Table 1 Water Demand - Offsite Associated Development Sites

Quarter	Maximum Demand (m ³ /day)	Maximum Number of Water Tanker Deliveries per day
Q1-23	27	1
Q2-23	211	8
Q3-23	323	11
Q4-23	260	9
Q1-24	136	5
Q2-24	141	5
Q3-24	143	5
Q4-24	66	3

1.3.4 SZC Co. assumes that from Q4 2023 water would be sourced from the on-site temporary desalination plant. Once this plant is operational, there will no longer be a requirement for water tanker deliveries to the MDS. However, a small number (up to 5) tanker deliveries per day will still be required to supply all of the off-site AD sites in aggregate throughout 2024.

1.3.5 SZC Co. considers that a large proportion of the water demand of the off-site AD could be satisfied using non-potable water; only the welfare demand

requires potable water. However, it has been assumed that the full demand is potable to provide a 'worst case' basis to estimate water tanker deliveries.

1.3.6 Potential non-potable water sources that will be explored to minimise potable demand include recycling and local abstraction licence trading.

1.3.7 Section 1.4 outlines the proposed non-potable water supply within the MDS.

1.4 Non Potable Water Supply

1.4.1 This section outlines the strategy to reduce the potable water demand during the construction of Sizewell C by means of recycling of potable water, use of water efficient fixtures and fittings and non-potable water use.

Minimising potable water demand

1.4.2 The Site Water Supply Strategy [REP7-036] describes the approach to minimising potable water use through demand reduction measures such as recycling of waste water within construction processes such as concrete batching and bentonite slurry production (Sections 2.2.2.1, 2.2.2.2, etc.) and use of water efficient fixtures and fittings such as waterless urinals, sensed taps and use of shower timers (Section 3.3.4).

1.4.3 Table 2-1 of [REP7-036] identifies the assumed recycling rates for different types of construction activity, including tunnelling (70%); cut-off wall construction (60%); and concrete batching (10-20%). Whilst challenging, SZC Co. is confident that these recycling rates are feasible based on experience at HPC and early contractor involvement in the water strategy. SZC Co. has calculated its request for water supply from NWL on that basis.

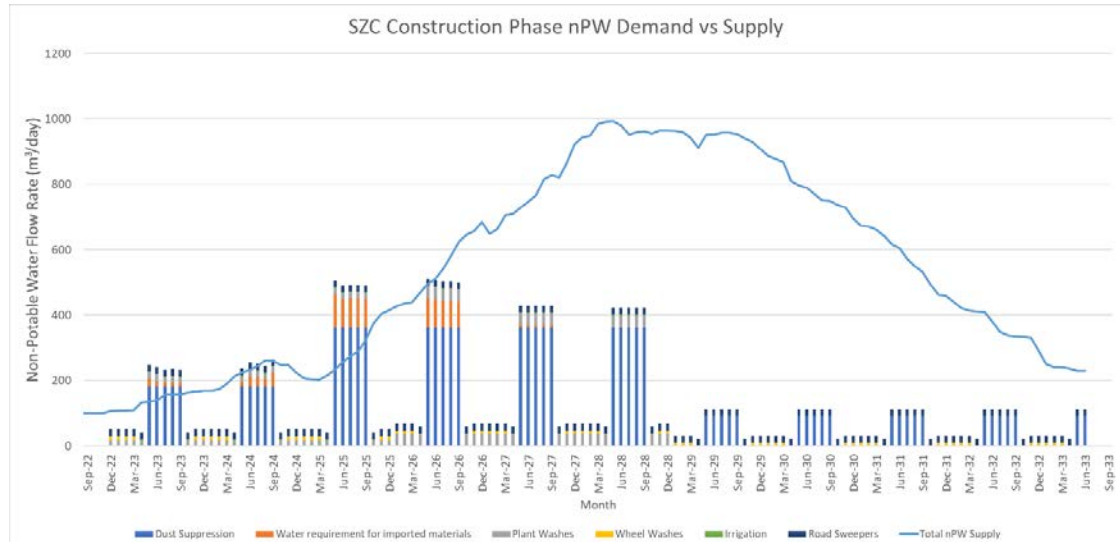
Non potable water demand

1.4.4 In addition, the strategy estimates the demand for non-potable water during construction activities and explains how this demand would be supplied.

1.4.5 The demand for non-potable water varies seasonally, being higher in the spring and summer months and lower in the winter. This is because a significant proportion of the demand is water for use in dust suppression.

1.4.6 **Figure 3-1** shows the non-potable water demand within the MDS broken down by component (including dust suppression, 'conditioning' of imported fill, plant washdown, wheel washes, road sweeping and irrigation).

Figure 3-1 SZC Construction Phase Non-Potable Demand vs Supply



1.4.7 The peaks occur during the first six summers, with approximately 225 m³/d demand in each of the 2 years 2023 & 2024. This equates to 37,500 m³ for each of the 2 summers. Thereafter peak demand is 450 to 500 m³/d for the 4 years 2025 to 2028, equating to 75,000 m³ for each summer. Thereafter the summer demand reduces to ~100m³/day.

1.4.8 The winter demand remains relatively consistent throughout the whole of the construction phase at approximately 50 m³/d. This equates to 14,700 m³ for each winter period. Total annualised demand is therefore 52,200 m³ for the early years and 89,700 m³ for the later years.

Non potable water supply

1.4.9 The main source of non-potable water will be treated effluent from SZB and SZC wastewater treatment plant as explained in Section 3.3.2 of [REP7-036]. The available supply of treated foul water from SZB is a daily average of 128 m³/d. SZC is expected to produce up to 890 m³/d, depending upon the time within the construction programme. At the commencement of SZC site works there will be negligible volume available due to the low workforce numbers, ramping up to the full complement and thus full available volume of treated water.

1.4.10 **Figure 3-1** shows the supply curve of these two effluent streams combined, compared against the demand curve for non potable water. The supply of treated foul water matches or exceeds the non potable water demand for all but the first and third summers, with a shortfall of approximately 70 m³/d in the summer of 2023 and approximately 250 m³/d in the summer of 2025.

- 1.4.11 Buffering, or storage of water from periods of low demand to serve high-demand periods, is therefore planned for. Buffering will be achieved through a combination of storage tanks at each foul treatment plant and within the lined 16,000 m³ capacity Water Resource Storage Area.
- 1.4.12 Foul water treatment would comprise primary and secondary (biological) treatment. SZC treated foul water is expected to deliver a 60 mg/l suspended solid (SS) and 40 mg/l Biological Oxygen Demand (BOD) standard, with no nutrient removal included.
- 1.4.13 Nutrient levels in the final effluent will typically be approximately 10 mg/l, expressed as Total Nitrogen (0.01 g N/l). Dust suppression usage is anticipated to be approximately 3 l/m²/day for 90 days through the year, equating to 270 l/m²/yr (0.27 kg N/ha/year). This loading is much less than government guidance (Defra Guidance – Using Nitrate fertilisers in NVZs) for agricultural nutrient application rates, which are typically more than 120 kg N/ha/yr, and which might be typical for current nutrient loadings in the areas of MDS which are currently under agricultural use.
- 1.4.14 Recovered water may require disinfection in order to ensure the recovered water is biologically safe to use. The need for such treatment would be determined during detailed design stages. This would principally consider the safety of operatives engaged in activities such as dust suppression, who would be in proximity to liquid and aerosol water for extended periods. Should disinfection be required, UV technology is likely to be employed. Chemical disinfection, by chlorination or similar, will not be used.
- 1.4.15 The use of treated foul water will not generate odour nuisance. The majority of odour encountered in treatment of foul water is associated with the solids handling aspects, and not with the final effluent.
- 1.4.16 The Site Water Supply Strategy [REP7-036] also identifies two existing licensed surface water abstractions within the EDF Sizewell estate. These abstraction points have a combined yearly abstraction allowance of approximately 80,000m³/year. This equates to approximately 220m³/day, which represents a little under half of the peak non-potable demand. The two abstractions are licensed for crop irrigation on land confined within the order limits. They will therefore become redundant if the DCO is consented. SZC Co. is in discussions with the Environment Agency to transfer these licenses to the applicant as an additional source of non-potable water. This additional resource will further support buffering described in Para 1.4.10 above to satisfy shortfalls in peak demand during the first three summers. There would be no new or materially different environmental effects as abstraction rates would be no greater than at present, and would be subject to any sustainability caps imposed by the Environment Agency.

1.5 Response to Emma Bateman and Paul Collins

1.5.1 This section provides a response to each of the questions asked.

Question 1: How confident is the applicant in the recycling assumptions set out in the Water Supply Strategy?

1.5.2 Response: SZC Co. is confident that whilst challenging, the assumed recycling rates set out in Table 2-1 of [REP7-036] are feasible, based on experience at HPC and early contractor involvement in the water strategy. SZC Co considers that it is entirely appropriate for challenging recycling targets to be set, given how water-stressed Suffolk is, especially within the local Blyth Water Resource Zone (WRZ). The estimated peak construction demand of 4Ml/d will not be exceeded. Refer also to Para 1.4.3 above for further details.

Question 2: What account has been given to the environmental effects of using non-potable water for activities such as dust suppression?

1.5.3 Response: Please refer to Section 1.4 Paras 1.4.12 – 1.4.15.

Question 3: Is local water abstraction proposed?

1.5.4 Response: Yes. Please refer to Section 1.4 Para 1.4.16.

1.6 Removal of Temporary Desalination Plant

1.6.1 The temporary desalination plant will be able to supply the full construction demand for potable water and will remain operational for as long as necessary, which is assumed to be up to commencement of the 'Hot Functional Testing' stage in the commissioning of Unit 1. This will be approximately 6 months before start of commercial operation as shown in the Implementation Plan [REP2-044] and Plate 2.1 of the Construction Method Statement [REP7-015].

1.6.2 SZC Co. confirms that there is no impediment to retention of the temporary desalination plant until this date, if required. This corresponds with Phase 5 'Commissioning and Site Restoration' post construction, as defined in [REP2-044] and [REP7-015], leaving at least two years to complete Land Restoration, including the removal of the SSSI Crossing Temporary Deck Portion which was queried by the ExA in Issue Specific Hearing 11.

1.7 Law and guidance on the supply of water and water resource management planning for Sizewell C

- 1.7.1 These matters are covered in a note attached as Appendix A. The note identifies the legislative background discussed at the ISH, as well as the process of preparing Water Resource Management Plans. It also addresses an earlier proposal put forward by NWL that a Grampian requirement might be necessary and explains why it would be inappropriate.

1.8 Update regarding consent for RSPB land

- 1.8.1 Subsequent to ISH11, and following a meeting held between SZC Co. and the RSPB on 16 September 2021, SZC Co. has committed to provide further information on the flood risk assessment in the context of RSPB's landholding, to supplement information provided in writing to the RSPB and SWT on 26 August 2021. This revised and augmented report will initially be provided informally, at the RSPB's request, by 30 September 2021. It is envisaged that the information would enable this issue to be addressed through the updated Statement of Common Ground to be submitted at Deadline 10.

1.9 Statement of Common Ground with Nick Scarr

- 1.9.1 At ISH11 the Examining Authority requested that the Applicant develop a Statement of Common Ground with Mr. Scarr in respect to coastal processes, the fate of the Sizewell-Dunwich Bank, in relation to the Flood Risk Assessment.
- 1.9.2 An initial meeting was held on 21 September 2021 between Mr Scarr and SZC Co. to explore his concerns, to share knowledge from the work the Applicant has undertaken, and to agree some common areas of understanding. A follow up meeting has been agreed for the week commencing Monday 27 September 2021 to further discussions and development of the Statement of Common Ground.

1.10 Consideration of tsunami risk

- 1.10.1 The Applicant at ExQ1 and ExQ2 has made written responses on the subject of Tsunami Risk in AI.1.4 [epage 159 [REP2-100](#)] and CG.2.0 [epage 97 [REP7-052](#)] outlining the position and replying directly to Mr Bill Parker's queries. The applicant has also provided the **Sizewell C Coastal Defences Report** [[REP2-116](#)] which has been revised and updated at Deadline 8 (Doc Ref. 9.13(A)) capturing the various additional submissions, questions and updates that have occurred over ExQs and ISH6, 7 and 11.

