

Water today, water tomorrow

# Water supply licensing – guidance on eligibility

## Contents

1. Introduction	2
2. The obligations of appointed water companies	5
3. Premises	7
4. Household and non-household premises	11
5. The threshold requirement	14
6. Determinations	24
7. Glossary of terms	26
<b>Appendix 1:</b> Examples of threshold requirement and premises	29
<b>Appendix 2:</b> Examples of premises that are likely to be household premises and non-household premises for the purpose of the water supply licensing regime	32
<b>Appendix 3:</b> Examples of premises raised in response to the licensing and eligibility consultation for eligibility consideration	34

## 1. Introduction

### 1.1 Background

The Water Industry Act 1991 (WIA91) permits a company that holds a water supply licence (licensee) to have access to an appointed water company's supply system to enable the licensee to supply water to its customers at eligible premises. Prospective licensees have to obtain a water supply licence before they can supply water through an appointed water company's supply system in competition with the appointed water company. Our guidance on making a licence application sets out the process and the information we will require from an applicant.<sup>1</sup> Prospective licensees can apply for one of the following.

- A **retail licence** – a water supply licence that authorises the holder to use an appointed water company's supply system for the purpose of supplying water to the premises of its customers (retail authorisation). A retail licence therefore permits the supplier to purchase a wholesale supply of water from an appointed water company and to retail it to its customers at eligible premises.
- A **combined licence** – a water supply licence that gives the holder the supplementary authorisation in addition to the retail authorisation. The supplementary authorisation allows the holder to introduce water into an appointed water company's supply system by means of which any particular supply of water to the premises under the licensee's retail authorisation is to take place.

### 1.2 Purpose of this guidance

Section 17A(3) WIA91 sets out the following three requirements which must be satisfied in relation to each of the premises supplied by a licensee:

- the customer's premises are not household premises;<sup>2</sup>
- when the licensee first enters into an undertaking (as explained in section 5.1.1) with a customer to give the supply, the total quantity of water estimated to be supplied to the premises annually by the licensee is not less than 5 megalitres (MI)<sup>3</sup> in relation to premises supplied with water using the supply

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<sup>1</sup> See the Water Supply Licence (Application) Regulations 2005 (SI 2005/1638) and Water Act 2003: Guidance on Applying for a Water Supply Licence.

<sup>2</sup> See section 17C WIA91.

<sup>3</sup> 5 million litres, or 5,000 cubic metres (m<sup>3</sup>).

system of an appointed water company operating wholly or mainly in England and not less than 50 Ml in relation to premises supplied with water using the supply system of an appointed water company operating wholly or mainly in Wales (the threshold requirement)<sup>4</sup>; and

- the premises are not being supplied by another licensee (but may be supplied by a licensee and one or more appointed water companies).

In all cases and for all aspects of eligibility, the licensee rather than the appointed water company must ensure that the premises of a potential customer are eligible. Unless doing so in pursuance of its licence, it is a criminal offence for a licensee to use an appointed water company's supply system for the purpose of supplying water to any premises of a customer, or for a licensee to introduce water into an appointed water company's supply system.<sup>5</sup> It is therefore a criminal offence for a licensee to breach any of the eligibility requirements set out above. In addition, any licensee that contravenes these requirements could face enforcement action by us under section 18 WIA91 and may incur financial penalties under section 22A WIA91. Alternatively, a licensee could face revocation of its licence.

**A licensee or prospective licensee should seek its own legal advice if it is unsure whether a customer's premises is eligible.**

This guidance explains how to assess whether a customer's premises is eligible to be supplied by a licensee. It includes information on what constitutes a single set of premises, premises that are likely to be household premises and non-household premises for the purpose of the water supply licensing (WSL) regime, and how to decide whether the threshold requirement is met.

It is important to note that premises may change in such a way as to make the original premises no longer eligible. For example, a site that meets one of the criteria in chapter 3 might be split into separate premises, in which case the licensee will need to assess the eligibility of each separate set of premises. In other cases, the premises might change its use to become household premises.

Regarding the threshold requirement, as long as it is met at the time the licensee enters into the undertaking to supply a set of premises, and those premises do not change, the same licensee can continue to supply those premises for the duration of the undertaking, even if consumption falls below the threshold requirement.

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<sup>4</sup> See section 17D WIA91.

<sup>5</sup> See sections 66I and 66J WIA91.

This guidance has been prepared on the basis of a 5 MI/year threshold requirement (and a 50 MI/year threshold requirement where applicable).

Customers, licensees and appointed water companies should consult this guidance when assessing whether a customer's premises is eligible.

### 1.3 Structure of this guidance

This guidance is structured as follows.

- Chapter 2 outlines the obligations on appointed water companies to enable water supply by licensees.
- Chapter 3 contains guidance as to what constitutes a single set of premises, with specific examples.
- Chapter 4 describes household and non-household premises and principal use.
- Chapter 5 contains guidance on the threshold requirement and explains how to assess whether it is met.
- Chapter 6 outlines the process to follow when requesting a determination on eligibility.
- The appendices include examples of eligible premises, household and non-household premises, and premises raised during the consultation process.

This document includes:

(a) statutory guidance which we are empowered to issue with the approval of the Secretary of State (having consulted the Welsh Ministers) as to the factors which are, or are not, to be taken into account in determining the extent of any premises for the purposes of section 17A(3) WIA91; and

(b) statutory guidance which we are required to issue with the approval of the Secretary of State (having consulted the Welsh Ministers) in accordance with which any estimate of the quantity of water to be supplied to any premises for the purposes of section 17D(2) WIA91 and Regulation 3 of the Water Supply Licence (New Customer Exception) Regulations 2005 (SI 2005/3076) shall be made.

**This document also sets out our understanding of provisions of the WIA91 and of relevant regulations and orders. It is not a substitute for the WIA91 or the regulations and orders made under the WIA91, or for any other legal provision. This document should be read in conjunction with those legal instruments and England and Wales case law. Anyone in doubt about how they may be affected should seek legal advice.**

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## 2. The obligations of appointed water companies

Sections 66A to 66C WIA91 set out the duties of appointed water companies to provide a supply of water to a licensee and/or to permit a licensee to introduce water into the appointed water company's supply system. These sections also set out the circumstances in which these duties do not apply.

Under section 66A(3) WIA91, an appointed water company does not have a duty to provide a supply of water to a licensee, or to take any steps to enable it to provide such a supply, if both the first and second conditions below are satisfied, or if the third condition below is satisfied.

