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With Compliments

Gyda Chyfarchion

Dear Abigail.

Please find enclosed Nigel Annett's response  
to William Powell's letter of 1 December (+enclosures),  
re: P-04-344 Freshwater East Public Sewer.  
Any queries please contact Peter Jones or myself.  
Kind regards  
Joe Price (Assistant to Nigel Annett)



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William Powell AM  
Chair, Petitions Committee  
National Assembly for Wales  
Cardiff Bay CF99 1NA

**Freshwater East**

Thank you for your letter of 1 December regarding Freshwater East and the petition your Committee has received from householders regarding the provision of a new Section 101A "first time" sewer.

You ask for our views on the matter and I enclose a copy of my letter of 27 November 2009 to Jane Davidson, then Minister for Environment, Sustainability and Housing, and a copy of my more recent letter to John Griffiths, Minister for Environment and Sustainable Development, which together will provide you with a good summary of where we stand.

In summary, we are legally required - following a determination first by the Environment Agency and more recently by the Welsh Government - to provide a Section 101A "first time" sewer serving households in Freshwater East. To date we have argued strongly - but unsuccessfully - that this scheme should not go forward on the grounds that it represents poor value for money. Having lost this argument and having agreed a legal undertaking with the Welsh Government to deliver the scheme in accordance with the determination made by Environment Agency Wales, we are asking that the Welsh Government requires that the Environment Agency (or any other enforcing authority) ensures that once the scheme is delivered the households for whom the new sewer has been laid are required to connect to it so that the (albeit limited) benefits are secured. This requirement that householders do actually connect to a new Section 101A sewer installed by Dŵr Cymru has not always happened in the past and investment expenditure has been wasted as a result (as illustrated in the enclosed correspondence).

**glas**  
Glas Cymru Cyfyngedig

We welcome correspondence in Welsh and English  
Rydym yn croesawu gohebiaeth yn y Gymraeg neu yn Saesneg

As you know, Dwr Cymru is owned on behalf of its customers and it is essential that our limited investment programme is directed at maximising environmental and other benefits. And as my letter to John Griffiths highlights, there are plenty of areas where we do need to invest in order to make material improvements to our environment.

I do not want you or your Committee to conclude that we are "at loggerheads" with either the Environment Agency or the Welsh Government. This has been a rare dispute (addressed openly and constructively) amongst general agreement between us on what our priorities for investment should be (we share common objectives which add up to delivering the best possible outcome for Wales and for everyone who relies upon Dŵr Cymru and the public service we deliver day to day). The root cause of this difficult and intractable situation (impasse even) is the state of the current guidance that relates to Section 101A schemes the updating of which all parties agree is long overdue (I understand that this updating is in hand).

I hope this letter plus enclosures meets your requirements. If you would like any more background on what has been a long running and very tricky issue to sort out please let me know.



Nigel Annett

Managing Director





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Jane Davidson  
Minister for Environment  
Sustainability and Housing  
National Assembly for Wales  
Cardiff Bay  
CARDIFF  
CF99 1NA

Dyddiad/Date: 27 November 2009

Ymholiadau/Enquiries: 01443 452193

Ein Cyf/Our Ref: Strategy/DEB/

Eich Cyf/Your Ref:

**S101A Water Industry Act 1991  
Freshwater East Judicial Review**

I write with regard to the judicial review of the Environment Agency's decision that we should provide a public sewer at Freshwater East further to the provisions of section 101A Water Industry Act 1991.

Section 101A requires sewerage undertakers to provide a public sewer for domestic premises where environmental or amenity problems are considered to arise, or to be likely to arise because of existing private arrangements for dealing with sewage, and where provision of a new public sewer is, in all the circumstances, the appropriate solution.

As I am sure you are aware, the judgment declared earlier this year supported in law maintenance of the Agency's decision taken at the time. A consequence of this judgment is a requirement for us to provide a sewer. Under section 101A a failure to provide a sewer is enforceable by the Welsh Assembly Government under the Water Industry Act 1991, section 18.