- 1.10.2 The ExA will be aware that SZC Co's. approach is in accordance with NPS EN-6, which states at paragraph 2.7.3 that the Planning Inspectorate "*should not duplicate the consideration of matters that are within the remit of the Nuclear Regulators.*" Paragraph 2.7.4 confirms that this includes the site licensing process.
- 1.11 **Timeline on spent fuel storage**
- 1.11.1 As set out in **Appendix 2B** of the **Fourth ES Addendum** (electronic page 113) [[REP7-032](#)], initially for the purposes of the EIA it is assumed that the end of operation of the Sizewell C power station will be in 2090s. By 2140s, the Interim Spent Fuel Store (ISFS) will have been decommissioned and 2190 has been assumed as the theoretical maximum site lifetime.
- 1.11.2 Before decommissioning of a new nuclear power station can take place, there is a requirement for the operator to undertake an Environmental Impact Assessment (EIA) and prepare an Environmental Statement under the relevant EIA Regulations, such as Nuclear Reactors (Environmental Impact Assessment for Decommissioning) Regulations 1999 (Ref. 5.1) and the Marine Works (Environmental Impact Assessment) Regulations 2007. For the Sizewell C UK EPR™ units the preparation and submission of the EIA will take place in the years leading up to End of Generation. The EIA performed at that time would take full account of the environmental impacts of decommissioning.
- 1.11.3 Further to the above information, SZC Co. can confirm that the **Main Development Site FRA** explicitly sets the timeline for assessment at epage 31 [[AS-018](#)] and for the subsequent **MDS FRA Addendum** [[AS-157](#)] assessment. This therefore matches the timeframe for the storage of spent fuel, with 2140 defining the end of nuclear decommissioning activities.
- 1.12 **Response to SCC on the Drainage Strategy**
- 1.12.1 A series of issues were raised in relation to the Outline Drainage Strategy by Suffolk County Council (SCC). These issues are not repeated verbatim here but SCC has provided a high-level document which explains those issues and this document is being used in the preparation of further liaison and dialogue between SZC Co. and SCC. This dialogue is described in greater detail below.
- 1.12.2 In order to provide the context for the development of the Drainage Strategy a brief description is provided below.
- 1.12.3 The Drainage Strategy has been developed in such a way that it will not adversely affect the hydraulic performance of the existing environment, nor

will it materially affect overland flow paths and will protect areas of Sizewell Marshes Site of Special Scientific Interest (SSSI) and other sensitive receptors.

- 1.12.4 The main drainage principle for the Sizewell C construction site is to mimic the existing environmental runoff patterns where possible. The Drainage Strategy has been developed in line with industry standards, guidance and best practice regarding the safe and sustainable management of surface water run-off.
- 1.12.5 The surface water drainage network will be designed to retain excess storm water which results from a 1 in 100-year return period rainfall event within the site.
- 1.12.6 The Drainage Strategy (Doc. Ref. 6.3 2A(C)) has been developed from the Outline Drainage Strategy [\[REP2-033\]](#) and has been updated to include the latest information from the Enabling Works Basic Design and the preliminary design layouts for the AD sites. It has also received updates to reflect the comments and advice received from stakeholders and in particular the Lead Local Flood Authority (LLFA).
- 1.12.7 The Drainage Strategy (Doc. Ref. 6.3 2A(C)) is a generic document that represents the direction of travel for future design work and is supported by a number of technical notes that provide a greater level of detail for the different requirements of the main development and associated development sites.
- 1.12.8 The wide-ranging nature of the issues raised by SCC at ISH11 has prompted further discussion between SZC Co. and SCC. The outcome is an Action Plan to enable agreement within the SoCG before the end of the Examination.
- 1.12.9 The Action Plan, provided at **Appendix B**, focuses on the following:
- Macro points of difference to be resolved
 - Technical queries
- 1.12.10 In terms of timescale, the Action Plan distinguishes between those issues that may be resolved within the period of Examination, those that may follow the end of Examination and those that would form part of the detailed design stage and thus subject to Requirement 5.
- 1.12.11 SZC Co. is supporting the delivery of work items against the Action Plan through the formation of a focus team, creation of a weekly progress plan

and establishment of weekly progress meetings through to the end of Examination.

1.13 Response to MMO

1.13.1 In its letter in lieu of attendance MMO raise several points on coastal processes; these are dealt with below:

- (a) Particle size of the SCDF: The MMO has requested that the particle size of the SCDF be representative of the natural particle size. As confirmed by Dr Dolphin in response in response to a similar statement by ESC, the modelling work has demonstrated that a SCDF comprising material of the same particle size as the native sediment is viable (i.e. can be maintained) throughout operation and decommissioning. However, a larger sediment size provides other benefits, for example better resistance to erosion. HPQC questioned whether a commitment to a specified particle size was necessary or even wise at this stage and not better left open for discussion and approval at the time of discharge of Requirement 12B. A statement will be added to the CPMMP that the default assumption is that the SCDF will comprise sediment within the native particle size range subject to confirmation at the discharge of Requirement 12B.
- (b) Impacts on adjacent beaches: Dr Dolphin explained he understood this concern to be related to the use of sediment material larger than the native particle size in the SCDF. As above, the default position is that the SCDF will be made of material within the native particle size so the expectation is that this concern is dealt with.
- (c) Dredging and scour monitoring: The MMO letter in lieu of attendance [\[REP\]](#) described concerns around the frequency of monitoring dredge impacts on the nearshore bars, scour protection around nearshore outfalls, scour around the offshore structures and target accuracies of the beach volume measurements. SZC Co confirms that all of these will be addressed/added to the final draft of the CPMMP to be submitted at D10.

1.14 SZC Co, MMO and ESC continue to discuss the details of Requirement 7A and DML Condition 17 to ensure that all three parties satisfied with the wording.

1.15 Response to Paul Collins

1.15.1 Paul Collins provided a very detailed statement on coastal processes; a full response to the points raised by Paul Collins will be provided at D10.

1.16 Additional Modelling Work on the adapted HCDF

- 1.16.1 Further modelling of the SCDF has been requested by the Environment Agency to test additional scenarios. This work is currently underway and, if time permits the completion of that work, will be submitted at D9 as preferred by the ExA. If the work is not completed in time for submission at D9 it will be provided to the EA, ESC, MMO and NE as soon as it is available and formally submitted to the ExA at D10.

1.17 Coastal Processes Monitoring and Mitigation Plan

- 1.17.1 In revision 10 of the draft DCO which is submitted at Deadline 8 (Doc. Ref. 3.1(I)), Requirement 7A has been updated to respond to the comments made by ESC at ISH11.
- 1.17.2 SZC Co. continues to engage with both ESC and the MMO in relation to the detailed drafting of the Coastal Processes Monitoring and Mitigation Plan ('CPMMP') and will be submitting a final version to the ExA at Deadline 10.
- 1.17.3 Finally, the ExA drew SZC Co.'s attention to the responses to ExQ2 CG.2.6. SZC Co. has provided comments on these responses at Deadline 8 (Doc. Ref. 9.96).

1.18 Water Monitoring Plan

- 1.18.1 An updated Water Monitoring Plan is submitted at Deadline 8. This has regard to written feedback provided by Natural England on 13 September 2021 and points raised during ISH11 as addressed by Stuart Smith and recorded within the **Written Summaries of Oral Submissions for ISH11** (Doc Ref. 9.100).

1.19 Response to East Suffolk Internal Drainage Board

- 1.19.1 A series of points were raised in relation to the water monitoring plan by East Suffolk Internal Drainage Board. These are summarised as follows:
- What is the relationship between trigger levels and consenting?
 - Will the IDB be able to participate in the review of triggers and implementation of the water monitoring plan?
- 1.19.2 Without prejudging the outcome of the consenting processes, it is assumed that any conditions and controls that are imposed through consents, licences and permissions will be drawn into the water monitoring and

management plan. This could include additional triggers or revision of existing trigger values.

- 1.19.3 East Suffolk IDB has a statutory land drainage responsibility for much of Sizewell Marshes SSSI. SZC Co. would welcome its participation in the development and implementation of the water monitoring and management plan.



SIZEWELL C PROJECT –
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APPENDIX 1: LAW AND GUIDANCE ON THE SUPPLY OF WATER AND WATER RESOURCE MANAGEMENT PLANNING FOR SIZEWELL C

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1 LAW AND GUIDANCE ON THE SUPPLY OF WATER AND WATER RESOURCE MANAGEMENT PLANNING FOR SIZEWELL C

1.1 Summary of the legal framework

a) Introduction

1.1.2 Private water companies which would now be responsible for supplying water to the nation were subject to a regime of statutory duties to provide water for domestic purposes. These duties are set out in the Water Industry Act 1991 (“WIA 1991”), and relevant extracts are provided at Appendix 1A to this note.

a) Section 37

1.1.3 The primary duty on the water companies, and the starting point for any consideration of the duties relating to the supply of water, is section 37 of the WIA 1991. which imposes a general and ongoing duty on every water undertaker to ensure that all arrangements have been made for providing supplies of water to premises in its area and for making such supplies available to persons who demand them, as are necessary for securing that the undertaker is and continues to be able to meet its obligations under Part III of the Act (Water Supply).

1.1.4 That primary duty is enforceable by the SoS under s.18 of the WIA 1991.

1.1.5 In essence, water undertakers have to plan to meet likely demand, including demand from growth from domestic and non-domestic sources. That would include growth identified in development plans and other policy documents – which would include site-specific NPS such as EN-6.

1.1.6 The way that water undertakers are obliged by law to plan to meet demand is via Water Resource Management Plans (“WRMPs”), the preparation, publication and maintenance of which is governed by sections 37A to 37D of the WIA 1991.

1.1.7 The published guidance on the preparation of WRMPs is addressed from paragraph 38 of this note.

a) Sections 37A-37D (Water Resource Management Plans)

1.1.8 The duty on water undertakers to prepare and maintain a WRMP is set out in sections 37A to 37D of the WIA 1991, supplemented by the Water

Resources Management Plan Regulations 2007 (which prescribe how such plans are to be prepared and published).

- 1.1.9 Section 37A(1) imposes a duty on each water undertaker to prepare, publish and maintain a WRMP. Subsection (2) provides that a WRMP is a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under Part III of the WIA 1991. Pursuant to subsection (3)(b), the WRMP must include, inter alia, the measures which the water undertaker intends to take or continue for the purpose set out in subsection (2).
- 1.1.10 Subsection (5) places an obligation on water undertakers to review their WRMP before each anniversary of the date when it was last published, and to send a statement of the conclusions of its review to the Secretary of State.
- 1.1.11 Pursuant to subsection (6) the water undertaker is obliged to prepare and publish a revised WRMP if (a) following the conclusion of its annual review, a material change of circumstances has been indicated or (b) if directed to do so by the Secretary of State.
- 1.1.12 Section 37AA(1) gives the Secretary of State the power to give a direction about the basis on which a WRMP is to be prepared. The power may be exercised where the Secretary of State considers it appropriate to do so with a view to securing that a water undertaker is able to meet the need for the supply of water to consumers in particular circumstances (subsection (2)).
- 1.1.13 Section 37B governs the procedures for preparation and publication of a WRMP.
- 1.1.14 Section 37C concerns the provision of information to the water undertaker by water supply licensees.
- 1.1.15 Section 37D provides supplementary powers in connection with directions pursuant to sections 37A, 37AA and 37B.
- 1.1.16 The preparation, assessment and testing of WRMPs includes Strategic Environmental Assessment and compliance with the requirements of the Habitats Regulations and Water Framework Directive.
- 1.1.17 It is important to understand the WRMP duties, and their clear purpose, as the context for the consideration of the further duties in relation to requests for domestic and non-domestic supply under Part III of the WIA 1991 which are set out and considered below.

b) Sections 41 to 44

- 1.1.18 Section 41 creates an absolute duty on a water undertaker to provide a water main to be used for supply to domestic premises if requested to do so by notice.
- 1.1.19 The timing of fulfilment of the duty is addressed by section 44. Section 44(1) provides for a 3 month period from the relevant day (defined in section 44(5) by cross-reference to satisfaction of the financial conditions in section 42) for the water main to be laid so that a connection can be made. That can, however, be extended by agreement under section 44(2).

c) Sections 55 and 56

- 1.1.20 Section 55 applies where a person makes a request to the undertaker to provide a supply of water to non-domestic premises.
- 1.1.21 Pursuant to section 55(2) the undertaker is under a duty, in accordance with terms and conditions determined under s.56, to take any such steps as may be determined to enable it to provide the requested supply, and having taken those steps, to provide the supply.
- 1.1.22 Unlike section 41, however, the duty created by section 55 is not an absolute duty because it is qualified by ss.(3):

“A water undertaker shall not be required by virtue of this section to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if the provision of that supply or the taking of those steps would –

- (a) Require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works; or
 - (b) Otherwise put at risk the ability of the undertaker to meet any of the existing or probable future obligations mentioned in paragraph (a) above.”
- 1.1.23 Any dispute arising between a person and the water undertaker under section 55(3) falls to be determined by OFWAT under section 56(2).

d) The Barratt case

- 1.1.24 ESW's letter to the Applicant of 16 July 2021 (appended to the Walker Morris letter of 3 September [REP7-147]) refers to the decision of the Supreme Court in *Barratt Homes Ltd. v. Welsh Water* [2009] UKSC 13. A copy of the Judgment is attached to this note as Appendix 1B.
- 1.1.25 The Barratt case was relied on in that letter for the suggestion that in cases where rights of connection and supply under the WIA 1991 come into conflict with the ability to give effect to those rights in the context of new development, a Grampian condition (or requirement) would be appropriate to ensure that development did not come forward until appropriate infrastructure was in place.
- 1.1.26 Whilst NWL is no longer pursuing the suggestion that a Grampian requirement would be appropriate in the circumstances of this case, to assist the Examining Authority SZC Co. has summarised below why the Barratt case would not support the imposition of such a requirement on the facts here.
- 1.1.27 The case was concerned with the right under section 106 WIA 1991 and the right that it creates for the owner or occupier of premises to connect to a public sewer (section 106 and the related general duty under section 94 to provide a sewerage system can be seen at paragraph 6 of the Judgment).
- 1.1.28 The right to connect contained in section 106 is an absolute right, and the burden of dealing with the consequences falls on the sewerage undertaker with the expense shared by all who pay sewerage charges (see paragraph 23 of the judgment). The person requesting a connection has to give 21 days notice, but there is no other control on the timing of the connection, even if the relevant sewer lacks the necessary capacity (see paragraph 41 of the judgment).
- 1.1.29 The issue before the Court was not whether a Grampian condition was appropriate to deal with this issue. Instead, the case concerned a much narrower issue of statutory interpretation which does not arise in this examination. The issue before the Court was summarised by Lord Phillips at paragraph 1 of the Judgment as follows:

“The principal issue raised is whether it is the property owner or the sewerage undertaker who is entitled to determine the point at which the property owner’s drain or sewer is to connect to the public sewer. This narrow issue of statutory interpretation conceals, however, wider and more fundamental issues that are less easily resolved. I propose first to resolve the narrow issue, before commenting on these wider issues.”