- The first condition is that:
  - (a) the premises to be supplied by the licensee consist only of land, for example those premises do not include a building or part of a building; or
  - (b) the supply to be made by the licensee to the premises is not for household purposes<sup>6</sup> (see chapter 4).
  
- The second condition is that the provision of the supply by the appointed water company would:
  - (a) require the appointed water company to incur unreasonable expenditure in carrying out works, in order to meet all its existing obligations to supply water for household or other purposes, together with its probable future obligations to supply water to buildings and parts of buildings for household purposes; or
  - (b) otherwise put at risk the appointed water company's ability to meet any of those existing or probable obligations.
  
- The third condition is that there is a contravention of regulations 3, 4 or 5(1)(c) of the Water Fittings Regulations (in so far as they apply by virtue of regulation 2 of those Regulations)<sup>7</sup> in relation to the water fittings used or to be used in connection with:
  - (a) the supply of water to the premises to be supplied by the licensee; or
  - (b) the use of water in those premises.

Similar conditions apply in relation to appointed water companies' duties under sections 66B and 66C WIA91. We may determine, in any case referred to us by a

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<sup>6</sup> 'Household purposes' refers to the use of water for drinking, washing, cooking, central heating and sanitary purposes: see section 218 WIA91.

<sup>7</sup> See the Water Supply Licence (Prescribed Water Fittings Requirements) Regulations 2005 (SI 2005/3077).

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licensee, whether any of the above conditions are satisfied. Details of the procedure for requesting a determination by us can be found in our guidance.<sup>8</sup>

Licensees and appointed water companies will be expected to reach agreement on the terms and conditions for retail supply and/or the introduction of water into the appointed water company's supply system. Where parties cannot agree terms, licensees can ask us to determine them.

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<sup>8</sup> See Water Act 2003: Procedure for handling water supply licensing determinations.

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### 3. Premises

This part of the guidance is made under section 17A(9) WIA91 and has been approved by the Secretary of State after consulting the Welsh Ministers.

The WIA91 does not define ‘premises’ for the purpose of assessing eligibility. Premises can include buildings or land. Licensees can only supply customers at individual eligible premises. Each of the premises supplied must be eligible. Customers cannot aggregate consumption at more than one set of premises in order to achieve eligibility, although some groups of properties may constitute a single set of premises in certain circumstances.

The guidance in this document about the factors to be taken into account in determining the extent of any premises applies to the requirements in section 17A(3) WIA91. It also applies to the assessment of whether a person is prohibited from using an appointed water company’s supply system for the purpose of supplying water to any premises of a customer under section 66I WIA91. The two provisions need to be interpreted consistently.

Licensees and appointed water companies should also refer to section 66I(2) WIA91 and the Water Supply (Exceptions from Supply System Prohibitions) Regulations 2005 (SI 2005/3075) concerning the circumstances in which the prohibition in section 66I WIA91 does not apply.<sup>9</sup>

#### 3.1 Defining the boundary – the extent of a premises

We will assess the eligibility of a customer’s premises with reference to the extent of those premises in the context of the criteria set out in this section. This is a mixed question of law and fact. Premises may not receive a water supply from more than one licensee at a time, but may receive a supply from a licensee and one or more appointed water companies. It is therefore important that licensees take account of this when assessing whether they can make a supply. In addition, the threshold requirement must be met within the boundary of a single set of premises.

Existing case law on the meaning of ‘premises’ must be treated with caution as the extent of any premises should be assessed in the particular statutory context of the WIA91. However, there may be some common themes. The new WSL provisions intend to capture the idea of a single customer at a single set of premises. The

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<sup>9</sup> These Regulations also apply to the prohibition in section 66J WIA91.

extent of the customer's premises should be assessed by reference to the buildings, other similar structures and/or areas of land for the benefit of which water is being, or will be, supplied. For example, premises could comprise one or more buildings or similar structures together with such associated land, facilities, amenities and services as are used for the purposes of the building(s). The new WSL provisions do not intend to change most existing arrangements whereby appointed water companies supply water on a large user tariff to single customers at single sets of premises. Therefore, a good starting point may be the appointed water company's existing assessment of whether a group of properties amounts to a single set of premises. However, some adjustments to certain existing assessments may be necessary, as different appointed water companies may have used different assessment criteria.

There will be a single set of premises in the following circumstances:

- (i) the premises are located within a single boundary and a single customer occupies the premises and is liable for water bills in respect of those premises (single boundary premises);
- (ii) the premises consist of co-located buildings, other similar structures and/or land which have adjoining boundaries or which are separated only by transport infrastructure and a single customer occupies the premises and is liable for water bills in respect of those premises (common occupation co-located premises); or
- (iii) the premises consist of a single building or co-located, separately occupied buildings, other similar structures and/or land with all four of the following characteristics:
  - they have a common landlord or managing agent in respect of the totality of the premises;
  - they have adjoining boundaries or are separated only by transport infrastructure;
  - they are served by a self-contained common water supply system that does not belong to an appointed water company; and
  - a single customer is liable for water bills in respect of the totality of the premises (common management co-located premises).

If premises meet the criteria in paragraphs (ii) or (iii), the criterion in paragraph (i) cannot be applied to any part of the premises as a means of reducing the area in order to bring the reduced premises within the eligibility requirements.

### **i) Single boundary premises**

In most cases, single boundary premises for these purposes will be the same as those that the appointed water company supplies with water. The boundary will usually be clear from the land register or from the property deeds. A single customer does not only mean a single legal or natural person. A single customer means a single economic entity or business which is liable for water bills. A single set of premises can have more than one meter and the number of meters is not necessarily a good indication of whether those premises comprise a single set of premises.

Appendix 1 shows an example of the application of the single boundary rule.

### **ii) Common occupation co-located premises**

Premises can be eligible even if transport and major through-traffic infrastructure separate parts of those premises. Transport infrastructure includes public highways, railways, other public rights of way and watercourses. Where a customer has two sites located on both sides of a public highway, and which satisfy the common occupation co-located premises criterion (and are therefore to be regarded as a single set of premises), the water consumption at those two sites can be added together to determine whether the threshold requirement is met.

Co-located premises with constituent parts that are separated from each other by anything other than transport infrastructure and its directly associated land are not eligible. For example, co-located premises separated by common land are not eligible. Likewise, co-located premises that are separated by a combination of common land and transport infrastructure are not eligible because of the existence of common land (that is something ‘other than transport infrastructure’).

Appendix 1 provides four examples of the application of the common occupation co-located premises rule.