However we do not believe that, in the light of more recent information coming to light after the Agency's decision in May 2007, it would be in the best interests of our customers at large, or the environment, to expend the monies otherwise required for the reasons that I set out in this letter. In our view, the economic and environmental dis-benefits far outweigh the minimal, if any, benefit from providing the sewer. In fact, as is set out below, providing the sewer in light of the most recent information itself causes environmental and public amenity disadvantages. I write accordingly to request that the Welsh Assembly Government does not enforce the duty to provide the sewer.

glas

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For completeness of this letter, I first set out the background to this particular S101A case. I apologise if this is all familiar to you already.

### **Background**

The S101A duty for Freshwater East has been assessed on three occasions. Acting on our behalf, Faber Maunsell first considered the position and reported their conclusions by letter in May 2000, when it was decided that the duty did not apply.

We agreed to have this decision reviewed on request of the original applicant, Lamphay Community Council. Faber Maunsell took into account new evidence that had then been brought to our attention at that time. The conclusion of that review was that the duty should apply. The findings were issued in a report dated February 2005.

However, at that time, our S101A assessment process did not take into account environmental cost-benefit considerations or specifically the willingness of property owners of those properties identified as polluting or likely to pollute, to connect to any new sewer, were one to be installed.

We were of the view that these were very important considerations that should be the subject of a s101A assessment process. We were concerned that any final decision as to provision of a public sewer should take due account of these considerations and felt that because these considerations had not been taken into account previously, our prior decisions on Freshwater East might be flawed as a matter of law, and in any event, substantively.

Because of these concerns, later in 2005 we decided to suspend works on a number of S101A schemes that were to have been undertaken in AMP4, while we reviewed the decisions made in respect of each scheme. This review involved 8 schemes including Freshwater East. In each case we wrote to the applicants involved on 4 October 2005 and informed them of our concerns and of our intentions. Throughout the review we kept all applicants informed in writing.

By February 2007 we had carried out an evaluation of each case and reached the decision that 7 of the 8 cases, including Freshwater East, had not been properly considered. We therefore decided that all such applications should be completely re-assessed. We wrote to the relevant applicants on 23 February 2007 withdrawing our earlier decisions that the areas qualified under S101A, and informed them that we would re-assess all 7 cases.

The re-assessment for Freshwater East was completed and the applicant informed in a letter dated 3 July 2009. The re-assessment, now properly taking into account environmental cost-benefit and the willingness to connect issues, concluded that:

- The number of polluting properties, including properties that do not cause pollution now but may be considered as likely to pollute in the future, had reduced substantially since the 2005 assessment –



from 81 down to 39. This was predominantly because a fault with the private drainage arrangements of an apartment block had been rectified by the owners of the building.

- The financial cost of providing a public sewer would be £2.6m
- If a public sewer were to be provided and the owners of all 39 properties chose to connect, the net value of the improvement to the environment and amenity when expressed in monetary terms would be around £240,000, only 9% of the cost of the scheme and therefore not representing value for money for our customers.
- Enquiries made of the 39 property owners as part of the re-assessment had indicated that only 3 were willing to make connections from their properties. This would erode the already low value of the improvement generated from £240,000 to £17,800, or less than 1% of the cost of the scheme.
- The NPV or whole life cost of solving the problems by the provision of cesspools at each property was now less than that of providing a public sewer, because of the reduction in the number of properties involved since the 2005 assessment. From a simple economic perspective therefore, a private solution would be the least costly.

The applicants for the Freshwater East sewer had been notified of our decision to review all the applications in our October 2005 letter. However in December 2006 they informed the Environment Agency that they were in dispute with us because we had not given a date by which we would provide a sewer following our February 2005 decision that the duty applied, effectively disregarding our plans for the review. The Agency processed the dispute with similar disregard for our review and determined that a date for provision of the sewer. We did not accept the Environment Agency's actions and this led to our application for judicial review of the Agency's decision in respect of Freshwater East.

The Judicial Review judgment has clarified a number of issues to do with the S101A provisions. Most relevant here are that environmental cost-benefit and the level of willingness amongst property owners to connect to any new sewer are both relevant considerations.