- 1.1.30 That is important, because there is a need to distinguish between those parts of the judgment which contain the ratio decidendi of the case, and those which contain comments on the wider issues (described by Lord Phillips in paragraph 59 as “an aside” to the issue of law that fell to be decided) and are therefore obiter.
- 1.1.31 Paragraphs 55 and 56 set out the Court’s findings on the principal issue that fell for determination, namely the “narrow issue of statutory interpretation” related to section 106. They are not relevant here, save as context for the comments on the wider issue.
- 1.1.32 The wider issue was characterised by Lord Phillips at paragraph 56 as being that in response to a request for connection to the public sewer under section 106 “no objection can be taken by a sewerage undertaker ... on the ground of lack of capacity of the sewer”.
- 1.1.33 At paragraphs 57 and 58 the Supreme Court made the following obiter comments on this wider issue:

“57. As OFWAT has pointed out, although the 1991 Act affords no such right, there is a case for deferring the right to connect to a public sewer in order to give a sewerage undertaker a reasonable opportunity to make sure that the public sewer will be able to accommodate the increased loading that the connection will bring. The only way of achieving such a deferral would appear to be through the planning process. Some difficult issues of principle arise however: is it reasonable to expect the sewerage undertaker to upgrade a public sewerage system to accommodate linkage with a proposed development regardless of the expenditure that this will involve? How long is it reasonable to allow a sewerage undertaker to upgrade the public sewerage system? Is it reasonable to allow the sewerage undertaker to delay planned upgrading of a public sewer in the hope or expectation that this will put pressure on the developer himself to fund the upgrading?”

- 1.1.34 The facts of this case suggest that a sewerage undertaker may well take a different view from OFWAT as to how these questions should be answered. Be that as it may, it would seem desirable that the sewerage undertaker and OFWAT should at least be consulted as part of the planning process. I would endorse the comment made by Carnwath LJ, at para. 48, that more thought may need to be given to the interaction of planning and water regulation systems under the modern law to ensure that the different interests are adequately protected” (emphasis added).

- 1.1.35 In short, Barratt does not provide (or purport to provide) an answer to the issue that arises here – even in respect of the absolute duty in respect of domestic supply pursuant to section 41. It certainly does not amount to authority for the proposition that the water undertaker can avoid the implications of its statutory duties, or entirely relieve itself from any time pressure to fulfil those duties, simply by asking for the imposition of a Grampian requirement.
- 1.1.36 The Supreme Court was not, of course, examining the suite of complementary and inter-related duties governing water undertakers' obligation to provide a secure supply of water to their customers. It was considering a different provision, namely the duty in relation to sewerage connection in section 106. Even in that context, the Supreme Court rightly recognised that difficult issues of principle arose from any suggestion that the answer lay in the imposition of a Grampian condition, and it was careful not to suggest that it had grappled with or resolved those difficult issues itself.
- 1.1.37 The Supreme Court's suggestion that both the sewerage undertaker and OFWAT would need to be consulted as part of the planning process was a recognition that this is a regulated industry, and that the regulator might take a different view as to the need for and reasonableness of any suggested imposition of a Grampian condition, having regard to the consequential implications for the undertaker's duties under the WIA 1991.
- 1.1.38 SZC Co.'s proposed protective provisions are effective to resolve the concerns that NWL expressed about the implications of its absolute duty under section 41, and so the question of whether a Grampian requirement would be justified having regard to that duty falls away without the need to involve OFWAT and to resolve the "difficult issues of principle" that would otherwise arise.
- 1.1.39 No issue of a potential Grampian requirement arises (or is suggested by NWL to arise) having regard to the section 55 duty, because of the existing safeguards for the undertaker's position built into section 55(3) and the important role of OFWAT in policing the reasonableness of water undertakers' responses to such requests pursuant to section 56.
- a) [Guidance on water resource management planning](#)
- 1.1.40 The Government has published the Water Resources Planning Guidelines, 2021, which provide detailed guidance to water companies on the preparation of WRMPs. The Guidelines explain that water companies are obliged to forecast water supply and demand over at least the statutory minimum period of 25 years. If a deficit is forecast, the undertaker should

consider “supply side options to increase the amount of water available to the undertaker or demand side options which reduce the amount of water its customers require.” (section 1.1) It is notable that the Guidance does not contemplate water companies planning on the basis that they might simply decline to supply customers the water they do in fact require.

- 1.1.41 WRMP must be maintained, and treated by the water company “as a live document”. The plan should be implemented, its progress monitored and action taken if required (section 3.9).
- 1.1.42 Section 4.1 explains that in developing WRMP, water companies need to compare supply with demand (including uncertainty) and see if there is a surplus (more supply than demand) or a deficit (less supply than demand). “If there is a deficit you must identify options to increase supply or reduce demand so that you achieve an environmentally sustainable secure supply of water” (emphasis added). Where the guidance uses the word “must”, this relates to a statutory requirement (see the explanation provided in section 1.2).
- 1.1.43 Water companies are required to develop and plan for demand forecasts which include forecasts of water requirements for both household and non-household customers (section 6.1). Section 6 of the Guidelines contain detailed provisions for forecasting, including non-household consumption and for the forecasts to cover a planning period of 25 years, with forecasts required to provide headroom for uncertainty (Section 7).
- 1.1.44 Section 6.3 makes clear to water companies that their planned property and population forecasts, and resulting supply, “must not constrain planned growth”. In other words, legitimate measures to reduce demand would not include constraining planned growth. Where increased demand as a result of planned growth (including from non-household customers) is forecast, the WRMP must plan to meet it.
 - a) [Water resource management planning for the water demands of the Sizewell C project](#)
- 1.1.45 Essex and Suffolk Water’s Water Resources Management Plan, 2019 is the current WRMP for the area covering Sizewell.
- 1.1.46 SZC Co. has been actively engaged with Essex and Suffolk Water (“ESW”) since June 2014 in respect of the likely potable water demand for Sizewell C, including requests that the project should be included in the WRMP.
- 1.1.47 In September 2019 ESW’s consultation response in respect of the then draft WRMP 2019 referred to the request that had been made for the 2019 WRMP to make specific reference to the Sizewell C project. It explained

that ESW had not included Sizewell C due to what it considered to be uncertainty at that time about the start date of the SZC project. In that context, reliance appears to have been placed on the National Infrastructure Commission's recommendation to the Government about the number of new nuclear power stations that ought to be supported, rather than extant Government policy and SZC Co.'s response to consultation. Nevertheless, the response continued by stating that once there was "greater certainty regarding the Sizewell C construction start date, we will consider this as a material change to our WRMP and will then include the new demand in our final plan Distribution Input forecast." That commitment is clear on the face of the WRMP at page 18, which states that, in those circumstances "we will consider this a material change and we will work with EDF to develop a new supply, albeit the capital cost of the scheme would be funded by EDF."

1.1.48 SZC Co. has continued to engage closely with ESW and other stakeholders including Anglian Water and the Environment Agency to identify a new potable supply, as explained in section 3 the Water Supply Strategy Report [REP7-036]. The level of engagement has increased following submission of the application and the application to change the proposed development in January 2021. The parties have continued to work closely together, funded by SZC. Co, to develop options and then to work up the proposals for the Sizewell Transfer Main.

a) **Conclusion**

1.1.49 SZC Co. and NWL are in agreement that protective provisions of the sort currently being negotiated remove the need for consideration of any form of Grampian requirement to address NWL's concerns about the implications of section 41 WIA 1991. SZC Co. does not consider such a requirement would be appropriate or justified in any event, but that issue is rendered academic by its willingness to include appropriate protective provisions in the DCO to address NWL's concerns.

1.1.50 Having regard to the scheme of the WIA 1991 and associated guidance summarised above, and what was said by the Supreme Court in Barratt, it would also clearly be wrong in principle to impose a Grampian requirement on any Development Consent Order granted for Sizewell C in order to address the issue of long-term non-domestic supply. Any such provision would have the following unacceptable effects, all of which would run contrary to the underlying objectives of the WIA 1991:

- bypassing the system of WRMP preparation and regular annual review which is intended to ensure that water undertakers provide a secure supply of water to their customers to meet demand so as not

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to constrain planned growth (including where material circumstances change);

- cutting out the crucial statutory role of OFWAT in balancing the various public interest considerations that arise in relation to specific requests by customers for non-domestic supply; and
- (c). enabling the water undertaker to escape from the implications of its duties to provide a secure supply of water under the WIA 1991 in the case of an urgently needed Nationally Significant Infrastructure Project that has been identified in national policy for over a decade.

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APPENDIX 1: SECTIONS OF THE WATER INDUSTRY ACT 1991 REFERRED TO

37.— General duty to maintain water supply system etc.

(1) It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made—

(a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

(b) for maintaining, improving and extending the water undertaker's water mains and other pipes,

as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part.

(2) The duty of a water undertaker under this section shall be enforceable under [section 18](#) above—

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by [the Authority]¹.

(3) The obligations imposed on a water undertaker by the following Chapters of this Part, and the remedies available in respect of contraventions of those obligations, shall be in addition to any duty imposed or remedy available by virtue of any provision of this section or [section 38](#) below and shall not be in any way qualified by any such provision.

37A Water resources management plans: preparation and review

(1) It shall be the duty of each water undertaker to prepare [, publish]² and maintain a water resources management plan.

(2) A water resources management plan is a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under this Part.

(3) A water resources management plan shall address in particular—

(a) the water undertaker's estimate of the quantities of water required to meet those obligations;

(b) the measures which the water undertaker intends to take or continue for the purpose set out in subsection (2) above (also taking into account for that purpose the introduction of water into the undertaker's supply system by or on behalf of [water supply licensees]³);

(c) the likely sequence and timing for implementing those measures; and

(d) such other matters as the Secretary of State may specify in directions [(and see also [section 37AA](#))]⁴.

(4) The procedure for preparing [and publishing]⁵ a water resources management plan (including a revised plan) is set out in [section 37B](#) below.

(5) Before each anniversary of the date when its plan (or revised plan) was last published, the water undertaker shall—

-
- (a) review its plan; and
- (b) send a statement of the conclusions of its review to the Secretary of State.
- (6) The water undertaker shall prepare [and publish]⁶ a revised plan in each of the following cases—
- (a) following conclusion of its annual review, if the review indicated a material change of circumstances;
- (b) if directed to do so by the Secretary of State;
- (c) in any event, not later than the end of the period of five years beginning with the date when the plan (or revised plan) was last published,
- and shall follow the procedure in [section 37B](#) below (whether or not the revised plan prepared by the undertaker includes any proposed alterations to the previous plan).
- (7) The Secretary of State may give directions specifying—
- (a) the form which a water resources management plan must take;
- (b) the planning period to which a water resources management plan must relate.
- (8) Before preparing its water resources management plan (including a revised plan), the water undertaker shall consult—
- (a) the Environment Agency [, if the plan (or revised plan) would affect water resources in England]⁷ ;
- [
- (aa) the NRBW, if the plan (or revised plan) would affect water resources in Wales;
-]⁸
- (b) the Authority;
- (c) the Secretary of State; and
- (d) any [water supply licensee]⁹ which supplies water to premises in the undertaker's area via the undertaker's supply system.
- [
- (9) Before giving a direction under subsection (6)(b), the Secretary of State shall consult—
- (a) the Environment Agency, if the revised plan would affect water resources in England, and
- (b) the NRBW, if the revised plan would affect water resources in Wales.
- (9A) Before giving a direction under subsection (6)(b), the Welsh Ministers shall consult—
- (a) the NRBW, if the revised plan would affect water resources in Wales, and
- (b) the Environment Agency, if the revised plan would affect water resources in England.

] ¹⁰

(10) In this section, in relation to a water resources management plan, “*published*” means published in accordance with [section 37B\(8\)\(a\)](#) below.

37AA Water resources management plans for England: resilience

(1) The Secretary of State may give a direction about the basis on which a water resources management plan for England is to be prepared.

(2) A direction under this section may be given only where the Secretary of State considers it appropriate to do so with a view to securing that a water undertaker is able to meet the need for the supply of water to consumers in particular circumstances.

(3) A direction under this section may, in particular, require a plan to be prepared on the basis of a specified assumption, including—

- (a) an assumption as to whether, and how often, specified circumstances are likely to arise;
- (b) an assumption that a specified power would or would not be exercised by the water undertaker or another person in specified circumstances.

(4) Before giving a direction under this section, the Secretary of State must consult—

- (a) the Authority,
- (b) the Welsh Ministers,
- (c) each water undertaker to which the direction would apply,
- (d) the Environment Agency,
- (e) the NRBW, and
- (f) such other persons as the Secretary of State considers appropriate.