### **iii) Common management co-located premises**

A set of co-located premises can be eligible when occupied by several persons who enjoy common water distribution services with a common landlord or managing agent and a single customer is liable for water bills. For example, a developer might sell or lease plots of land to industrial and commercial users on an industrial park. The sites might together be eligible if one organisation, which is liable for water bills for all sites, manages the sites and the self-contained water distribution system.

If a development comprises co-located industrial and commercial properties and houses, the houses will only be considered part of the single set of premises if they are commonly managed with the other industrial and commercial properties and are not billed directly for water. The other criteria in category (iii) will also need to be met. It is likely that most houses would be separately managed and therefore premises in their own right. Houses that are separate premises would fall under the definition of household premises<sup>10</sup> described in chapter 4.

Our interpretation of ‘single customer liable for water bills’ does not include a billing agency arrangement under which a managing agent acts as the ‘post box’ for the individual occupiers of the premises and does not incur any personal liability in respect of those bills. It only applies where the managing agent is personally liable for the bills.

It will not necessarily be possible for two completely separate businesses to create eligible premises by simply joining their pipe networks together and for one of them to be solely liable to the supplier for the water bills for their premises as a whole. First, in most cases, the two businesses will not have a common landlord or managing agent. Secondly, in many situations the businesses will not have adjoining boundaries or be separated only by transport infrastructure. Thirdly, in some cases it will not be possible to join the two water pipe networks without using the appointed water company’s supply system.

Appendix 1 provides an example to illustrate the application of the common management co-located premises rule.

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<sup>10</sup> See section 17C WIA91.

## 4. Household and non-household premises

### 4.1 Domestic/non-domestic use and household/non-household premises

This chapter is non-statutory and subject to any regulations the Secretary of State or the Welsh Ministers may make under sections 17C(3) and (4) WIA91. The Secretary of State and the Welsh Ministers have no current policy intention to make regulations.

We will take this chapter into account when determining issues a licensee or a potential customer of a licensee refers to us under section 17E WIA91, as to whether the premises to be supplied are household premises.

Premises that satisfy the single set of premises eligibility requirement described in chapter 3 must also satisfy the requirement in section 17A(3)(a) WIA91 that the premises are not household premises.

The WIA91 provides for the supply of water for domestic and non-domestic purposes. The purposes refer to the primary purpose for which water is used. It does not affect the non-household requirement for eligibility.

As set out above, water supplied for ‘domestic purposes’ refers to water used for drinking, washing, cooking, central heating and sanitary purposes.

Section 17C WIA91 defines household premises as those in which, or in any part of which, a person has his home. The fact that a person has his home in, or in part of, any premises does not mean that the premises are household premises unless the principal use of the premises is as a home.<sup>11</sup> For example, a hospital has health workers’ accommodation, but the hospital is not ‘household premises’ for the purpose of the WSL regime, provided that the principal use of a hospital is not as a home. Under those circumstances, the use of water for domestic purposes to supply its health workers’ accommodation does not affect the hospital’s eligibility to be supplied by a licensee.

Appendix 2 sets out what we consider to be household and non-household premises for the purpose of the WSL regime. It takes account of and, where relevant, is consistent with definitions of the use of premises under other legislative provisions. By way of example, amendments to the WIA91 made by the Water Industry Act 1999

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<sup>11</sup> See section 17C(2) WIA91.

(WIA99) removed appointed water companies' powers to disconnect a water supply for non-payment in respect of a specific list of premises. However, the list in appendix 2 is not identical to Schedule 4A WIA91, which was inserted by the WIA99, because the WSL regime pursues different policy aims from Schedule 4A WIA91. For example, under Schedule 4A WIA91, a university and a private dwelling house are both listed as premises that cannot be disconnected for non-payment of water bills. For the purposes of the WSL regime, however, a university is potentially eligible for a supply by a licensee (whereas a house is not, on any basis).

## 4.2 Principal use

Having considered the circumstances of a particular case against the examples of household and non-household premises in appendix 2, a licensee or customer might find that a single set of premises comprises both a household and a non-household element. For the purposes of the WSL regime (section 17C WIA91), household premises are those in which, or in any part of which, a person has his home, and where the **principal** use of the premises is as a home. So, for example, a hospital site might consist of a main building (that is, where the principal use is not as a home) and another building containing health workers' accommodation (that is, where the principal use is as a home).

By way of guidance, we consider that the principal use of mixed-use premises will not be as a home where both of the following criteria are satisfied.

- **The household part of the premises is dependent in some way upon the non-household part.** We define 'dependent' as meaning that the existence of the household part is linked to the function of the non-household part of the premises. For example, a university hall of residence is dependent upon the university, as there would be no need for the hall in the absence of the university. Similarly, health workers' accommodation and barracks are dependent upon the hospital and the military base respectively; and
- **The premises are liable for business rates or are exempt from business rates but the type of premises in question appears within the list of non-household premises in appendix 2.**

These criteria are to be applied only where there are mixed-use premises and the principal use of those premises is in question.

Inevitably, these criteria will not cover all circumstances. Where there is any doubt, we have the power, in a case referred to us by a licensee or a potential customer of a licensee, to determine whether premises are household premises.

## 5. The threshold requirement

This chapter includes statutory guidance and is issued under section 17D(3) WIA91, which sets out the threshold requirement, and has been approved by the Secretary of State after consulting the Welsh Ministers. Any estimate of the quantity of water to be supplied to any premises for the purposes of section 17D(2) WIA91 and Regulation 3 of the Water Supply Licence (New Customer Exception) Regulations 2005 (SI 2005/3076) (the New Customer Exception Regulations) shall be made in accordance with this guidance.<sup>12</sup>

The threshold requirement is that, at the time the licensee first enters into an undertaking with a customer to supply the premises, the total quantity of water estimated to be supplied annually by the licensee is not less than 5 MI (or 50 MI in relation to premises supplied with water using the supply system of an appointed water company operating wholly or mainly in Wales). The threshold requirement relates to the amount of water the licensee supplies using one or more appointed water companies' supply systems (as defined in section 17B(5) WIA91). The amount of water that a customer receives by means of private supplies does not count towards assessing whether the threshold requirement is satisfied.

### 5.1 When does the threshold requirement take effect?

#### 5.1.1 Undertaking and premises

The word 'undertaking' has a wider meaning than the word 'contract' or 'agreement' in ordinary contract law. An undertaking may be entered into once commercial managers have agreed the principal commercial terms of an agreement, but before the legally binding contracts have been finalised and signed. However, it will be easier to demonstrate that an undertaking has been entered into once legally binding agreements have been signed. An undertaking may also encompass a number of successive agreements on similar terms.

