

## LEGISLATIVE CONSENT MEMORANDUM

### Water (Special Measures) Bill

1. This legislative consent memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru<sup>1</sup> if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Water (Special Measures) Bill (“the Bill”) was introduced in the House of Lords on 4 September. The Bill can be found at: <https://bills.parliament.uk/bills/3751>.

#### Policy Objective(s)

3. The UK government is introducing the Water (Special Measures) Bill to strengthen the powers of the regulator and address water pollution issues. The Bill was announced in the King’s Speech on 17 July and reflects the Labour Government’s manifesto commitment. The proposed Bill is a response to the perceived widespread failures by the water sector in addressing pollution caused by sewage discharges and aging infrastructure. The Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs has agreed that all but one of the provisions which relate to the regulation of the water industry should apply to Wales.

#### Summary of the Bill

4. The Bill is sponsored by the Department for the Environment, Food and Rural Affairs.
5. The key provisions of the Bill cover measures which will strengthen the powers of water industry regulators, including Ofwat, Natural Resources Wales (NRW) and the Drinking Water Inspectorate (DWI).
6. The UK Government sought the Welsh Government’s view on the proposed Bill early in the process. The Secretary of State for Environment, Food and Rural Affairs wrote to the Deputy First Minister and Cabinet Secretary for Climate Change on 26<sup>th</sup> of July offering to work collaboratively and extend the provisions to Wales, if the Welsh Government wishes to do so. The Deputy First Minister and Cabinet Secretary for Climate Change agreed, in principle, to extend the provision to Wales and sought powers equivalent to those of the Secretary of State for the Welsh Ministers through the Bill. An initial draft of the Bill was

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<sup>1</sup> Please note in accordance with Welsh Government policy we refer to the legislature in Wales as “Senedd Cymru” on first use and “the Senedd” thereafter unless the context stipulates otherwise.

received from Defra on August 20<sup>th</sup> and, following addition of several measures, a final draft Bill was shared by Defra on August 29<sup>th</sup>. Water policy officials have been engaging with colleagues in Defra in assessing the proposed measures and assessing their relevance to and impact on Wales ahead of introduction.

7. The changes implemented by the Bill are made by a combination of freestanding provisions and amendments to the Water Industry Act 1991 and the Water Resources Act 1991, with those two Acts comprising a significant proportion of the existing legislative landscape in respect of water.

### **Provisions in the Bill for which consent is required**

8. The following clauses of the Bill have been identified as requiring consent because they relate to water industry, which is a devolved matter.

#### Clause 1 Rules about remuneration and governance

The Bill will create a new framework for holding companies and chief executives accountable for governance and remuneration, with the aim of improving performance and restoring trust in the sector. The provisions in the Bill will not set out the rules on remuneration and governance themselves but will provide Ofwat with the power to set rules for water companies. Ofwat is required to consult with the Secretary of State, the Welsh Ministers, the Consumer Council for Water, water companies and other relevant parties on all rules ahead of implementation.

#### Clause 3 Emergency overflows

This sets a new requirement on water companies to publish near real-time data (within an hour) on discharges from all emergency overflows by April 2035. This will require water companies to install Event Duration Monitors (EDM) on all emergency overflows. EDMs are already in place in Wales but currently without the reporting requirement. The Welsh Ministers have responsibility under this clause in relation to sewerage undertakers whose areas are wholly or mainly in Wales. The Welsh Ministers may by regulations make provision for exceptions from the duty under this clause.

#### Clause 4 Impeding investigations: sentencing and liability

Provisions already exist to allow Environment Agency, Natural Resources Wales and the Drinking Water Inspectorate to bring criminal charges against companies and executives, but there is a high evidential bar that must be met. Some regulators have faced issues gathering evidence for prosecutions because of obstruction of investigations. Obstructing the regulators is not always punishable by imprisonment, or triable in the Crown Court. The Bill will introduce provisions that will

- enable the courts to include imprisonment as a sanction in cases where the regulators' investigations have been obstructed;
- enable this offence to be heard in the Crown Court; and
- enable executives and directors to be prosecuted for this offence, where it is committed with their consent or connivance, or is attributable to their neglect.

#### Clause 5 - Civil penalties: modification of standard of proof

When applying civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 ("the 2008 Act") the current requirement is that the regulator must be satisfied "beyond reasonable doubt" that the company or individual has committed the relevant offence before applying the civil sanction. Defra Ministers feel that for some minor and moderate offences relating to water this standard of proof is disproportionately high and limits the ability of the regulator to successfully bring enforcement action.

Under the new provision the Welsh Ministers can introduce secondary legislation under the 2008 Act that will allow the regulator to apply civil sanctions to specified offences committed by water companies on the basis of a reduced "balance of probabilities" standard of proof. The objective of this is to make it easier for regulators to bring enforcement action against water companies who have committed certain environmental offences. This new provision is intended to sit alongside and complement any existing civil sanctions as well as the continued ability for the regulator to pursue criminal prosecution as an alternative. The Welsh Ministers will be required to consult prior to introducing the secondary legislation and such legislation will be subject to the affirmative procedure.

#### Clause 6 Automatic penalties for certain offences

The purpose of the automatic penalties is to place a duty on the regulator to take enforcement action whenever they are in possession of sufficient evidence to show that an offence has been committed by a water company. Exceptions to the duty to apply an automatic penalty are set out at clause 6(5) and include circumstances where the regulator determines that exceptional circumstances apply which mitigate the company's culpability. This could include circumstances where breaches occur for reasons outside the company's control, such as IT failures or where there has been third-party interference with company assets. Exceptions are also applied where more serious action is contemplated, such as criminal proceedings or variable monetary penalties. The offences automatic penalties can apply to must be specified by secondary legislation.