(5) In this section—

“*specified*” means specified in a direction under this section;

“*water resources management plan for England*” means a water resources management plan prepared by a water undertaker whose area is wholly or mainly in England.

37B Water resources management plans: publication and representations

(1) A water undertaker shall—

- (a) send a draft water resources management plan to the Secretary of State;
- (b) state whether it appears to the undertaker that any information contained in that plan is or might be commercially confidential (as regards itself or another person); and

- (c) give the Secretary of State the name of each such other person and his address for service of a notice under subsection (2)(a) below.
- (2) If the water undertaker states that it so appears in relation to any such information, the Secretary of State shall–
- (a) if the person to whom or to whose business the information relates is not the water undertaker, give that person notice that the information is included in a draft water resources management plan and, unless subsection (10) below applies, is required to be published under this section; and
 - (b) give each person (including the water undertaker) to whom any such information relates a reasonable opportunity–
 - (i) of objecting to the publication of the information relating to him on the ground that it is commercially confidential; and
 - (ii) of making representations to the Secretary of State for the purpose of justifying any such objection,and shall determine, taking any objections and representations under paragraph (b) into account, whether the information is or is not commercially confidential.
- (3) A water undertaker shall–
- (a) (subject to subsection (10) below) publish the draft water resources management plan in the prescribed way or, if no way is prescribed, in a way calculated to bring it to the attention of persons likely to be affected by it;
 - (b) publish with it a statement–
 - (i) whether any information has been excluded from the published draft plan by virtue of subsection (10) below and, if it has, the general nature of that information; and
 - (ii) that any person may make representations in writing about the plan to the Secretary of State before the end of a period specified in the statement; and
 - (c) send a copy of the published draft plan and accompanying statement to such persons (if any) as may be prescribed.
- (4) The Secretary of State shall send to the water undertaker a copy of any representations he receives following publication of the draft plan under subsection (3) above and shall give it a reasonable period of time within which to comment on the representations.
- (5) The Secretary of State may in regulations prescribe how such representations and any comments by the water undertaker on them are to be dealt with.
- (6) Regulations under subsection (5) above–
- (a) may provide for the Secretary of State to cause an inquiry or other hearing to be held in connection with the draft water resources management plan; and
 - (b) if they do so provide, may provide for [subsections \(2\) to \(5\) of section 250](#) of the [Local Government Act 1972](#) (local inquiries: evidence and costs) to apply with prescribed modifications to such an inquiry or hearing

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as they apply to inquiries under that section.

(7) The Secretary of State may direct a water undertaker that its water resources management plan must differ from the draft sent to him under subsection (1) above in ways specified in his direction, and (subject to subsection (9) below) it shall be the duty of the water undertaker to comply with the direction.

(8) The water undertaker shall–

(a) (subject to subsection (10) below) publish the water resources management plan in the prescribed way or, if no way is prescribed, in a way calculated to bring it to the attention of persons likely to be affected by it; and

(b) publish with it a statement whether any information has been excluded from the published plan by virtue of subsection (10) below and, if it has, the general nature of that information.

(9) If the water undertaker considers that publishing a water resources management plan complying with a direction under subsection (7) above would mean including in the published plan any information (other than any information in relation to which the Secretary of State has already made a determination under subsection (2) above) which might be commercially confidential (as regards itself or another person)–

(a) the water undertaker shall send the Secretary of State a notice saying so, and giving the Secretary of State the name of any such other person and his address for service of a notice under subsection (2)(a) above as applied by paragraph (b) below; and

(b) subsection (2) above shall apply in relation to that information as it applies in relation to the information referred to there;

and the Secretary of State may either confirm his direction under subsection (7) above (which is to be treated as a new direction under subsection (7)) or revoke the previous such direction (or the previous one so treated) and give a new one.

(10) The published version of a draft water resources management plan published under subsection (3)(a) above, and a water resources management plan published under subsection (8)(a) above, shall exclude any information which the Secretary of State–

(a) has determined under subsection (2) above (or that subsection as applied by subsection (9) above) is commercially confidential; or

(b) directs the water undertaker to exclude on the ground that it appears to him that its publication would be contrary to the interests of national security.

(11) Any steps to be taken by a water undertaker under this section shall be completed by such time or within such period as the Secretary of State may direct.

37C Water resources management plans: provision of information

(1) It shall be the duty of each [water supply licensee]² to provide the water undertaker with such information as the water undertaker may reasonably request for the purposes of preparing or revising its water resources management plan.

(2) In the event of any dispute between a water undertaker and a [water supply licensee]² as to the reasonableness of the water undertaker's request under subsection (1) above, either party may refer the matter for determination by the Secretary of State, and any such determination shall be final.

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(3) For the purposes of [paragraph \(b\) of section 37B\(1\)](#) above, the water undertaker shall identify in its statement under that paragraph any information–

- (a) provided by a [water supply licensee]² pursuant to subsection (1) above; and
- (b) contained in the water undertaker’s draft water resources management plan,

which the [water supply licensee]² has (at the time of providing it to the water undertaker) specifically identified as being, in the [water supply licensee’s]³ opinion, commercially confidential.

(4) The water undertaker shall not use any unpublished information save for the purpose of facilitating the performance by it of any of the duties imposed on it by or under this Act, any of the other consolidation Acts or the [Water Act 1989](#).

(5) In subsection (4) above–

- (a) “*unpublished information*” means confidential information which–
 - (i) is provided to the water undertaker by a [water supply licensee]² under this section;
 - (ii) relates to the affairs of any individual or to any particular business; and
 - (iii) by virtue of [section 37B](#) above, is not published;
- (b) “*the other consolidation Acts*” has the same meaning as in [section 206](#) below.

37D Water resources management plans: supplementary

(1) Directions given under [[section 37A, 37AA or 37B](#)]² above may be–

- (a) general directions applying to all water undertakers; or
- (b) directions applying only to one or more water undertakers specified in the directions,

and shall be given by an instrument in writing.

(2) It shall be the duty of each water undertaker to whom directions apply to comply with the directions.

(3) The duties of–

- (a) a water undertaker under [sections 37A to 37C](#) above and under this section; and
- (b) a [water supply licensee]³ under [section 37C](#) above,

shall be enforceable by the Secretary of State under [section 18](#) above.

[

(4) The Minister may by order made by statutory instrument amend the period for the time being specified in [section 37A\(6\)\(c\)](#).

(5) In subsection (4), “*the Minister*” means—

- (a) the Secretary of State, in relation to an order applying to water undertakers whose areas are wholly or mainly in England, and

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-
- (b) the Welsh Ministers, in relation to an order applying to water undertakers whose areas are wholly or mainly in Wales.
- (6) A statutory instrument containing an order made by the Secretary of State under subsection (4) is subject to annulment in pursuance of a resolution of either House of Parliament.
- (7) A statutory instrument containing an order made by the Welsh Ministers under subsection (4) is subject to annulment in pursuance of a resolution of the Assembly.
- (8) Subsection (9) applies in relation to a statutory instrument containing both—
- (a) an order made by the Secretary of State under subsection (4), and
 - (b) an order made by the Welsh Ministers under subsection (4).
- (9) If in accordance with subsection (6) or (7) (negative resolution procedure)—
- (a) either House of Parliament resolves that an address be presented to Her Majesty praying that an instrument containing an order made by the Secretary of State be annulled, or
 - (b) the Assembly resolves that an instrument containing an order made by the Welsh Ministers be annulled,
- the instrument is to have no further effect and Her Majesty may by Order in Council revoke the instrument.

41.— Duty to comply with water main requisition.

(1) It shall be the duty of a water undertaker (in accordance with [section 44](#) below) to provide a water main to be used for providing such supplies of water to premises in a particular locality in its area as (so far as those premises are concerned) are sufficient for domestic purposes, if—

(a) the undertaker is required to provide the main by a notice served on the undertaker by one or more of the persons who under subsection (2) below are entitled to require the provision of the main for that locality;

(b) the premises in that locality to which those supplies would be provided by means of that main are—

(i) premises consisting in buildings or parts of buildings; or

(ii) premises which will so consist when proposals made by any person for the erection of buildings or parts of buildings are carried out;

and

(c) the conditions specified in [section 42](#) below are satisfied in relation to that requirement.

(2) Each of the following persons shall be entitled to require the provision of a water main for any locality, that is to say—

(a) the owner of any premises in that locality;

(b) the occupier of any premises in that locality;

(c) any local authority within whose area the whole or any part of that locality is situated;

[

(ca) where the whole or any part of that locality is situated within a Mayoral development area, the Mayoral development corporation;

]¹

(d) where the whole or any part of that locality is situated in a new town, within the meaning of the [New Towns Act 1981](#)—

(i) the [new towns residuary body]²; and

(ii) [...] ³ the development corporation for the new town [...] ³;

and

(e) where the whole or any part of that locality is situated within an area designated as an urban development area under [Part XVI](#) of the [Local Government, Planning and Land Act 1980](#), the urban development corporation.

[

(2A) The duty to provide a water main under this section does not arise in relation to premises in a retail exit area that are not household premises.

]⁴

(3) The duty of a water undertaker under this section to provide a water main shall be owed to the person who requires the provision of the main or, as the case may be, to each of the persons who joins in doing so.

(4) Where a duty is owed by virtue of subsection (3) above to any person, any breach of that duty which causes that person to sustain loss or damage shall be actionable at the suit of that person; but, in any proceedings brought against a water undertaker in pursuance of this subsection, it shall be a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach.

(5) In this section “*local authority*”, in relation to the Inner Temple and the Middle Temple, includes, respectively, the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple.

42.— Financial conditions of compliance.

(1) The conditions mentioned in section 41(1)(c) above are satisfied in relation to a requirement for the provision of a water main by a water undertaker if—

- (a) such undertakings as the undertaker may have reasonably required in accordance with subsection (2) below have been given by the person or persons who have required the provision of the main; and
- (b) such security as charging rules allow and the undertaker may have required has been provided for the discharge of any obligations imposed by those undertakings on any person who, under subsection (3) below, may be required to secure his undertakings.

(2) The undertakings which a water undertaker may require for the purposes of subsection (1) above in respect of any water main are undertakings which—

- (a) bind the person or persons mentioned in that subsection to pay to the undertaker such charges as the undertaker may impose in accordance with charging rules, and
- (b) in the case of undertakings binding two or more persons, bind them either jointly and severally or with liability to pay apportioned in such manner as they may agree.

(3) For the purposes of subsection (1)(b) above a person may be required to secure his undertakings in relation to the provision of a water main if—

- (a) it was by virtue of section 41(2)(a) or (b) above that he required, or joined in requiring, the provision of the main; and
- (b) he is not a public authority.

(6) Any dispute between a water undertaker and any other person as to—

- (a) the undertakings or security required by the undertaker for the purposes of this section; or
 - (b) the amount or amounts by way of charges required to be paid in pursuance of any such undertaking,
- may be referred to the Authority for determination under section 30A above by either party to the dispute.

(7) [...]

]

Wales

42.— Financial conditions of compliance.

(1) The conditions mentioned in [section 41\(1\)\(c\)](#) above are satisfied in relation to a requirement for the provision of a water main by a water undertaker if—

(a) such undertakings as the undertaker may have reasonably required in accordance with subsection (2) below have been given by the person or persons who have required the provision of the main; and

(b) [such security as charging rules allow and the undertaker may have required]¹ has been provided for the discharge of any obligations imposed by those undertakings on any person who, under subsection (3) below, may be required to secure his undertakings.

(2) The undertakings which a water undertaker may require for the purposes of subsection (1) above in respect of any water main are undertakings which—[

(a) bind the person or persons mentioned in that subsection to pay to the undertaker such charges as the undertaker may impose in accordance with charging rules, and

]²

(b) in the case of undertakings binding two or more persons, bind them either jointly and severally or with liability to pay apportioned in such manner as they may agree.

(3) For the purposes of subsection (1)(b) above a person may be required to secure his undertakings in relation to the provision of a water main if—

(a) it was by virtue of [section 41\(2\)\(a\)](#) or (b) above that he required, or joined in requiring, the provision of the main; and

(b) he is not a public authority.

[...]³

(6) Any dispute between a water undertaker and any other person as to—

(a) the undertakings or security required by the undertaker for the purposes of this section; or

(b) the amount [or amounts by way of charges]⁴ required to be paid in pursuance of any such undertaking,

[may be referred to the Authority for determination under [section 30A](#) above by either party to the dispute.]⁵

[

(7) In this section “*relevant deficit*” and “*discounted aggregate deficit*” have the meanings given by [sections 43 and 43A](#) below, respectively.

]⁶

43.— Calculation of “relevant deficit” for the purposes of section 42.

(1) For the purposes of [section 42](#) above the relevant deficit for any year on a water main is the amount (if any) by which the [relevant revenue in respect of that main for that year is]¹ exceeded by the annual borrowing costs of a loan of the amount required for the provision of that main.