Water use only has to be assessed at the time when the licensee first enters into an undertaking with a customer to supply any particular premises. As long as the total quantity of water estimated to be supplied to the premises at that time is not less than the threshold requirement, a customer can continue to be supplied by the same licensee for the duration of the undertaking even if consumption at those premises falls below the threshold requirement, provided that the premises does not change.

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<sup>12</sup> See section 17D(3) WIA91 and Regulation 4 of the New Customer Exception Regulations.

Where a customer reduces its demand below the threshold requirement for any reason after the licensee has entered into an undertaking with the customer, provided that the premises do not change, the customer will continue to be allowed to take supplies from the licensee for the duration of the undertaking. This is because the supply is part of the same undertaking. Alternatively, the customer could choose to be supplied by the appointed water company or another licensee. However, the customer will not be allowed to transfer to another licensee unless its premises meet the threshold requirement at that time.

This flexibility is in order not to penalise customers if their demand falls after they have switched, for example because they have implemented water efficiency measures after the licensee has first entered into the undertaking to give the supply. Indeed, offering such measures could be part of a licensee's competitive strategy. However, if there is an interruption in the supply by a licensee (for example, because a customer enters into an undertaking with a different licensee), the threshold requirement will have to be reassessed if and when the first licensee enters into another undertaking with the customer. In this regard, 'first enters into an undertaking' refers to the time at which the licensee and a customer first enter into any given undertaking. It does not simply require that the threshold requirement be satisfied at the time of entering into the first such undertaking.

In some cases, premises may close temporarily either through planned or unplanned circumstances. Where premises have a planned closure for several months in every year, and do not require a supply during that period, the threshold requirement must still be satisfied taking into account the closure period. Each time premises reopen after a planned temporary closure, there will have been no interruption in supply because the planned closure will have already been taken into account in the undertaking.

Premises may also close temporarily and unexpectedly for a short period and may not need a supply of water during that period. When the customer reopens its premises, the supply will not have been interrupted because the parties did not intend to terminate their commercial relationship. The threshold requirement will not need to be satisfied for a second time when the premises reopen.

The threshold requirement **will not** have to be satisfied a further time, and water use will not have to be reassessed against it in the following circumstances (among others):

- an agreement expires or is cancelled and is immediately renewed to ensure the ongoing supply of water at the same premises by the same licensee with the undertaking remaining in place;

- the licensee's water supply licence is varied, but the licensee continues to supply the same premises;
- the terms of the agreement to supply water at the same premises are varied, irrespective of the impact on water supplied, but the undertaking remains in place;
- the customer changes its use of the premises;<sup>13</sup>
- there is a temporary closure of premises owing to expected or unexpected circumstances; or
- there is a temporary interruption in the supply of water owing to technical difficulties.

The threshold requirement **will** have to be satisfied a further time, and water use will have to be reassessed against it in the following circumstances (among others):

- at the same premises, a customer wishes to change its supplier from licensee A to licensee B;
- at the same premises, having been supplied by licensee A and then having been supplied by an appointed water company or licensee B, a customer wishes to revert to licensee A (in those circumstances, licensee A would not be continuing the original supply and any new supply would be pursuant to a new undertaking);
- a customer moves to new premises and wishes those new premises to be supplied by the licensee;
- a customer sells part of its premises so that the original premises is split and occupied by different customers; or
- a customer buys a plot of land next to its existing premises, so that the two plots of land together form a new single set of premises.

The threshold requirement **will not** have to be satisfied a further time in respect of premises which always meet the common management co-located premises criteria (see paragraph (iii), section 3.1) and which merely takes on new occupiers or creates new sites within its boundary. However, if a set of premises that meets any of the criteria in section 3.1 is divided into separate premises, the threshold requirement **will** have to be satisfied in respect of each of those new sets of premises. Examples of this would be where category (i) or (ii) premises are split by transfer to two separate occupiers or category (iii) premises are split such that two managing agents are liable for water bills.

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<sup>13</sup> This only refers to the need to reassess the volume of water supplied; if the premises are changed from non-household to household, it will cease to be eligible and the licensee will have to stop supplying it.

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### 5.1.2 New customer exceptions

Section 17D(7) WIA91 provides for the Secretary of State<sup>14</sup> to make provision by regulations as to the circumstances in which a licensee is not, for the purposes of section 17D(2) WIA91, to be regarded as entering into an undertaking with a new customer to give a supply of water to any premises. The relevant regulations are the New Customer Exception Regulations. Where a new customer exception applies, the threshold requirement will not have to be reapplied and the new customer can continue the current supply arrangement with the current supplier at the same premises.

This offers protection to customers where there has been no change to the current supply arrangement but who could be considered to be new customers and might otherwise be required to reapply the threshold requirement. It is particularly important for customers whose consumption has fallen below the threshold requirement, perhaps because of water efficiency measures. Without the New Customer Exception Regulations, the customer's premises would be ineligible for a supply from any licensee, including the current supplier. The New Customer Exception Regulations therefore avoid penalising the customer for any changes in its demand for water, including the effect of improvements in the efficient use of water. We would expect this situation to only apply to a small number of customers.

In circumstances where the New Customer Exception Regulations do not apply and the new customer's premises would be ineligible to be supplied by a licensee, the interim supply duty of the appointed water company under section 63AC WIA91 may apply. This ensures that the customer continues to receive water until it makes a section 52 or section 55 WIA91 request, or the appointed water company serves a disconnection notice. However, the interim supply duty does not apply if it would put at risk the appointed water company's ability to meet its existing supply obligations and its probable future obligations to supply water for domestic purposes to buildings or parts of buildings or require it to incur unreasonable works expenditure in order to do so.

For customers whose consumption is above the threshold requirement, the New Customer Exception Regulations still apply. But the issue of eligibility does not arise, as any reassessment of the threshold requirement would not render the premises ineligible to continue to be supplied by its current supplier.

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<sup>14</sup> For the purpose of this section, Secretary of State means the Welsh Ministers in relation to premises supplied with water using the supply system of an appointed water company whose area is wholly or mainly in Wales.

The New Customer Exception Regulations set out the two circumstances in which the licensee will not be regarded as entering into an undertaking with a new customer and so the threshold requirement **will not** bite.