#### Clause 7 Abstraction and impounding: power to impose general conditions

This provision provides the Welsh Ministers with regulation making powers for the purpose of securing that water industry licences under this Chapter have effect, subject to conditions or rules specified in the regulations.

#### Clause 8 - Charges in respect of Environment Agency and NRW functions

The Environment Agency and Natural Resources Wales's regulatory activities are in part funded through environmental permitting and abstraction licensing charges to operators of relevant regulated activities. The bill will expand the powers available to the Environment Agency and Natural Resources Wales, enabling them to recover their costs for enforcement from water companies.

#### Clause 9 Drinking Water Inspectorate: functions and fees

The Drinking Water Inspectorate acts on behalf of the Welsh Ministers and are responsible for the regulation of the Security and Emergency Measures Direction specifically for water companies who are wholly or mainly in Wales. At present the Inspectorate cannot recover full costs for this work. The Bill will make amendments to sections 86 and 86ZA of the Water Industry Act. This will allow for subsequent amendments to be made to the Water Quality and Supply (Fees) Order 2016 to ensure that the Drinking Water Inspectorate are able to recover their Security and Emergency Measures Direction costs in full.

#### Clause 11 Modification by Welsh Ministers of water company's appointment conditions etc to recover losses

This provision relates to a special administration regime which applies when a water company is in insolvency. The Welsh Ministers have responsibility in relation to a water company operating wholly or mainly in Wales. The Bill will ensure that any possible shortfall in funding provided by the government during special administration can be fully recovered.

#### Clause 12 Winding-up petitions

Currently, in the event that a water company becomes insolvent, its directors or creditors could make a 'winding-up petition' (a legal tool used by creditors asking a company to be declared insolvent) without notifying government or Ofwat. In the subsequent court proceedings, there is no legal requirement for government or Ofwat to be heard. To address this gap, the Bill will set a requirement that government and Ofwat are notified of any winding-up petition presented to the court and give both parties guaranteed representation rights.

#### Clause 13 Extent, commencement, transitional provision and short title

This clause sets out when and how provisions of the Bill will come into force.

9. Consent is required for these provisions because they contain provision for a purpose within the legislative competence of the Senedd. No provisions modify the Senedd's competence
10. The Bill includes direct and indirect powers for the Welsh Ministers to make subordinate legislation. Direct powers for the Welsh Ministers to make regulations are contained in clauses 3 and 6 and these powers are subject to the affirmative Senedd procedure. New regulation-making powers for the Welsh Ministers are inserted into the Water Resources Act 1991 by clause 7, which will be subject to the negative procedure. Finally, clause 13 provides Welsh Ministers with commencement powers which are not subject to any procedure.
11. The provisions in para 11 relate to the regulation of the water industry, which is a devolved area of competence.

#### **UK Government view on the need for consent**

12. The UK Government has produced a devolution assessment indicating that legislative consent is required for all the clauses of the Bill, except clauses 2 and 10 which do not apply to Wales. Welsh Government agrees with this assessment.

#### **Reasons for making these provisions for Wales in the Water Special Measures Bill**

13. The Bill will bring positive changes and support our overall aim to reduce water pollution in Wales. The Bill legislates on a range of issues and policy matters on which the UK Government and Welsh Government share clear aims and objectives.
14. Water is an inherently cross-border issue, and the issue of environmental impacts of water quality is one we cannot solve alone. Welsh Government has always taken a collaborative approach within Wales to improving water quality and governance in the sector, and this Bill is an opportunity to extend that cooperation cross-border.
15. Some regulations and laws also apply in both England and Wales. A coordinated approach across is essential to ensure regulatory consistency.
16. Some elements of the Bill relate to reserved matters, notably on insolvency, therefore any legislation brought forward by the Senedd would not be as comprehensive as the current proposals.
17. Welsh Government has not yet agreed to the application of clause 2 to Wales, relating to putting Pollution Incident Reduction Plans on a statutory

footing. We will continue to review options on this issue and work with NRW and Defra to agree an approach which is appropriate to the context and approach to the sector in Wales.

### **Financial implications**

18. The Bill itself does not introduce any additional financial obligations for the Welsh Government.
19. Clause 2 relating to Event Duration Monitoring does carry an implicit duty on water companies to install relevant systems on their infrastructure. However, this is already largely in place across Wales and would in any event form part of ongoing Price Review settlements for the sector by the regulator Ofwat.
20. Clauses 5, 6, 8 and 9 relating to civil sanctions, automatic fines and cost recovery for regulators will allow for greater cost recovery for regulators and the imposition of financial penalties on water companies in Wales at a lower cost and administrative burden to the regulators.
21. Clause 12 allows for cost recovery (among other functions) by the Welsh Government in the event of Welsh Government having to implement its powers on Special Administration. This builds on existing law around Special Administration and allows for reduced or no financial costs in the long term for Welsh Government in the event of a Special Administration.

### **Conclusion**

22. In my view it is appropriate to deal with these provisions in this UK Bill as its aims are wholly in line with Welsh Government policy, the matter is an inherently cross-border issue requiring collaboration and coordination between our two Governments, and some elements of the Bill relate to reserved matters. Therefore, I recommend that the Senedd supports the proposals and gives its consent.

**Huw Irranca-Davies MS**  
**Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs**  
**18 September, 2024**