(2) The annual borrowing costs of a loan of the amount required for the provision of a water main is the

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aggregate amount which would fall to be paid in any year by way of payments of interest and repayments of capital if an amount equal to so much of the costs reasonably incurred in providing that main as were not incurred in the provision of additional capacity had been borrowed, by the water undertaker providing the main, on terms—

- (a) requiring interest to be paid and capital to be repaid in twelve equal annual instalments; and
 - (b) providing for the amount of the interest to be calculated at such rate, and in accordance with such other provision, as may have been determined for the purposes of this subsection.
- (3) A determination for the purposes of subsection (2) above shall be made either—
- (a) by the undertaker with the approval of [the Authority]² ; or
 - (b) in default of such a determination, by [the Authority]² .
- (4) For the purposes of this section the costs reasonably incurred in providing a water main (“the new main”) shall include—
- (a) the costs reasonably incurred in providing such other water mains and such tanks, service reservoirs and pumping stations as it is necessary to provide in consequence of the provision of the new main; and
 - (b) such proportion (if any) as is reasonable of the costs reasonably incurred in providing [or procuring the provision of]³ any such additional capacity in an earlier main as falls to be used in consequence of the provision of the new main.

[

- (5) In subsection (4) above the reference to an earlier main, in relation to the new main, is a reference to any water main which—
- (a) has been provided in pursuance of a water main requisition; or
 - (b) has been vested (by virtue of a declaration made under this Chapter) in the water undertaker,
- in the period of twelve years immediately before the provision of the new main.

]⁴

- (6) Any reference in this section to the provision of additional capacity in a water main provided in pursuance of a requirement under any enactment is a reference to such works carried out or other things done in connection with the provision of that main as are carried out or done for the purpose of enabling that main to be used for purposes in addition to those for which it is necessary to provide the main in order to comply with the requirement.

[

- (7) Any reference in this section to the relevant revenue in respect of a main provided by a water undertaker for any year is—
- (a) in relation to premises connected with the main which are supplied with water by the undertaker, is a reference to so much of the aggregate of any charges payable to the undertaker in respect of services provided in the course of that year as represents charges which—

- (i) have been imposed by the undertaker in relation to those premises; and
 - (ii) are reasonably attributable to the provision of a supply of water (whether or not for domestic purposes) to those premises by means of that main;
- (b) in relation to premises connected with the main which are supplied with water by a licensed water supplier, is a reference to so much of the aggregate of any charges made during the course of that year which—
- (i) are payable by the supplier to the undertaker in respect of the duty under [section 66A\(2\)\(b\)](#), [66B\(3\)\(b\)](#) or [66C\(2\)\(b\)\(ii\)](#) below; and
 - (ii) are reasonably attributable to the use of that main for the purpose of the supplier supplying water to those premises.

] ⁵

- (8) An approval or determination given or made by [the Authority] ⁶ for the purposes of subsection (2) above—
- (a) may be given or made in relation to the provision of a particular water main, in relation to the provision of mains of a particular description or in relation to the provision of water mains generally; and
 - (b) may be revoked at any time except in relation to a water main [in respect of which the conditions referred to in [section 42\(1\)](#) above have already been satisfied.] ⁷
- (9) In this section “*water main requisition*” means —
- (a) a requirement under [section 41](#) above (including, by virtue of [paragraph 1 of Schedule 2 to the Water Consolidation \(Consequential Provisions\) Act 1991](#), a requirement under [section 40 of the Water Act 1989](#));
 - (b) a requirement under the provisions of [section 36 or 37 of the Water Act 1945](#) or of [section 29 of Schedule 3](#) to that Act (water main requisitions); or
 - (c) a requirement under any local statutory provision corresponding to [section 41](#) above or to any of those provisions of that Act of 1945.

43A Calculation of “discounted aggregate deficit” for the purposes of [section 42](#)

- (1) For the purposes of [section 42](#) above the discounted aggregate deficit on a water main is the amount equal to the sum of the estimated relevant deficits for each of the twelve years following the provision of the main, in each case discounted in accordance with subsection (6) below.
- (2) The estimated relevant deficit for any year is the amount (if any) by which the estimated revenue in respect of the water main for that year would be exceeded by the annual borrowing costs of a loan of the amount required for the provision of that main.
- (3) [Subsections \(2\) to \(6\), \(8\) and \(9\) of section 43](#) above (which relate to the annual borrowing costs of a loan of the amount required for the provision of a water main) shall apply for the purposes of this section as they apply for the purposes of that.
- (4) Any reference in this section to the estimated revenue in respect of a water main for any year—
 - (a) in relation to premises expected to be connected with the main and supplied with water by a water undertaker, is a reference to so much of the aggregate of any charges expected to be payable to the undertaker

for the provision of services in the course of that year as would represent charges–

- (i) imposed by the undertaker in relation to those premises, and
- (ii) reasonably attributable to the provision of a supply of water (whether or not for domestic purposes) to those premises by means of that main; and

(b) in relation to premises expected to be connected with the main and supplied with water by a licensed water supplier, is a reference to so much of the aggregate of any charges expected to be made during the course of that year as would be–

- (i) payable by the supplier to the undertaker in respect of the duty under [section 66A\(2\)\(b\)](#), [66B\(3\)\(b\)](#) or [66C\(2\)\(b\)\(ii\)](#) below; and
- (ii) reasonably attributable to the use of that main for the purpose of the supplier’s supplying water to those premises.

(5) For the purpose of calculating estimated revenue under subsection (4) above, a thing is expected to be the case if, at the time the calculation is made, it is reasonably likely to occur.

(6) The estimated relevant deficit for a year mentioned in subsection (1) above shall be discounted in order to determine its net present value by applying such factor, and in accordance with such other provision, as may be determined by the Authority.

(7) A determination made by the Authority for the purposes of subsection (6) above–

- (a) may be made in relation to the provision of a particular water main or in relation to the provision of water mains generally; and
- (b) may be revoked at any time except in relation to a water main in respect of which the conditions referred to in [section 42\(1\)](#) above have already been satisfied.

44.— Determination of completion date and route for requisitioned main.

(1) A water undertaker shall not be in breach of a duty imposed by [section 41](#) above in relation to any locality unless–

- (a) the period of three months beginning with the relevant day has expired; and

[

(b) the water undertaker has not, before the end of that period, so laid the water main to be provided as to enable (as the case may be)–

- (i) service pipes to premises in that locality; or
- (ii) a water main which is the subject of an agreement under [section 51A](#) below (“the self-laid main”),

to connect with the main at the place or places determined under subsection (3) below.

]¹

(2) The period mentioned in subsection (1)(a) above may be extended in any case—

(a) by agreement between the water undertaker and the person or persons who required the provision of the main; or

(b) where there is a dispute as to whether the period should be extended, by [the Authority]² on a reference under subsection (4) below.

(3) The places mentioned in subsection (1)(b) above shall be—

(a) such places as are determined by agreement between the water undertaker and the person or persons who required the provision of the water main; or

(b) in default of agreement, such places as are determined by [the Authority]³, on a reference under subsection (4) below, to be the places at which it is reasonable, in all the circumstances, for service pipes to premises in the locality in question [, or (as the case may be) the self-laid main,]⁴ to connect with the water main.

[

(4) A reference for the purposes of subsection (2) or (3) above may be made to the Authority for determination under [section 30A](#) above by either party to the dispute.

]⁵

(5) In this section “*relevant day*” , in relation to a requirement to provide a water main [...]⁶ , means the day after whichever is the later of the following, that is to say—

(a) the day on which the conditions specified in [section 42](#) above are satisfied in relation to the requirement; and

[

(b) the day on which the place or places where (as the case may be)—

(i) service pipes to premises in the locality in question; or

(ii) the self-laid main,

will connect with the main are determined under subsection (3) above.

]⁷

44.— Determination of completion date and route for requisitioned main.

(1) A water undertaker shall not be in breach of a duty imposed by [section 41](#) above in relation to any locality unless—

(a) the period of three months beginning with the relevant day has expired; and

[

(b) the water undertaker has not, before the end of that period, so laid the water main to be provided as to enable (as the case may be)—

(i) service pipes to premises in that locality; or

(ii) a water main which is the subject of an agreement under [section 51A](#) below (“the self-laid main”),
to connect with the main at the place or places determined under subsection (3) below.

]¹

(2) The period mentioned in subsection (1)(a) above may be extended in any case—

(a) by agreement between the water undertaker and the person or persons who required the provision of the main; or

(b) where there is a dispute as to whether the period should be extended, by [the Authority]² on a reference under subsection (4) below.

(3) The places mentioned in subsection (1)(b) above shall be—

(a) such places as are determined by agreement between the water undertaker and the person or persons who required the provision of the water main; or

(b) in default of agreement, such places as are determined by [the Authority]³, on a reference under subsection (4) below, to be the places at which it is reasonable, in all the circumstances, for service pipes to premises in the locality in question [, or (as the case may be) the self-laid main,]⁴ to connect with the water main.

[

(4) A reference for the purposes of subsection (2) or (3) above may be made to the Authority for determination under [section 30A](#) above by either party to the dispute.

]⁵

(5) In this section “*relevant day*” , in relation to a requirement to provide a water main [...] ⁶, means the day after whichever is the later of the following, that is to say—

(a) the day on which the conditions specified in [section 42](#) above are satisfied in relation to the requirement; and

[

(b) the day on which the place or places where (as the case may be)—

(i) service pipes to premises in the locality in question; or

(ii) the self-laid main,

will connect with the main are determined under subsection (3) above.

55.— Supplies for non-domestic purposes.

(1) This section applies where the owner or occupier of any premises in the area of a water undertaker requests the undertaker to provide a supply of water to those premises and—

(a) the premises are premises which do not consist in the whole or any part of a building; or

(b) the requested supply is for purposes other than domestic purposes.

[

(1A) This section also applies where—

- (a) a water undertaker is requested to provide a supply of water to premises which are not in the undertaker's area by the owner or occupier of the premises;
- (b) the premises are household premises (as defined in [section 17C](#) above) or [, in the case of premises to be supplied using the supply system of a water undertaker whose area is wholly or mainly in Wales,]² the total quantity of water estimated to be supplied to the premises annually for the purposes of [subsection \(2\) of section 17D](#) above is less than the quantity specified in that subsection; and
- (c) paragraph (a) or (b) of subsection (1) above applies.

] [

(1B) But this section does not apply to any premises if—

- (a) they are in a retail exit area, and
- (b) they are not household premises (as defined in [section 17C](#)⁴ above).

] ³

(2) Where this section applies, it shall be the duty of the water undertaker, in accordance with such terms and conditions as may be determined under [section 56](#) below—

- (a) to take any such steps as may be so determined in order to enable the undertaker to provide the requested supply; and
- (b) having taken any such steps, to provide that supply.

(3) A water undertaker shall not be required by virtue of this section to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if the provision of that supply or the taking of those steps would—

- (a) require the undertaker, in order to meet all its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes, to incur unreasonable expenditure in carrying out works; or
- (b) otherwise put at risk the ability of the undertaker to meet any of the existing or probable future obligations mentioned in paragraph (a) above.

(4) A water undertaker shall not be required by virtue of this section to provide a new supply to any premises, or to take any steps to enable it to provide such a supply, if there is a contravention in relation to the water fittings used or to be used in connection with—

- (a) the supply of water to those premises; or
- (b) the use of water in those premises,

of such of the requirements of regulations under [section 74](#) below as are prescribed for the purposes of this subsection.

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(5) Where—

- (a) a request has been made by any person to a water undertaker for the purposes of subsection (2) above; and
- (b) the steps which the undertaker is required to take by virtue of that request include steps for the purpose of obtaining any necessary authority for, or agreement to, any exercise by the undertaker of any of its powers or the carrying out by the undertaker of any works,

the failure of the undertaker to acquire the necessary authority or agreement shall not affect any liability of that person, under any term or condition in accordance with which those steps are taken, to re-imburse the undertaker in respect of some or all of the expenses incurred by the undertaker in taking those steps.

(6) Nothing in this section shall impose any duty on a water undertaker to provide a supply of water to any premises during any period during which it is reasonable for the supply of water to those premises to be cut off or reduced for the purposes of the carrying out of any necessary works.

(7) The duty of a water undertaker to supply water under this section at the request of any person, and any terms and conditions determined under [section 56](#) below in default of agreement between the undertaker and that person, shall have effect as if contained in such an agreement.

(8) Except so far as otherwise provided by the terms and conditions determined under [section 56](#) below in relation to any supply, the duties of a water undertaker under this section shall have effect subject to the provisions of [[sections 60 to 63 and 63AB and 75](#)]² below.

56.— Determinations on requests for non-domestic supplies.

(1) Subject to subsection (3) below, any terms or conditions or other matter which falls to be determined for the purposes of a request made by any person to a water undertaker for the purposes of [section 55](#) above shall be determined—

- (a) by agreement between that person and the water undertaker; or
- (b) in default of agreement, by [the Authority]¹ according to what appears to [it]² to be reasonable.

(2) Subject to subsection (3) below, [the Authority]¹ shall also determine any dispute arising between any person and a water undertaker by virtue of [subsection \(3\) or \(4\) of section 55](#) above.

(3) [The Authority]¹ may, instead of [itself]² making a determination under subsection (1) or (2) above, refer any matter submitted to [it]² for determination under that subsection to the arbitration of such person as [it]² may appoint.

(4) For the purposes of any determination under this section by [the Authority]¹ or any person appointed by [it]² it shall be for a water undertaker to show that it should not be required to comply with a request made for the purposes of [section 55](#) above.