- Regulation 3(1)(a) and (2) means that where a corporate group changes the subsidiary which contracts with a licensee, that new subsidiary is not to be treated as a new customer, provided that the whole set of premises continues to be occupied by the same corporate group as at the date of the original undertaking and the business and water consumption at those premises continues as before.
- Regulation 3(1)(b) and (3) has the effect that, where there is a change in the person occupying a set of premises, the new person is not to be treated as a new customer, provided that the whole set of premises is acquired by that person and the business and water consumption at those premises continues as before. This may be the case with certain asset acquisitions and certain structural reorganisations (including where a customer changes from being an unincorporated body to an incorporated body, and changes in the way that public sector customers are legally constituted).

The New Customer Exception Regulations do not include a specific reference to change of registered, official or trading name and/or correspondence address of the customer. This is because these changes would not amount to a 'new customer' as a new contract would not be required. Therefore no exception is required.

The New Customer Exception Regulations also empower us to make determinations on whether a new contract is deemed to be an undertaking with a new customer. Determinations can be made at the request of licensees, actual customers or potential customers.

## **5.2 Method of assessing volume where supply is metered**

The threshold requirement is forward looking. It is the total quantity of water likely to be supplied to the premises every year. The assessment of the volume likely to be supplied can be made by reference to historical meter readings or evidence of likely future demand that must be justifiable in the case of a new customer. Future demand should be used where that demand is likely to be significantly different from past consumption or where no past consumption data exists. To assess a customer's likely usage, the licensee should use one of the three methods below (set out in order of precedence).

1. Premises meet the threshold requirement where, at the time the licensee first enters into an undertaking with a customer to give the supply, the volume of water supplied in the past 12 months has not been lower than 5 MI (or 50 MI where applicable) and there are no material changes in a customer's demand characteristics to suggest that future demand is not going to be the same as in the past.
2. Premises meet the threshold requirement where the above requirement has not been met, but the average of the volume of water supplied in the past three years is not less than 5 MI/year (or 50 MI/year where applicable) and there are no material changes in a customer's demand characteristics to suggest that future demand is not going to be the same as in the past.
3. Premises meet the threshold requirement where neither of the above requirements is met, but the customer and licensee can demonstrate objectively and can justify that the estimated volume of consumption in the next 12 months and annually thereafter will be no less than 5 MI (or 50 MI where applicable).

### **5.3 Method of assessing volume where supply is not metered**

Not every eligible customer is supplied on a metered basis. We estimate that 89.4% of non-household premises are metered and that 10.6% are unmetered.<sup>15</sup> Some customers pay according to the rateable value of their premises. The rateable value is an assessment of the annual rental value of their property made by the Valuation Office Agency and payable to the local authority in which the premises are situated. A set charge for the financial year is calculated by multiplying the rateable value figure by the relevant tariff for water charges.<sup>16</sup>

Where an eligible premises is not supplied on a metered basis, the appointed water company can estimate the amount of water supplied and bill the customer on that basis. Licensees should apply the same methods for estimating supply used by appointed water companies. Where available, copies of the customer's bills are the easiest way of showing whether supplies to a customer's premises meet the threshold requirement. If a customer's past bills show that the eligible premises met the threshold requirement, and there is no significant change in business practices or forecast demand, it is likely to meet the threshold requirement.

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<sup>15</sup> Ofwat 'Customer charges 2010-11', non-household data tables.

<sup>16</sup> In England, non-domestic rating is governed by Part III (sections 41 to 67) of the Local Government Finance Act 1988. For further information, visit the Valuation Office Agency's website at [www.voa.hmrc.gov.uk](http://www.voa.hmrc.gov.uk).

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Some appointed water companies provide free optional meters to non-household customers who wish to move from unmetered to metered charging. Other appointed water companies charge for that facility. The appointed water companies generally require all non-household properties to be metered and, if that is the case, they may not charge a business customer for installing the meter. However, it is not mandatory for non-household premises to have a water meter fitted. Customers should contact their appointed water company to find out the current policy.

If it is unreasonably expensive or impracticable to install a meter, appointed water companies may choose to offer an assessed charge. Appointed water companies may determine assessed charges in different ways. This could include an assessment based on the type of property, the number of occupants at a set of premises, or an appointed water company's assessment of the customer's usage.

#### **5.4 Multiple appointed water companies**

Where eligible premises are served by more than one appointed water company, each supplying less than 5 MI/year (or 50 MI/year where applicable), a licensee will only be able to supply the premises if the threshold requirement is satisfied. The threshold requirement is based on the total quantity of water to be supplied by a single licensee. For example, if a factory takes a supply of 3 MI/year from one appointed water company and 2 MI/year from another, it will meet the threshold requirement if a single licensee is to supply the premises with 5 MI/year from the supply systems of both or either appointed water companies under a single agreement with the customer.

#### **5.5 Potable and non-potable supplies**

Some premises currently receive both a potable<sup>17</sup> and a non-potable<sup>18</sup> water supply. Under the WSL regime, the total potable and non-potable volume supplied can be aggregated when considering the threshold requirement. The method of assessment set out above will apply in this case. If a supply of water changes from potable to non-potable or vice versa and the premises are still non-household premises, the threshold requirement will not have to be reapplied.

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<sup>17</sup> Water for domestic and food production purposes which is wholesome at the time of supply. See sections 67 and 68 WIA91 and the Water Supply (Water Quality) Regulations.

<sup>18</sup> Water that is not intended for domestic or food production purposes.

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Where a customer requires a non-potable supply, it will need to be supplied from a discrete non-potable supply system in order for a licensee to be able to rely on the licensing provisions in the WIA91.

## **5.6 Private supplies**

Some premises receive private water supplies. These are supplies made by means other than through an appointed water company's supply system and, as such, are not regulated by us. Most private supplies are to individual houses and farms. Some hospitals and industrial premises have private supplies for their own sites.

Manufacturers, power stations and farmers also directly abstract large volumes of water for various purposes. There are also some private water supply networks, including parts of the canal network. The volume of water supplied to premises by means of private supplies and direct abstractions cannot be added to the volume supplied by an appointed water company's supply system in order to satisfy the threshold requirement. This is because the supply of water by a licensee must be in pursuance of its undertaking to supply a customer using an appointed water company's supply system, as defined in section 17B(5) WIA91.

A licensee is permitted to introduce into a supply system water that is already located on a customer's site, for example from a borehole, and to retail this water back to the customer where this activity is in pursuance of its licence. However, the customer itself may not introduce its own on-site private water supply into an appointed water company's supply system in order to satisfy the threshold requirement because it is prohibited by section 66J WIA91 (unless it holds a water supply licence) from introducing water into the supply system. We believe that, in practice, however, it is unlikely that a customer with its own on-site private water supply would want to do this. This also applies to private supplies of potable and non-potable water.