However, the Judge concluded that these aspects had been previously considered in our case in a different guise, and thus not in the manner or to the extent that we now believe should apply. As a result, the Judge was unable to hold that the Agency 2007 decision was not, on the basis of the material to which the Court was permitted to have regard, legally flawed so as to allow the court to issue a quashing order. The court did not have regard to the 2009 re-assessment in coming to its decision. We of course accept the Court's decision on the law.

Whilst, therefore, we failed to obtain a quashing order on this particular matter, we succeeded in establishing that we cannot be precluded in all circumstances from reviewing a decision under S101A. Withdrawal or revocation of a decision can be effective even if not sanctioned by the Environment Agency.

The Court also recognised the legality of taking into account willingness to connect and also the legitimacy of applying environmental cost benefit analysis as set out in the Green Book - this position had always been consistently opposed by the Agency

#### **Why we consider it inappropriate to provide a sewer under S101A**

We are firmly of the view that a sewer should not be provided at Freshwater East under S101A because, further to the points made above:

- At £2.6m, the cost of the sewer would be more than 10 times greater than the maximum potential value of the improvements to the environmental and amenity benefit that could be generated – that is assuming that all 39 properties were to connect to a new public sewer.
- Enquiries made of all 39 property owners once our re-assessment report of June 2009 had been issued to the applicants found that only 5 would connect their property to a new sewer, 3 may connect and 23 would not. 8 owners failed to respond. This low level of interest in making connections reflects experience we have gained following construction of S101A schemes during AMP3. \*
- The low level of connection would itself mean that the new public sewer would not be an effective solution either as to use of financial and natural resources or more broadly at Freshwater East.
- Provision of a new sewer which is under-utilised can generate additional operational problems such as blockages and odour, leading to increased operational costs, an unsatisfactory service for customers and adverse experience for the public.
- We do not have power to require owners to make their properties connect to a public sewer if one were to be provided, nor do we have powers to prosecute for pollution. These powers rest with Local Authorities and with the Environment Agency. All are reluctant to use their respective powers to compel connection where such power is available to them.
- The 2009 re-assessment has found that overall a public sewer would cost more than a private solution. In any event, it has now been shown on a simple approach not to be a cost effective solution.
- The final conclusions of our 2009 re-assessment were not available in time for the judicial review and were not taken into account by the court.

\* This is in part because of the high cost of making a connection<sup>4</sup> - typically £3-8,000.



The Welsh Assembly Government has discretion as to recourse to its enforcement powers under section 18. Given the disbenefits of provision of a public sewer, we respectfully request the Welsh Assembly Government to exercise its discretion so as to refrain from using the enforcement powers under section 18 of the Act in relation to s101A as regards Freshwater East.

There are other provisions within the Act which would enable the property owners or the local authority to secure a public sewer for the area in a cost effective and environmentally beneficial manner, and we would be happy to offer assistance and advice on this.

**Discretion in the use of enforcement powers.**

Given the importance of the matters in issue, we have sought Counsel's Opinion as to the discretion of the Welsh Assembly Government regarding use of the Section 18 enforcement powers. That Opinion advised us that it does possess such discretion. I enclose a copy of the Opinion (dated 16 October 2009) for your reference, together with copies of related documents to which it refers.

While not detracting from the benefit of studying the Opinion as a whole, may I draw your particular attention to paragraph 21, the scenarios explored, and in relation to these, paragraphs 41, 59, and 60.

Once you have had an opportunity to consider this request, we would be pleased to discuss the matter in more detail with you or your officials. It may be helpful at that stage if we were to present plans of the private and public options considered, the comments provided by the property owners in response to the enquiries mentioned, which illustrate their views on whether a sewer should be provided for their area, as well as any other information that you would find helpful.