(5) The charges in respect of a supply provided in compliance with any request made for the purposes of [section 55](#) above—

- (a) shall not be determined by [the Authority]¹ or a person appointed by [it]², except in so far as, at the time of the request, no provision is in force by virtue of a charges scheme under [section 143](#) below in respect of supplies of the applicable description; and
- (b) in so far they do fall to be determined, shall be so determined having regard to the desirability of the undertaker's—

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(i) recovering the expenses of complying with its obligations under [section 55](#) above; and

(ii) securing a reasonable return on its capital.

(6) To the extent that subsection (5)(a) above excludes any charges from a determination under this section, those charges shall be fixed from time to time by a charges scheme under [section 143](#) below, but not otherwise.

(7) The determination of any matter under this section shall be without prejudice to the provisions of [sections 233 and 372](#) of the [Insolvency Act 1986](#) (conditions of supply after insolvency).

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APPENDIX 1: BARRATT HOMES LTD V WELSH WATER [2009]

Case No: A2/2008/2122(A)

A2/2008/2122

Court of Appeal (Civil Division)

[2008] EWCA Civ 1552, 2008 WL 5538950

Before: Lord Justice Pill Lord Justice Carnwath and Lord Justice Lawrence Collins

Date: Friday, 28th November 2008

On Appeal from the High Court of Justice Queen's Bench Division Cardiff City Registry (Mr Justice Wyn Williams)

Representation

Mr A Porten QC and Mr S Gasztowicz appeared on behalf of the Appellants.
Mr M Sheridan appeared on behalf of the Respondent.

Judgment

Lord Justice Carnwath:

Background

1. This is an appeal against a decision of Wyn Williams J. It raises important issues as to the nature and extent of the rights conferred by section 106 of the Water Industry Act 1991 to make connections to public sewers.
2. Barratt is a major house-builder. It is engaged in a development of a site at Llanfoist, Abergavenny. It has planning permission dated 14 May 2007 for 98 houses and a school. Dwr Cymru Cyfyngedig ("DCC") is the sewerage undertaker for the area. It is the only water and sewerage company in England and Wales which is a not-for-profit organisation. Its operation and investment are funded through customer bills.
3. Barratt wished to connect the drains from the development to the public sewer at point X, in the road immediately adjoining the northern boundary of the development site. DCC objected to a connection at that point because of the risk of overflow in the stretch of sewer immediately downstream. It was willing to allow a connection at a location some 3-400 metres to the east, at point Y.
4. On 29 May 2007 Barratt served notice under section 106 of its proposal to connect at point X. DCC

responded on 25 June 2007 purporting to approve the proposal, but stating that the connection must be at point Y. The letter indicated that the connection would need to be made either by laying a new sewer or by improving the existing sewer, and that the requisition procedure under section 98 of the 1991 Act could be used to overcome any problems with intervening landowners. The DCC later placed concrete round the sewer at point X to prevent any connection there.

5. Barratt began these proceedings against DCC for immediate relief (under CPR Part 8) by way of a declaration that it is entitled to have its development connected to the public sewer at point X in accordance with its notice, and an injunction requiring the removal of the concrete.

6. By the time the proceedings were begun 38 houses had been built and 31 had been sold. The school was opened in September 2008. Interim measures had been put in place for sewage to be stored and collected by tankers. Current market conditions have delayed the further progress of the development.

7. Three issues arise:

- i) *Alternative location* Whether DCC was entitled to require the connection to be made at an alternative location, because of the prospect of sewer overload
- ii) *The 21 day limit* Whether by serving its response outside the 21 day limit set by the Act, DCC lost the right to object to the connection at point X.
- iii) *European law* Whether the answer is affected by the EC Directive on the treatment of Urban Waste Water (91/271/EEC) .

8. The judge answered the first question in favour of Welsh Water. He held, following *Walton J in Beech Properties Ltd v G E Wallis Ltd [1997] EGCD 75* , that the statute permitted an undertaking to require the connection to be made at an alternative location in order to avoid prejudice to the system as a whole. He thought the second question relating to the 21 day limit was unsuitable to answer under Part 8 procedure, because it raised “somewhat intricate questions of mixed law and fact” (para 37). He found it unnecessary to rule on the issue of European law.

The statute

9. Section 94 imposes a general duty on every sewerage undertaker to provide and maintain a system of public sewers so as to ensure that its area is “effectually drained”. Section 98 requires an undertaker to comply with a requisition for the provision of a public sewer to be used for domestic purposes, but that is subject to payment by the person making the requisition.

10. Section 106 , which is directly in issue, confers rights to connect to the public sewers. The relevant parts are:

“(1) Subject to the provisions of this section—

- (a) the owner or occupier of any premises in the area of a sewerage undertaker; or
- (b) the owner of any private sewer draining premises in the area of any such undertaker,

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shall be entitled to have his drains or sewer communicate with the public sewers of that undertaker and thereby to discharge foul water and surface water from those premises or that private sewer.

(2) A person desirous of availing himself of his entitlement under this section shall give notice of his proposals to the sewerage undertaker in question.

(3) At any time within twenty-one days after a sewerage undertaker receives a notice under subsection (3) above, the undertaker may by notice to the person who gave the notice refuse to permit the communication to be made, if it appears to the undertaker that the mode of construction or condition of the drain or sewer is such that the making of the communication would be prejudicial to the undertaker's sewerage system

(4) For the purpose of examining the mode of construction and condition of a drain or sewer to which a notice under subsection (3) above relates a sewerage undertaker may, if necessary, require it to be laid open for inspection."

11. Though not directly relevant to this case, I note that subsection (2) makes certain specific exclusions from the general right. For example, where separate public sewers are provided for foul water and for surface water, the section does not entitle any person "to discharge directly or indirectly—

- (i) foul water into a sewer provided for surface water; or
- (ii) except with the approval of the undertaker, surface water into a sewer provided for foul water..."

12. Section 106(6) enables a dispute as to the reasonableness of a refusal to be referred to the Director of the Office of Water Services ("OFWAT"). Although OFWAT was consulted in this case, no formal determination was sought. It is not suggested that this provision in any way limits the power of the court to rule on the legal issues.

13. Reference has also been made by way of comparison to subsection (8), which allows a wider discretion to refuse a connection in Greater London, where a sewer is used for the general reception of sewage from other public sewers. A private connection may be refused on "such grounds as the undertaker thinks fit", and there is no right to apply to OFWAT to challenge the refusal.

14. I should also note section 107, under which the undertaker may give notice of its intention to make the communication itself rather than allowing the developer to make it; and section 108, which requires the person making the communication to give reasonable notice to the undertaker of the actual works. The standard form of a notice under section 106 used in this case provided for 48 hours' notice.

15. We have also been referred to section 112 of the Act, which provides the means by which the undertaker can require that the proposed drain or sewer be constructed so as to form part of the general system. Under this procedure the undertaker may require the person to construct the drain in the manner which accords with the

requirements of the undertaker, but by section 112(6) the undertaker must repay to the person constructing the drain the extra expenses reasonably incurred to comply with these requirements. In my view that section sheds no light on the construction of section 106 .

Factual background

16. Before returning to the legal issues, I need to fill in some of the factual history, in relation both to the planning proposal, and to the attempts to resolve the drainage problems.

17. The site had been considered suitable for housing development since at least 1999, when it was allocated in the draft Monmouthshire Unitary Development Plan. However, it was accepted that improvements to the public sewerage system (costed at that time at some £200,000) would be required to accommodate the development, and that in the meantime DCC would object to any proposal for such development.

18. Discussions with Barratt in 2005 and 2006 led in due course to their contributing some £13,000 for a hydraulic modelling assessment. This assessment highlighted the risk of increased spillage if the connection were made at point X. The existing system was designed to ensure that any such overflow would occur at the so called “combined sewer overflow” (CSO), located in open land to the east between points X and Y. It was calculated that the point X connection could lead to an increase of 29% in the incidents of overflow when the development was fully built. It was recommended that there should be either improvement to the relevant section of sewer, or a connection at an alternative location downstream. Discussions followed between Barratt and DCC on the alternative solutions.

19. The planning application for the present development was submitted to the County Council’s planning authority in June 2006. The planning officer’s report referred to the drainage issue, and the ongoing discussions with DCC. It was noted that, if off-site infrastructure improvements were required, they could be secured by a “Grampian” condition or a section 106 agreement. The application came before the planning committee on 12 December 2006. According to the minutes, the head of planning stated that work on constructing houses could not take place until the drainage had been improved to DCC’s standards, but that this would result in a general improvement of the drainage network in the area. It was resolved that conditional permission be granted subject to conclusion of a planning agreement. The permission was issued on 14 May 2007. Condition 10 provided:

“No development should take place until a scheme of foul drainage and surface water drainage has been submitted to and approved by the local planning authority and the approved scheme shall be completed before the buildings are first occupied.”

20. On 29 May 2007, as already noted, Barratt served its notice under section 106 . It is to be noted that, even after the statutory 21 days had passed, Barratt continued to press for a response. Following that response on 26 June, Barratt sought further information about the cost of the sewer connection stipulated by that letter. There were also discussions about the use of the requisition procedure. It seems that at this stage DCC, with the support of the Environment Agency, had the assurance from the County Council that condition 10 would not be treated as discharged until its sewerage requirements had been met.

21. On 20 July Barratt confirmed that it would “underwrite (DCC’s) abortive costs in progressing a scheme for the improvement works to the public sewerage system”. This seems to have been treated by DCC as a formal request to initiate the requisition procedure under section 98. However, in September Barratt’s position began to harden. In a letter dated 11 September it took the point that the undertaker had no power under section 106 to set the point of connection. About this time it also seems to have sought advice from OFWAT.

22. OFWAT’s advice was not helpful to DCC. In a letter of 25 January 2008 they rejected DCC’s suggestion that initiation of the requisition procedure had resulted in loss of any rights under section 106. As the letter said: “Developers typically pursue both options for the sewerage of their sites in order to establish the most cost effective viable option”. They also expressed the view that, by failing to respond to the section 106 notice within 21 days, DCC had lost the right to object. They added that it would be for Barratt to confirm with the planning authority that it would satisfy planning condition 10.

23. On 20 February Barratt wrote to the County Council enclosing the OFWAT letter and an opinion of Anthony Porten QC (this apparently followed a meeting on 5 February, but there is no record of what took place). Barratt requested that condition 10 be discharged “as a matter of urgency” as they were investigating possible proceedings against DCC. On 3 March a notice was issued by the County Council, in the name of the Development Control Manager, confirming that the condition had been discharged. It appears that this was done under delegated authority, and without consulting DCC.

24. As already noted, DCC remained unwilling to accept that Barratt was entitled to make the connection at point X, and took steps to make it physically impossible for it to do so.

Section 106 — history and case-law

25. The development of the modern statutory scheme for sewage disposal and drainage was described by Lord Nicholls in *Marcic v Thames Water Utilities [2004] 2AC 42* at paragraph 10. He described in particular the changes made by privatisation in 1989 and the role of the Director of Water Services (or OFWAT).

26. So far as concerns provisions for connecting public sewers, they have a long history. Section 21 of the Public Health Act 1875 provided that an owner or occupier of premises was entitled to cause his drains to empty into the sewers of the local authority, subject to giving notice, and to complying with:

“...the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made...”

27. In *Ainsley v Kirkheaton Local Board [1891] 60 LJ(Ch) 734*, it was held that section 21 conferred a right to an owner to drain into an existing sewer without reference to whether it might cause a nuisance. The right was described as “an absolute right” in *Brown v Dunstable Borough Council [1899] Ch 378*, albeit one subject to the power to make “regulations” in respect of the mode of connection. In *Wilkinson v Llandaff RDC [1903] 2 Ch 695*, it was held by Stirling LJ that this power gave the authority the power “to define by regulation the particular sewer with which the communication is to be made” (p 703).

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28. In 1936 the section was recast in a form substantially similar to what became section 106. Section 34 of the Public Health Act 1936 retained the right to connect, but without the provision for regulations. Instead, there was a proviso prohibiting certain categories of connection (as now in s1 : see para 11 above); and the authority were given the right, within 21 days of notice of the proposals, to object on the grounds that the “mode of construction or condition” of the drain would lead to prejudice to the sewerage system. Any question as to reasonableness of a refusal would be determined by the magistrates’ court.

29. It is notable that the grounds on which connection may be refused under this section (as under section 106) are narrow. They relate solely to the mode of construction or condition of the connecting drain. This formulation is even narrower than under the 1875 Act, which allowed the authority to regulate “the mode of communication”. In *Wilkinson*, as we have seen, those words were interpreted by Stirling LJ as enabling the authority to direct the connection to a particular sewer, in order to avoid foul sewage being directed to a surface water drain. That potential problem is dealt with in a different way in the later Acts, by a specific prohibition in the proviso on particular types of connection.

30. It is, in my view, clear both from the wording of section 34, and from the history that the authority is not permitted to object to a connection on the grounds of overloading to the public sewer. This has been the generally accepted interpretation at least since *Smeaton v Ilford Corporation* [1954] 1 Ch 450. We have also been shown a decision by OFWAT to that effect, in a determination dated 11 August 1997 (*Post Office v Yorkshire Water*). That decision was circulated to the industry at the time, and as far as we know has not been questioned. Any remaining doubt on this issue was settled by the *House of Lords in Marcic v Thames Water Utilities* [2004] 2AC 42, where it was accepted without question that under section 106 the water undertaker was unable to prevent connections through its existing system, even at the risk of overload (see, for example, per Lord Nicholls para 34).