## **5.7 Reservation charges and standby charges**

Some customers with access to a private supply may need a back-up supply from their appointed water company. These customers may pay a reservation charge (also known as a standby charge) to reserve some system capacity from the appointed water company.

The volume of water a customer reserves cannot be included in the assessment of the quantity of water to be supplied to the premises by the licensee. This is because we do not consider the volume of water reserved by a customer to be part of the normal supply that the customer expects to consume or that will in fact be supplied to the premises. In practice, we expect this may not always be an issue because many customers who pay a reservation charge are those who take most of their water through private supplies and whose premises are therefore not likely to meet the threshold requirement.

## **5.8 Leakage**

For the purpose of eligibility, any assessment of the amount of water supplied to a set of premises should not include the amount that is lost through leakage in the appointed water company's supply system. The threshold requirement relates to the total quantity of water that is supplied to the premises, as measured at the meter or by other appropriate means as explained above. However, the amount of water lost through leakage from the meter (or other appropriate point of measurement) to the point at which the water is used does count towards the threshold requirement. A customer's consumption would therefore include the amount of water lost through leakage via the customer's own on-site system. This is consistent with our existing policy on leakage in the Access Codes Guidance.

## **5.9 Meter under-registration**

Meter under-registration describes a situation where the meter that measures the quantity of water used under-records the amount passing through it. This might happen when the mains water pressure is too low to allow the true volume of water to be accurately measured. For the purposes of determining eligibility, the threshold requirement relates to chargeable volume of water (that is, the volume of water as measured by the meter). It does not relate to any volume of water that the meter does not record.

## **5.10 Retail and combined water supply**

For the purpose of satisfying the threshold requirement, water can be supplied to premises by means of both retail and combined supplies. Provided the total quantity of water estimated to be supplied to the premises is not less than 5 MI/year (or 50 MI/year where applicable), it is irrelevant whether the licensee supplies the premises by means of a retail supply, a combined supply or both. For example, where a customer expects to consume 50 MI of water a year, a licensee can supply that customer with 40 MI through combined supply and the remaining 10 MI by purchasing the supply of water from an appointed water company and retailing it to the customer's premises.

## 6. Determinations

Section 17E(1) WIA91 allows us to determine, in a case referred to us by a licensee or a potential customer of a licensee, whether a proposed supply of water by the licensee to the customer would be in accordance with the licensee's retail authorisation. Section 17E(2) WIA91 provides that the matters we may determine include the following:

- the extent of the premises to be supplied;
- whether the premises to be supplied are household premises;
- whether the threshold requirement is satisfied in relation to the premises to be supplied; and
- any other matter the determination of which is relevant to those matters.

Also, under Regulation 5(1) of the New Customer Exception Regulations, we may determine, in a case referred to us by a licensee or an actual or potential customer of a licensee, whether that licensee is, pursuant to Regulation 3 of the New Customer Exception Regulations, not to be treated as entering into an undertaking with a new customer to give a supply of water to any premises.

Details of our policies and procedures in relation to determinations under the WSL regime are contained in our guidance.<sup>19</sup>

We expect that in most cases it will be clear whether or not premises are eligible and we will not need to become involved.

Licensees and customers should not request determinations as an alternative to following this eligibility guidance. We may reject any request for a determination where we are not satisfied that the person or persons making the request has tried to follow our eligibility guidance.

We expect a request for a determination to be for one or both of the following reasons.

- The eligibility guidance does not cover factors specific to the case.
- The interested parties have followed the eligibility guidance but cannot decide how to apply it.

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<sup>19</sup> See Water Act 2003: Procedure for handling water supply licensing determinations.

## **6.1 Use of independent advice**

When determining eligibility issues, we may seek views from the appointed water company, licensee and customer. We may also need to engage with other parties, for example consultants or company reporters, in relation to some technical or financial issues.

## **6.2 Publishing determinations**

The text of our determinations will be published in accordance with sections 195 and 195A WIA91. We will consider on a case-by-case basis the extent to which it is appropriate to publish the full text of a determination. We will inform all relevant parties of our proposed approach and give them an opportunity to comment.

We must maintain a register of determinations and this will be available on our website.

## 7. Glossary of terms

Here is a brief description of some of the terms used in the WSL regime. Readers should refer to WIA91 for precise statutory meanings.

**Access:** The wholesale supply of water by an appointed water company to a licensee for the purpose of making a retail supply of water to the premises of the licensee's customer; and/or the introduction of water by the licensee into an appointed water company's supply system for that purpose.

**Access agreement:** An agreement between an appointed water company and a licensee for access by a licensee to an appointed water company's supply system, pursuant to the retail authorisation and/or supplementary authorisation.

**Access code:** An appointed water company's document that sets out all principal aspects of access to its supply system and the terms and conditions on which it will grant access to its supply system by a licensee.

**Access terms:** The terms on which an appointed water company and a licensee agree access to an appointed water company's supply system.

**Appointed water company:** A company appointed under section 6 WIA91 to provide water services in respect of a defined geographic area of England and Wales.

**Combined licence:** A retail licence with the supplementary authorisation, authorising the holder to introduce water into an appointed water company's supply system and to supply that water to a customer's eligible premises (section 17A(5) and (6) WIA91).

**Combined supply:** A supply made pursuant to a combined licence.

**Defra:** Department for Environment, Food and Rural Affairs.

**DWI:** Drinking Water Inspectorate.

**Eligible premises:** Premises that satisfy the eligibility requirements in section 17A(3) WIA91.

**Household premises:** Premises in which, or in any part of which, a person has his home.

**Licensee:** A company holding either a retail licence or a combined licence; also referred to as a licensed water supplier.

**Non-potable water:** Water that is not intended for domestic or food production purposes.

**Potable water:** Water for domestic and food production purposes that is wholesome at the time of supply. This is defined in section 68 WIA91 and the Water Supply (Water Quality) Regulations.

**Primary water undertaker:** For the purposes of section 66A WIA91 (wholesale water supply by primary water undertaker) and section 66C WIA91 (wholesale water supply by secondary water undertaker), an appointed water company is the primary water undertaker of a licensee if the appointed water company's supply system is to be used for the purposes of making the supply to the premises of the licensee's customer (section 66A(8) WIA91).

**Retail authorisation:** An authorisation to a company to use an appointed water company's supply system for the purpose of supplying water to the eligible premises of customers of the company (section 17A(2) and (4) WIA91).

**Retail licence:** A water supply licence giving the holder the retail authorisation, entitling the holder to purchase wholesale a supply of water from the appointed water company and to supply it retail to a customer's eligible premises (section 17A(4) WIA91).