Yours sincerely



**Nigel Annett**  
Managing Director

*I have copied this letter plus  
enclosures to Chad Miles.*

Encl  
Opinion  
Key sections of the Water Industry Act 1991  
Judgement  
"the OFWAT case": *R v [OFWAT] ex parte Lancashire CC and Others [1998]*





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John Griffiths AC/AM  
Minister for Environment and Sustainable Development  
Welsh Government  
Cardiff Bay  
Cardiff CF99 1NA

4 November 2011

*Dear John*

**First time sewerage, S101A Water Industry Act 1991**

Thank you for your letter of 26 October regarding the provision of first time sewerage at Freshwater East. We will of course comply with your direction and I will shortly let you have a draft Section 19 undertaking under which we will carry out the necessary steps to comply with our duty to provide first time sewerage at Freshwater East in accordance the determination made by Environment Agency Wales.

The Freshwater East scheme will cost around £3.0 million and will represent very poor value for money indeed. When we last surveyed the 39 properties that will be expected to connect to the new sewer, only 5 said that they were willing to make a connection; 23 said they would not connect, 3 were undecided and we were unable to get a response from the remaining 8. This is hardly surprising as the cost of connecting to the new sewer at Freshwater East will be in the range £2-16,000 per household.

**glas**  
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This indicated poor take-up at Freshwater East echoes our experience elsewhere. Over the last 10 years we have spent some £10 million of our customers' money on 20 S101A schemes. In many instances, the take-up has been low and as a result the environmental benefits have not been delivered. Not only does low take-up limit the environmental benefit but it also creates operational problems for us such as blockages and odour because flows in the new sewer are less than the designed capacity. So, for example, at Titley in Herefordshire none of the 10 properties have connected to the new S101A sewer and as a result we are having to tanker sewage away from the site. Similarly, at a first time sewerage scheme at St Briavels not one of the four properties has connected. At East Williamston only 7 of the 34 properties have connected to a scheme delivered in 2007 at a cost of £1.2 million.

When household incomes in Wales are being squeezed hard - as a result of rising energy bills, high RPI and falling real incomes, as well as changes to benefits - it is all the more important that we spend our customers' money carefully and deliver as much as possible from what is a fixed capital budget, and I know that this is your priority too.

At today's Board meeting, we decided that we would reprioritise our investment spend over the remainder of this AMP5 regulatory period to find £8 million to bring forward ten high value schemes in the Llanelli and Gowerton catchments to remove rainwater from our sewer system to reduce the risk of flooding and cut the number of spills following storms. We must ensure therefore that the S101A scheme which will now go ahead at Freshwater East delivers environmental and other benefits that compare with what the £3 million would deliver if invested on making improvements to our sewerage system elsewhere.

Can I therefore ask that, alongside our Section 19 undertaking, you secure from Environment Agency Wales a binding commitment that they will ensure that all polluting properties do in fact connect to the new sewer once it is constructed. It will be embarrassing, to the say the least, if we spend £3 million at Freshwater East and only 5 of the 39 properties chose to connect, especially when that £3 million could achieve a great deal at places like the Loughor Estuary.



There are another four S101A schemes with an estimated cost of some £2 million that have been determined by Environment Agency Wales which we will now progress during the course of AMP5 and I would like you to secure from Environment Agency Wales a similar binding commitment that they will ensure that polluting properties connect, once the new sewer is commissioned. Better still, would be a requirement that Environment Agency Wales revisits all the S101A schemes that we have delivered over the last 10 years and uses its powers to require those polluting properties that did not connect to do so.

I met with Claire Bennett and Chris Mills last week to review our progress on tackling the problems caused by the very high volumes of rainwater draining into our sewer system in the Llanelli and Gowerton catchments and I told both that I would be writing to you about Freshwater East in these terms.

Incidentally, I am very encouraged by the work we have done on the Loughor Estuary and what we now plan to do; taking rainwater out of sewerage systems is the way forward (NB climate change and dealing with the likelihood of more frequent intense storms is one of our biggest challenges) and our plans for Llanelli and Gowerton will become a reference site for what the future holds. I think you would be interested in seeing the results of the modeling and other work we have done to date and our immediate plans which are underway following today's Board meeting; let me know if you would like me to arrange a briefing.

Yours ever

Nigel

Nigel Annett  
**Managing Director**