31. I should add that, although the requisition procedure under section 98 is now found in the same Act as section 106, it has a much shorter history. It was first introduced in 1973. The two sections are not in terms expressed as mutually exclusive. As OFWAT pointed out, there is nothing in the Act to prevent a developer exploring both options at the same time.

The issues

Alternative location

32. This is the most important issue from the general point of view. This relates to the basis of DCC’s refusal for a connection at point X. Even if, on the basis of the authorities I have referred, the outright refusal on grounds of overload would not have been permissible, Mr Sheridan submits that it was open to the authority to reject the particular location in favour of an alternative location which would not have the same adverse consequences.

33. The judge in effect accepted this submission. He thought (see para 54) that the phrase “mode of construction” was apt to include the point at which the drain connects with the public sewer; and that, accordingly, if the making of connection at a particular point is prejudicial to the system, it could properly be said that the mode of construction had caused the prejudice. He thought it objectionable that the statute should be interpreted in such a way that the undertaker could not use the power of refusal to prevent such deleterious

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consequences.

34. He gained support from observations of Walton J in the *Beech Properties v G E Wallis* [1977] EGCD 735. In that case this particular point did not arise and so the comments of the learned judge were obiter. What he said was this:

“...it does appear to me that, wise as the words of subsection (1) may be, and for the moment ignoring the opening qualification, they do not confer upon an individual the right to connect his sewer to the water authority’s sewer at any point which he may choose. In most cases, of course, the matter will be quite academic. There will be the water authority’s sewer, going along the road; a new house is built in the road; and quite obviously and clearly the owner will expect to have a right to drain into that sewer, and it would be very difficult, assuming that there are no problems under the proviso to subsection (1), to imagine a set of circumstances where the water authority would be entitled to say that he must not connect to that sewer but to some other sewer. Even so, if the new house was built at a crossroads and there were available sewers in both roads, I can see no reason why the owner should be entitled to drain into the sewer of his choice if the water authority required him to drain into the other, which might, for example, well be a relief sewer expressly provided for the district because the other sewer was approaching capacity. Similarly, I see no reason why the owner is entitled to connect at point X rather than an adjacent point Y, if the water authority requires him to connect at Y. I think that I am only saying here in less felicitous language what has already been said in very much more forthright terms by Romer and Stirling LJ, particularly the latter, in *Wilkinson v Dina Powis Rural District Council* [1903] 2 Ch 695 ...”

35. I am unable with respect to accept the approach of Wyn Williams J on this point or his reliance on the comments of Walton J. It is quite clear, as I have indicated, from the history of the section and the authorities, that there are strict limits to the extent to which the undertaker is able to avoid the deleterious consequences of a connection. If Parliament had intended to give the undertaker control over the *location* of the connection, as opposed to its condition and construction, it could easily have done so. It did not. (An example of a wider provision is found in the equivalent Scottish statute, discussed in *Tayside RC v Secretary of State for Scotland* [1996] SLT 473).

36. As to the comment of Walton J, the judge was right in my view to question his reliance on *Wilkinson* which related to a different form of wording. Taken at their highest, the examples given by Walton J bear no relation to the present case. He was referring to a possible choice between two drains at the same crossroads, or on a single sewer the choice between point X and “adjacent point Y”. That gives no support for the attempted imposition, as in this case, of a connection through a completely new sewer to a point some 300m away from the proposal.

37. Mr Sheridan also seeks support in a passage in the OFWAT decision (*Post Office v Yorkshire Water*) to which I have referred. Although the decision rejected a refusal based solely on lack of capacity, some consideration was given to the possibility of an alternative. Reference was made (at para 6.7) to a sewer being provided to another site in response to a requisition. This could be connected to the Post Office site by a further 170 metre sewer. It was suggested that Yorkshire Water could provide this extra length of sewer, and if so it would be reasonable for it to insist on the Post Office making the connection to it. However, it is clear that the extra sewer would have to be provided at Yorkshire Water’s expense. This is of no assistance to DCC which is not, as I understand it, offering to provide the connection to point Y at its own expense.

38. On this issue I would allow the appeal.

The 21 day limit

39. Mr Porten argues that the 21 day time-limit is absolute, and that once it has passed the developer becomes “entitled” to make the connection. He relies on cases such as *Petch v Gurney* [1994] 3 AER at 731 (a case under the Taxes Management Act 1970), in which Millet LJ expressed the principle in clear terms:

“Where a statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement had been done in a particular manner as merely directory...But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time.” (p.738 c-f)

As has been seen, Mr Porten’s position is supported by OFWAT.

40. Mr Sheridan on the other hand refers to more recent authorities, which indicate that the distinction is not so clear-cut, and that an assessment must be made of the Parliamentary intention, taking account of the context of the requirement and the consequences of non-compliance. He relies in particular on the exhaustive discussion in the speeches in *R v Soneji [2006] 1 AC 340*, developing the approach first signalled in *London & Clydeside Estates v Aberdeen DC [1980] 1 WLR 182*. In the present context, he argues, the power to refuse a connection is designed for the protection of the public. It cannot be intended that it should be lost by a limited delay which causes no harm to anyone. In this case the delay of a few days was of no possible prejudice to Barratt, as evidenced by their own conduct in continuing to press for an answer after the limit had passed.

41. Had I found it necessary to this point, I would see considerable force in Mr Sheridan’s submissions. While I see the theoretical attractions of Mr Porten’s argument, the context is very different from those of the cases to which he refers. Recent authority allows a more flexible approach. In this case, the public interest consideration seems to me to point strongly to allowing some flexibility where no prejudice is caused to the developer. However, I bear in mind that this view would conflict with that of the statutory regulator, from whom we have not heard specific argument. Since it is not necessary to decide the point, I would prefer to leave it open for further consideration in another case which may depend upon it.

European issues

42. Mr Sheridan argues that section 106 must be interpreted in the light of the EC Directive on the treatment of Urban Waste Water 91/271/EEC, which has been given effect by the Urban Waste Water Treatment Regulations 1994. In general terms the Directive requires that it provide adequate collecting systems for urban waste water, including the prevention of leaks and pollution due to storm overflows. The argument, as I understand it, is that section 106 cannot be read in such a way as to require DCC to accept a connection which would result in a contravention of those regulations; or alternatively it must be read so as to avoid such consequences.

43. I accept that the provisions of the Directive and the Regulations may be of relevance in a planning context. We were referred to the relevant guidance in Planning Policy Wales March 2002, which requires local planning authorities to take account of infrastructure capacity and the effects on existing local communities and the environment. That much is not in issue, but the argument in the present case goes further, and suggests that somehow we can modify the provisions of the statute to give effect to that Directive and those Regulations.

44. An argument to similar effect was considered and rejected in Northern Ireland by Weathercup J in *Re Friends of the Earth [2007] Env LR 7* para 39. He said:

“I do not interpret the measures required in respect of urban waste water “entering” collecting systems as requiring restrictions on entry. The obligations are to provide the required collecting systems and treatment and discharge standards. The result to be achieved is a compliant system and the wording and purpose of the Directive do not expressly or impliedly require restrictions on new connections in non compliant areas. It is not for the Court to introduce an obligation to prevent new connections in non compliant areas where that does not arise expressly or impliedly under the Directive or the Regulations.”

45. I respectfully agree. The argument in the present case is not about whether the sewers require improvement but who should pay for it. Nothing in the Directive or the regulations seems to me to impinge on the allocation of that responsibility as between undertaker and the developer.

Section 106 in context

46. Finally I should comment on DCC’s concerns about the general implications of our decision for sewerage undertakings. It is important to see section 106, and indeed section 98, in context. A developer is not given a free hand by the Water Authority to impose the burden of his drainage requirements on the water undertaker. He requires planning permission.

47. A responsible planning authority would normally refuse planning permission until satisfied that drainage requirements can be resolved to the satisfaction of the relevant authorities. If off-site works are required, it may impose a condition or require an agreement to ensure that they are carried out at the expense of the developer. That appears to be what was contemplated in this case. Condition 10 was apparently imposed to protect DCC’s position. Until late 2007 it seems to have been accepted by the county council that it would not be discharged until ECC’s requirements were met. The section 106 notice, even if DCC had lost the right to object under that Act, did not have the effect of overriding the condition. As was made clear in OFWAT’s letter on January 2008, it was for Barratt to secure the release of the condition.

48. It is unclear what exactly led the county council to its decision that the condition had been discharged. It seems an odd decision at first sight. I find it hard to see how it could be said that the approved drainage scheme was “completed” until an effective connection was made to the public system (although Mr Porten would argue otherwise). In any event, it seems surprising that the county council, which apparently regarded the improvements to the drainage system as of benefit, did not do more to ensure they were carried out. It also seems regrettable, if it be the case, that the county council did not first consult DCC before agreeing to the discharge. We were told by Mr Sheridan that, since privatisation, drainage undertakers are not automatic statutory consultees for planning applications. However, it seems that that gap may have been filled by planning guidance. It may be that more thought needs to be given to the interaction of planning and water regulation systems under the modern law, to ensure that the different interests are adequately protected, given the significant changes since the days when the predecessor of section 106 first came into existence. But OFWAT itself does not seem to have concerns about the present arrangements. The fact that something may have gone wrong in this case does not throw any doubt on the efficacy of the whole system. Nor does it throw any light on the correct approach to construction of the statute.

49. In conclusion, for these reasons I would allow the appeal and would hear submissions on what relief should

now be given.

Lord Justice Lawrence Collins:

50. I agree.

Lord Justice Pill:

51. I also agree. I too, on the time limit issue, would be inclined to the view that service of the counter-notice by Dwr Cymru Cyfyngedig, the respondent, a few days out of time did not prohibit reliance on it in these proceedings. I would have regard to the short extension required; to the absence of any conduct of the appellants, Barratt Homes Limited, to their prejudice during the days before service; and in particular to the serious adverse effect upon health and the environment which could occur if a respondent was not able to challenge the validity of the notice as the respondent has done.

52. This is not a situation in which it follows necessarily from non-compliance with the express time limit that the claim to connect cannot be challenged. That is not to give anything other than every encouragement to respondents, on receipt of a notice from a developer, to issue a counter-notice promptly. It is not necessary to decide this point in this appeal.

53. On the construction of the statute, Mr Sheridan, for the respondent, submits that section 106 of the Water Industry Act 1991 (“the 1991 Act”) should not be given a liberal construction in the owner’s favour. Concerns for protection of the environment have grown in recent years. The court should have regard, it is submitted, to the practical workability of section 106 in that context. Connection should be allowed only to sewers that are capable of taking the additional flow, which is dependent on the availability of public funds. Common sense should prevail, it is submitted. The statute did not contemplate that the respondent would have to rely on the planning system to protect its position.

54. Persuasive though the appeal to common sense often is, I agree with the analysis of Carnwath LJ of the authorities and with the conclusion he has reached. I am unable to conclude that the expression “mode of construction and condition of the drain or sewer” in section 106(4), repeated in section 106(5) of the 1991 Act, has any bearing upon the location of the communication with the public sewer contemplated in section 106(1)(b) and section 106(4). Mode of construction has nothing to do with location.

55. The Sewerage (Scotland) Act 1968 expressly recognised the distinction. Section 12(3) provided that a permission to an owner to connect his sewer with the sewers of a local authority may specify “the mode and point of connection”, thereby distinguishing the two concepts. I would not go as far as to accept the submission of Mr Porten QC, on behalf of the appellants, that the owner or occupier described in section 106(1) can dictate the precise location of the connection. Circumstances may be such as to allow a modest discretion to the sewerage undertaker where good reason is shown, for example, that the precise location chosen by the applicant is not a feasible or a sensible location at which to connect. That, however, is very far from what the respondent

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has sought to do in this case. The respondent has sought to dictate a communication with the sewer at a point about 300m from that requested, and across land in third-party ownership and control. That, in my judgment, is outside any modest discretion which the authority may have.

56. I add words about the sequence of events which has led to the case coming before the courts, having regard to the strong arguments presented on behalf of the respondent by Mr Sheridan, that the result of the court's conclusion is to leave a large gap in the protection which the public and the respondent, like other sewage authorities, need. The events have arguably led to the unsatisfactory situation of sewage from a substantial development potentially being discharged into an inadequate sewer, with possible implications for the environment and even for public health.

57. The permission sought was for a development of 98 houses and a primary school on a five-hectare site in the village of Llanfoist near Abergavenny. It would involve a doubling in the size of the village. In context it was a substantial development in this rural area, in the consideration of which the availability of suitable infrastructure, including for sewage, would be expected to be considered.

58. The planning officer's report demonstrates that the respondent was consulted and its views were set out in the report to the appropriate committee of the Monmouthshire County Council as local planning authority. The planning officer recorded:

"The Environment Agency has confirmed they have no objection to the proposed development subject to drainage conditions. The applicants are in discussion with Dwr Cymru...whose formal comments on the application are awaited particularly with regard to sewage. If off-site infrastructure improvements are required, this could be addressed by 'Grampian' condition or by S.106 Agreement as appropriate and Committee will be informed of Welsh Water's response."

There is no doubt that the respondent did object to the proposal on sewage grounds.