**Secondary water undertaker:** An appointed water company other than a licensee's primary water undertaker (section 66C(1)(a)(i) WIA91).

**Supplementary authorisation:** An authorisation to a company to introduce water into an appointed water company's supply system for the purpose of retail supply of water to a customer under section 17A(5) WIA91.

**Supply system:** Any water mains and other pipes used for the purposes of conveying water from an appointed water company's treatment works to its customer's premises and any water mains and other pipes used to convey non-domestic water from any source to premises that are not connected directly to any water mains and pipes connected to those treatment works. This term is defined in section 17B(5) WIA91.

**Water Fittings Regulations:** The Water Supply (Water Fittings) Regulations 1999 (SI 1999/1148, amended by SI 1999/1506 and SI 2005/2035). These Regulations replaced the Water Byelaws in England and Wales and are largely enforced by the appointed water companies.

**Water Supply Licence:** A licence granted to a company giving it the retail authorisation, or both the retail authorisation and the supplementary authorisation.

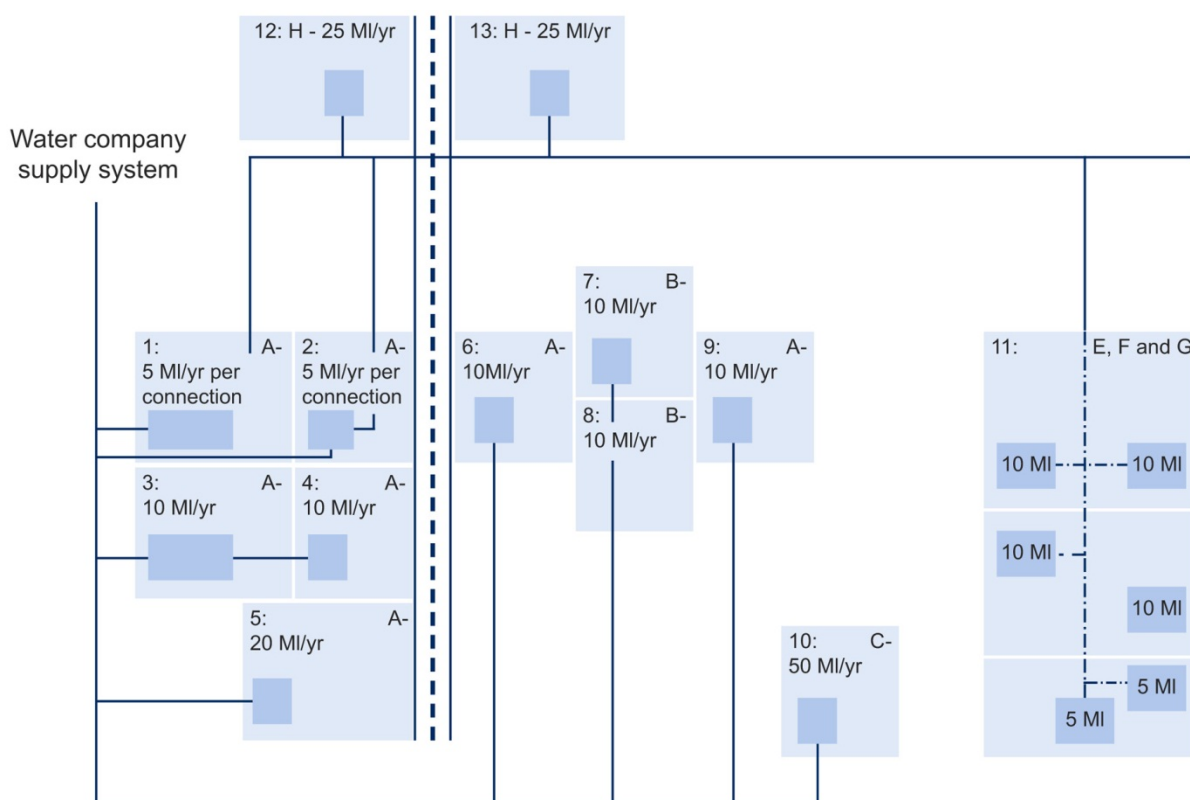
**Water Supply (Water Quality) Regulations:** The Water Supply (Water Quality) Regulations 2000 (SI 2000/3184, amended by SI 2001/2885, SI 2002/2469, SI 2005/2035, SI 2007/2734 and SI 2010/991) for supplies made using appointed water companies' supply systems wholly or mainly in England and the Water Supply (Water Quality) Regulations 2010 (SI 2010/994, amended by SI 2011/14) for supplies made using appointed water companies' supply systems wholly or mainly in Wales.

**WIA91:** The Water Industry Act 1991 (as amended).

**Wholesale supplies:** Supply of water to a licensee by an appointed water company for the purposes of retail by the licensee to its customer's premises.

**WSL regime:** The water supply licensing regime introduced by the Water Act 2003, which amended the WIA91.

## Appendix 1: Examples of threshold requirement and premises



### Single boundary premises: example one

Site 10 consists of one building surrounded by a piece of land. The site is assumed to fall clearly under the non-household definition as set out in section 4.1 and meets the threshold requirement. Site 10 is therefore eligible.

### Common occupation co-located premises: example one

Sites 1, 2, 3, 4, 5 and 6 are occupied by the same customer and the sites are adjoining, apart from site 6 which is separated only by a public highway. Each site is assumed to fall clearly under the non-household definition as set out in section 4.1. A fence or a wall separates each site (apart from site 6). Although the total consumption of sites 1 to 5 would meet the threshold requirement, sites 1 to 5 by themselves are not eligible as such because they do not constitute a single set of premises. This is because the single set of premises is constituted by sites 1 to 6 (see example below), and the guidance makes clear that different sites cannot be disaggregated when they comply with criteria (ii) or (iii).

### **Common occupation co-located premises: example two**

Site 6 is separated from sites 1 to 5 only by a public highway and is occupied by the same customer. Sites 1 to 6 are therefore a single set of premises. Sites 1 to 6 fall clearly under the non-household definition as set out in section 4.1. The consumption of site 6 must be added to the consumption of sites 1 to 5 to determine whether the threshold requirement is met, as they constitute a single set of premises. This is because, although there are several different boundaries, they are all adjoining or separated only by a public highway and they are all occupied by the same customer.

**Note:** If site 6 were separated from sites 1 to 5 by more than a public highway (for example, common land), then the single set of premises would be constituted by sites 1 to 5 and site 6 would be a separate single set of premises. In this case, sites 1 to 5 and site 6 would each need to satisfy the threshold requirement for each of them to be separately eligible.

### **Common occupation co-located premises: example three**

A public highway separates sites 12 and 13, both of which are occupied by the same customer. Both sites fall clearly under the non-household definition as set out in section 4.1. The consumption of sites 12 and 13 can be added in order to meet the threshold requirement, regardless of how many companies supply the site. This is because although there are two sites, they are separated only by a public highway.

### **Common occupation co-located premises: example four**

The customer, who occupies sites 1 to 6, also occupies site 9. Sites 1 to 6 and site 9 do not form a single set of premises, and the consumption at site 9 cannot be added to the consumption of sites 1 to 6, because it is separated by other than one piece of transport infrastructure (that is, it is separated by sites 7 and 8).

### **Common management co-located premises: example one**

Site 11 has its own water supply system. Three occupants are located within site 11. The boundary of each occupier's property consists of one piece of land and two buildings and the properties are adjoining. The premises are assumed to fall clearly under the non-household definition as set out in section 4.1. Individually, no occupier is eligible for a supply from a licensee because, individually, none of the sites satisfies the threshold requirement. However, if all of the occupiers' properties have a common landlord or managing agent, are connected to a self-contained common water supply system within site 11 that does not belong to the appointed water

company and a single customer is liable to pay water bills, site 11 constitutes a single set of premises and is eligible.

## Appendix 2: Examples of premises likely to be household premises and non-household premises for the purpose of the water supply licensing regime

The list below sets out examples of premises that are likely to be household or non-household premises for the purpose of the WSL regime. It is not exhaustive. The list should be referred to in conjunction with section 17C WIA91 and the guidance in chapter 4 to assess whether a particular premises is household or non-household. Where a single set of premises has a household and a non-household use, the premises will not be household premises unless the principal use of the premises is as a home. For example, an on-campus university hall of residence, which is on the same premises as the university, would be classed as non-household, together with the university, if the principal use assessment criteria were met. However, where halls of residence are separated from the university by more than transport infrastructure, the halls of residence will be separate household premises.

If, having followed the guidance in chapter 4, a licensee and/or a potential customer are in doubt as to whether premises are household or non-household, the matter may be referred to us for a determination.<sup>20</sup>

**It may be helpful for appointed water companies and licensees to refer to our published determinations for further details about eligibility requirements, including examples of premises designated as household and non-household.**

### Household

- Private dwelling.
- Boat used for habitation.
- House in multiple occupation.
- Accommodation for the elderly in which a person has his only or principal home.
- Residential accommodation for elderly persons where the service of a warden is provided.
- Children's homes.
- Health workers' accommodation.
- Barracks and married quarters.
- Stately home used as a private residence.

### Non-household

- Airport/airfield.
- Military base.
- University.
- Charity premises, unless considered a private residence.
- Stately home owned by the National Trust, unless considered a private residence.
- Factory, industrial site, warehouse.
- Leisure centre or facility.
- Prison.
- Hospital.
- Hospice.

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<sup>20</sup> See Water Act 2003: Procedure for handling water supply licensing determinations.

## Household

- Farmhouse.
- University halls of residence.
- Caretaker's flat.
- Vicarage or equivalent.
- Monasteries, nunneries and similar religious communities.
- Caravan parks and mobile home parks used as static homes in which a person has his only or principal home.

## Non-household

- Offices.
- School (boarding or non-boarding).
- Hotels or youth hostels.
- Hostel for the homeless.
- Religious premises or places of worship.
- Caravan parks and mobile home parks used for the purpose of holiday homes.
- Holiday villages.
- Day care centres.
- Marinas and docks.
- Retail premises, shops.
- Farm buildings used for agricultural purposes.

## Appendix 3: Examples of premises raised in response to the licensing and eligibility consultation<sup>21</sup> for eligibility consideration

**Example one:** A site split into two by a small area of common land, with a physical link between, such as a walkway or a shared service duct. The site can be treated as one under Carbon Trading rules or the Gas Network Code.

A set of co-located premises that is separated by anything other than transport infrastructure and its directly associated land, for example, common land, **is not a single set of premises**. Although we recognise that the sites may be treated as one under Carbon Trading rules or the Gas Network Code that is not the case for the purposes of eligibility under the WSL regime. See paragraph (ii), section 3.1, common occupation co-located premises.

**Example two:** A group of six motorway service stations all on the same motorway but each 25 miles from the next, owned and managed by the same organisation, individually below the threshold requirement but collectively above that threshold requirement.

These service stations **are not a single set of premises**, and therefore their water consumption cannot be aggregated to assess eligibility, as they are separated by land other than transport infrastructure (for example, farmland). The criterion that (putative) constituent parts be separated only by transport infrastructure requires that if the infrastructure were removed, there would be a single set of premises within a single boundary.

**Example three:** A university or hospital or a corporate business headquarters situated in a city centre or campus with many non-household premises separated purely by highway infrastructure. Do these premises qualify if the total consumption is above the threshold requirement and they are managed by the same organisation?

These premises **comprise a single set of premises** as they consist of co-located buildings, other similar structures and/or land, where there is a single customer liable for water bills and which have adjoining boundaries or are separated only by transport infrastructure. See paragraph (ii), section 3.1, common occupation co-located premises. To determine eligibility it is necessary to determine whether the

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<sup>21</sup> Water Act 2003: Eligibility, licensing, customer transfer protocol and strategic supplies (October 2004).

single set of premises complies with the criterion that principal use be non-household.

**Example four:** A medium-sized local authority has many hundreds of ineligible non-household premises, including libraries, schools, administration buildings and leisure centres. If these are separated only by highway infrastructure and are managed by the same authority, will they qualify if the total consumption exceeds the threshold requirement?

These sets of premises are likely **not to be a single set of premises**, as local authority buildings are likely to be spread throughout the borough. ‘Separated by highway infrastructure’ does not mean that it is sufficient to be able to drive from one site to another; it requires that if the transport infrastructure were removed, the sites would be adjacent.

**Example five:** A university consists of one campus, with little islands of other premises (not part of the university). Can the non-university premises be excluded from the eligibility assessment?

Yes. The non-university premises can be excluded from being in the set of premises boundary prior to eligibility assessment.

**Example six:** Two university sites merge that are located diagonally across and split by a road. Could they be eligible as one site?

Possibly. This all depends on the facts of the individual case. If the premises would be adjacent if the transport infrastructure were removed, then the premises could be **a single set of premises** as common occupation co-located premises.



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