59. In relation to an earlier proposal for a somewhat larger development of 120 dwellings, the respondent stated, by letter of 14 September 2005:

"The proposed development would overload the existing public sewerage system. No improvements are planned within Dwr Cymru['s]...Capital Investment Programme. We consider any development prior to improvements being undertaken to be premature, and therefore OBJECT to the development. It may be possible for the Developer to fund the accelerated provision of replacement infrastructure or to requisition a new sewer under Sections 98-101 of the [1991 Act].

Reason:- to prevent hydraulic overloading of the public sewerage system, to protect the health and safety of existing residents and ensure no detriment to the environment"

60. That submission was set out in further detail in a letter of 21 March 2006. The minutes of the meeting of Monmouthshire County Council planning committee at which the application was considered and at which permission was granted, subject to conditions, show that the council's Head of Planning and Regeneration

stated in the course of discussion that:

“Until work had been carried out to improve the drainage in the area, to Welsh Water standards, work on constructing the housing development could not take place...In addition, the new site would improve the drainage network in the area, which was currently, in Welsh Water’s opinion, at capacity, resulting in objections from that body to additional single dwellings utilising the existing drainage network.”

61. Permission was granted on 14 May 2007 subject to this condition (10) amongst others:

“No development shall take place until a scheme of foul drainage and surface water drainage, has been submitted to, and approved by, the Local Planning Authority and the approved scheme shall be completed before the building(s) is/are first occupied.”

The reason given is “To ensure a satisfactory method of foul and surface water drainage”.

62. As to condition 10, the Environment Agency Wales, who clearly were also consulted, wrote to the local planning authority on 23 October 2007:

“We would recommend that the Local Planning Authority await finalisation of the foul discharge arrangements between the applicant, Barratt Housing Developments and Welsh Water prior to discharging condition 10 to ensure there is an agreed approach and sufficient capacity available to deal with foul flows from this site. Once the LPA is satisfied with foul water disposal arrangements, we can recommend discharge of Condition 10.”

63. The respondent repeated its objection on 21 November 2007:

“However, after seeing a copy of the planning committee report and the comments and recommendations made at the meeting it is evident that the planning condition imposed reflects the discussion which highlighted that improvement works are required to the public sewerage system prior to this development communicating”

64. Mr Porten submits that condition 10 relates only to drainage within the appeal site. It is not necessary to resolve that issue. It is certainly not a view the planning officer took or that the Environment Agency took or that the respondent took.

65. In the event, the condition was discharged by a letter of 3 March 2008. That followed representations made on behalf of the appellants on 19 and 20 February 2008.

“I can confirm that, further to receipt of the above correspondence, Barratt’s are in the process of

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investigating litigation of Welsh Water [that reference is to advice which leading counsel had prepared on the legal issue on which in the event this court has found in the appellants' favour]. I would therefore respectively request that condition 10 be discharged as a matter of urgency."

66. Those were representations which the appellants were entitled to make. However, having regard to the background described, it was to be expected that the local planning authority would consider not only the legal point which had been raised but the underlying point on the adequacy of sewers which had been raised. That was not resolved by resolution of the legal issue in the appellants' favour. I agree with Carnwath LJ that it is surprising that the local planning authority were, as I see it, distracted from consideration of the submissions of substance made, to some of which I have referred, by a consideration of a legal point which they apparently considered decisive.

67. However, my purpose is not to criticise the local planning authority who are not here to speak for themselves. It is to demonstrate that, in the planning process, procedures are available under which the position of the public and of sewage authorities can be protected. Several of the options have been mentioned in the documents which were before the local planning authority in this case. Protection may be sought in section 106. The respondent can expect to have protection in the planning process, as can the public interest. If there was a failure to provide that protection in this case, and I do not think it necessary to rule upon it, it does not demonstrate that there is a large gap in the system. Moreover, and perhaps more to the point, it does not demonstrate that section 106 should be construed in the way for which the respondent contends.

68. I too would allow this appeal on the basis indicated by Carnwath LJ.

Order: Appeal allowed.

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SIZEWELL C PROJECT –
WRITTEN SUBMISSIONS ARISING FROM
ISSUE SPECIFIC HEARING 11

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APPENDIX 2: DRAINAGE STRATEGY ACTION PLAN

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Sizewell C – Drainage Strategy – Action Plan

No.	Area	Issue identified	Actions	Target Delivery date
1	Control Document	Drainage Strategy needs to be tied legally together with Technical Notes.	Reach agreement between SZC Co. and SCC on the degree of reliance on and relationship between the Drainage Strategy and series of supplementary technical notes, including the information to be provided through the subsequent Actions in this document.	Deadline 10
2	Infiltration Figures	2021 Results need to have a location plan so they can be reviewed. Includes additional test results for TVBP and Yoxford. Includes existing geotechnical reports for FMF, NP&R, GRR and SP&R.	SZC Co. to: <ul style="list-style-type: none"> • Provide Table of 2021 Results and 2021 Plan. • Show reason for chosen infiltration value from all results available (all sites). • Supply existing reports with available values for 2VB, Yoxford, FMF, NP&R, SP&R and GRR. • Supply any new infiltration data for FMF, NP&R, GRR and SP&R 	1 Oct 1 Oct 1 Oct 1 Oct
3	Choice of treatment Indices for pollution control.	Index for Pond used rather than Basin in ACA. Other Zones can have simplified approach. Excludes roads which have HEWRAT assessments.	SZC Co. to: <ul style="list-style-type: none"> • Review ACA result and revise, as necessary. • Complete WMZ1 as further example. 	1 Oct 1 Oct

			<ul style="list-style-type: none"> Complete other zones using simplified approach – worst pollution source with least treatment route. Undertake pollution assessment for AD sites, with priority on FMF 	<p>Deadline 10</p> <p>1 Oct</p>
4	Perimeter Swale space availability (MDS).	Swales may need to be large on MDS. Reassurance that space is available.	<p>SZC Co. to:</p> <ul style="list-style-type: none"> Set out overview of space available on plan. Provide indicative dimensions and sections. Compare to SCC design standards 	<p>1 Oct</p> <p>1 Oct</p> <p>1 Oct</p>
5	Confirmation of treatment in the MDS WMZ Basins.	Confirm that the proposed basins can give the required treatment as part of the overall discharge requirement.	SZC Co. to confirm basin treatment design criteria and reference Hinkley C design for comparison.	Deadline 10
6	Calculation of impermeable / permeable areas on MDS.	Clarification of the derivation of Catchment Area percentage runoffs	<p>SZC Co. / SCC to hold Technical Meeting to resolve methodology. Meeting held 21st September between Technical experts and clarifications presented.</p> <p>SZC Co to provide: plan/table showing breakdown of PIMP, PR calculations in each WMZ area.</p>	1 Oct
7	Review of original hydrological catchments.	Need to understand original topography to be clear on approach.	SZC Co. to provide baseline (e.g. topographical plan) for natural drainage routes and WMZ catchments / outfalls. Simple overlay and comparison of	1 Oct

	island operational drainage.			
10	Northern Park & Ride	<p>Highway improvements proposed to discharge to ordinary watercourse 150m east of A12, outside Order Limits, presumably on land outside of the Applicants control.</p> <p>The scheme proposes to outfall to two ditches. Neither of these ditches have been evidenced or demonstrated to have an effective outfall (particularly any piped crossing beneath the railway line). The level of the both outfall ditches are unknown, therefore the maximum depth of any attenuation structure is not known.</p> <p>Calculations have only been provided for the proposed surface water system serving the A12 roundabout. It is unclear why calculations were not provided for the entire site. The calculations that were provided do not accurately model the proposed surface water drainage strategy.</p> <p>Whilst a Qbar discharge rate has been proposed (which SCC support). However, the methodology used to determine this runoff rate is not agreed by SCC, as stated in SCC's response to REP6-024 [7-157]</p> <p>No assessment of pollution has been undertaken</p>	<ul style="list-style-type: none"> • SZC to provide evidence and confirm availability of Outfall under A12. (5 l/s if no Inf.) located within the red line boundary. • SZC to provide existing topographic survey showing fall in ground level from basin locations to watercourses at the boundary • SZC/SCC to hold technical meeting to discuss issues with a view to reaching agreement, informed by supporting information. 	<p>1 Oct</p> <p>1 Oct</p> <p>30 Sept</p>

11	Southern Park & Ride	<p>The proposed drainage strategy is heavily reliant on below ground attenuation to provide sufficient storage of the sites required attenuation volume (73.6%). This is not compliant with Local Plan Policy SCLP9.6,</p> <p>Only FSR rainfall has been applied to calculations. Calculations provided for MDS WMZs show this to be the least conservative methodology which would result in an underestimation of the required attenuation volumes.</p> <p>No climate change allowance has been modelled.</p> <p>No pollution assessment has been undertaken.</p>	<ul style="list-style-type: none"> • SZC Co. provide explanation why temporary underground storage is reasonable. • Pump fail storage capacity • SZC/SCC to hold technical meeting to discuss issues with a view to reaching agreement, informed by supporting information. 	<p>1 Oct</p> <p>1 Oct</p> <p>1 Oct</p>
12	Freight Management Facility	As per SP&R	<ul style="list-style-type: none"> • SZC Co. provide explanation why temporary underground storage is reasonable. • SZC/SCC to hold technical meeting to discuss issues with a view to reaching agreement, informed by supporting information. • Open discussions with adjacent landowner (Home Farms) as to potential receipt of excess surface water. 	<p>1 Oct</p> <p>30 Sept</p> <p>8 Oct</p>
13	Swales in Sizewell link road.	<p>SCC position has concerns with having swales at the base of embankments rather than at the top.</p> <p>At meeting on 16 Sept SCC agreed to further technical discussions on this topic</p>	SZC Co. to hold discussion with SCC to resolve this issue or design to be modified to move swales to top of	30 Sept.

			embankment at future stage. Informed by cross sections.	
14	Two Village Bypass infiltration Basin 2 East of River Alde Embankment	<p>SCC is concerned that the position of the basin has been moved so that it is further from the highway to be adopted and separated by the farm access track.</p> <p>SCC are also concerned that the high infiltration rate could indicate a direct connectivity to the aquifer which could cause water quality issues.</p>	<p>SZC Co. to:</p> <ul style="list-style-type: none"> • Hold meeting with SCC to understand nature of concerns. • Review proposed position of basin and demonstrate that it works hydraulically and that there is no alternative to the alignment of the farm access track. • Provide data / evidence relating to basin and aquifer. 	<p>30 Sept.</p> <p>1 Oct</p> <p>1 Oct</p>

APPENDIX 3: SUMMARY OF LANDOWNER ENGAGEMENT ON THE MAIN DEVELOPMENT SITE COASTAL FLOOD RISK

Main development site – British Energy Generation Limited & EDF Energy Nuclear Generation Limited

Engagement has been undertaken with those landowners who are impacted to the greatest extent by the flood risk around the Main development site. Terms have been agreed for the freehold acquisition of the significant majority of the land impacted by this increased flood risk. Engagement is ongoing in relation to land where terms for acquisition have not been agreed.

Main development site – Additional Landowners

Engagement is ongoing with all the other landowners affected by the areas of additional flooding, either directly in meetings, or via their agents who have been thoroughly briefed on the extent of the potential additional flooding. Those landowners with whom discussions are progressed directly (in meetings) are unconcerned about the impact of what they see as an imperceptible difference in flooding in extreme events.

The landowners who have expressed these views, appreciate that the additional areas to be flooded in extreme events are contiguous with land that would already be flooded, if a similar event were to happen without the proposed scheme having been built.

Agreements to Flood the additional land are not proposed to be documented because the areas of additional flood land are:

- remote from the red line boundary.
- imperceptible from the existing flood events.

SZC Co. is awaiting feedback from agents in respect of some of the landowners, but there is regular communication between the parties and SZC Co. will seek to address any concerns. A summary table is provided below in respect of the additional third-party landowners.

Main development site – Natural England

At the request of the Environment Agency, SZC Co. has engaged with Natural England in respect to the RSPB's landholding. A report summarising the flood risk impacts was provided on 8 September 2021. A response is awaited.

Landowner	Engaged	Comments	Briefed	Prior Engagement
Ann Sylvester	Y - via agent	Awaiting feedback from agent	Meeting with agent 27 th August – Plans sent 8 th September	Y – SLR land take
David Edward Watson, Middleton	Y - via agent	Awaiting feedback from agent	Meeting with agent 27 th August – Plans sent 8 th September	N
Emma Louise & Laurence Justin Dowley	Y	Informed, consider impact insignificant	Meeting with landowner & agent 3 rd September – Plans shared	Y – SLR & MDS land take
Cripps Trust Corporation Limited	Y - as above	As above	As above	Y – as above
Francis James Winter & Stuart Edward Winter	Y - via agent	Awaiting feedback from agent	Plans sent to agent 8 th September (agent already briefed on 3 rd September)	Y – RE initial Marsh Harrier site options
John Robert Poll & Karen Poll	Y - via agent	Awaiting feedback from agent	Meeting with agent 27 th August – Plans sent 8 th September	Y – SLR & MDS land take
Nathaniel John Bacon & India Bacon	Y	Informed, consider impact insignificant. To revert on query regarding likelihood of 1 in 200 yr event.	Meeting with landowner & agent 2 nd September – Plans shown, not sent	Y – SLR land take & MH site
The RSPB	Y	Informed. Additional information requested, with updated report to be provided by SZC Co. by 30 September 2021.	Meeting with landowner. Plans and report previously provided 26 August 2021.	Y – SOCG meetings