



WATER ACT 2003
WATER SUPPLY LICENSING

**Procedure for handling water
supply licensing determinations**

Responses to the consultation

November 2005

Procedure for handling water supply licensing determinations

Responses to the consultation

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1. Introduction

In June 2005 we issued the consultation 'Proposed procedure for handling water supply licensing determinations'. From 1 December 2005, customers who are likely to be supplied with at least 50 megalitres¹ of water per year in eligible premises will be able to choose whether to purchase water from their existing water undertaker² or from a licensed water supplier (licensee).

We will have powers to make determinations about some aspects of the new supply arrangements. The consultation explained these powers and set out our proposed process for making determinations. It also included in our proposed timescales for carrying out investigations and when we will consult the Drinking Water Inspectorate (DWI). We asked for views on our proposed timescales and whether we had included the right stages in the process.

This paper summarises the responses we received and explains how we have taken account of them in the final WSL determinations procedure. If you wish to discuss any aspect of this paper, please contact Sarah Thomas on 0121 625 1408 or e-mail enquiries@ofwat.gsi.gov.uk.

¹ This is 50 million litres or 50,000 cubic metres.

² The term 'water undertaker' means a company appointed under the Water Industry Act 1991 (WIA91) to provide water services to a defined geographic area.

2. Responses to consultation

2.1 Summary

We received responses from four water undertakers operating in England and Wales, WaterVoice (now CCWater) and Water UK. A list of respondents is in appendix 1, and copies of all replies are available to read in our library.

Respondents said it was useful to have the procedure set out and they considered that it was generally clear and reasonable. The key points that were raised and our conclusions to these are summarised below.

2.1.1 Timescales

Most respondents agreed that the timescales were proportionate. However, water undertakers commented that the procedure should take more account of the need to approach secondary undertakers³, or the possibility that licensees⁴ will lodge a number of disputes or issues at one time.

WaterVoice considered that the timescales were too long. It said that there was scope to streamline the procedure and suggested that only one exchange of correspondence was necessary at stage 1 of the process.

Our conclusions

We have not changed the timescales. We consider that these timescales are realistic for a new regime, but we will review them after the procedure has been in operation.

2.1.2 Eligibility

Water undertakers wanted us to consider eligibility queries before a supply arrangement is in operation, with a view to indicating whether we would be minded to intervene under section 18 of the WIA91. Water undertakers stated that they should not be put at risk of entering into an unlawful agreement and that if we considered such queries, it would reduce unnecessary work on the part of the water undertaker and the licensee in negotiating a supply agreement. The alternative would be for water undertakers to make an objection under the customer transfer protocol (CTP), but they considered that this process would be cumbersome.

One water undertaker considered it would be helpful for the paper to point out where the CTP deals with similar issues.

³ A water undertaker other than a licensee's primary water undertaker, in relation to a wholesale supply, or proposed wholesale supply, of water under section 66C(1)(a)(i) WIA91.

⁴ Companies holding either a Retail Licence or a Combined Licence; also referred to as a licensed water supplier.

Our conclusions

It is the licensee's responsibility to ensure that the premises of potential customers are eligible in accordance with our eligibility guidance. In practice, we acknowledge that undertakers may seek advice and ask for reassurance from us that arrangements are appropriate before they enter into a WSL access agreement. However, if we were to consider such queries at an early stage, we would be unable to enforce the outcome of any investigation or issue a formal determination. For this reason we have not revised the procedure along the lines suggested by respondents.

2.1.3 Access terms

Water undertakers agreed that a determination that is accepted by a licensee should be binding on an undertaker. However, they stated that it was important to recognise that the rest of the terms and conditions of an access agreement may be affected by our determination. Both a licensee and a water undertaker must be given the opportunity to negotiate terms and conditions other than those that we have determined, in line with any determination that we have already made. This needs to be clarified in our procedure.

Our conclusions

We consider that the parties should seek to agree everything that can be agreed before a licensee refers a matter to us for determination. We have the power to determine the period for which, and all the terms and conditions on which, the water undertaker must perform its duties and we are not bound by anything the parties may have agreed before the licensee refers the matter to us for determination. We will, however, take full account of those points that the parties have agreed. Also, as part of the determination procedure, both parties will be able to make representations to us as to the 'knock-on' effects on 'agreed' terms of the matters in dispute.

2.1.4 Submitting information

Respondents stated that the section listing the information to be submitted in support of a dispute or query is overly prescriptive. In particular, one respondent queried the need to provide information about how much potable and non-potable water is supplied each year and whether any water is lost through leakage.

Our conclusions

We considered whether asking for comprehensive information at the start of a case could reduce the time taken to resolve the dispute later on in the process. But we acknowledge that in some cases the requirement to provide such information may be onerous. We will consider on a case-by-case basis whether to ask for a full list of information.

2.1.5 Competition Act 1998 (CA98) investigations

Water undertakers wanted us to indicate which type of complaint would be subject to an investigation under CA98 rather than WIA91.

Our conclusions

It is not possible or desirable for us to give guidance of the kind sought. We will not provide an indication of which type of complaint would be subject to an investigation under the CA98 rather than the WIA91 because which Act is more appropriate depends on the specific features of each complaint. Information on past complaints we have considered under CA98 and how we apply CA98 is publicly available (see 'Other issues' below). We will consider whether to apply our WIA91 powers in relation to a CA98 complaint on a case-by-case basis.

2.1.6 Draft determinations

One water undertaker stated that in most cases it would not expect parties to submit additional information that materially affects the determination after a draft determination has been issued. Another water undertaker considered that it should be made clear that there should be a good reason for not having submitted the information until after the draft determination.

Our conclusions

We have revised the text to make it clear that we expect parties to submit all relevant information before the draft determination is issued.

2.1.7 Memorandum of Understanding with the Environment Agency

One water undertaker pointed out that we do not appear to have a Memorandum of Understanding (MoU) with the Environment Agency.

Our conclusions

A MoU with the Environment Agency is being developed.

2.1.8 Other issues

Respondents also asked us to do the following:

- Add contact details for various types of query.
- Clarify whether we will consult interested parties when applying relevant exemptions in relation to the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.
- Explain that we would not modify or terminate an agreement unless we have followed a similar determination procedure.
- Clarify our enforcement powers.

- Review the document for plain English.

Our conclusions

We have revised the document to take account of these views, as appropriate.

We have also noted the following comment, which was not a matter for this consultation.

- We should publish a procedure for handling complaints brought under the Competition Act 1998.

Information on how we have handled past CA98 complaints is contained in our annual reports on competition complaints⁵. Guidance on how Ofwat applies CA98 is provided in the publication 'The Competition Act 1998 – the Application in the Water and Sewerage Sectors'⁶. The Office of Fair Trading also provides guidance on competition law on its website⁷.

⁵ <http://www.ofwat.gov.uk/aptrix/ofwat/publish.nsf/Content/navigation-ca98annualreports>.

⁶ <http://www.ofwat.gov.uk/NR/rdonlyres/09200BCA-FC1F-47C8-A188-CAA06773469C/0/oft422.pdf>.

⁷ <http://www.ofwat.gov.uk/Business/Legal/Modernisation/publications.htm>.

Appendix 1: List of respondents

Water undertakers

Dŵr Cymru – Welsh Water
South East Water
Thames Water
United Utilities

Other stakeholders

Water UK
WaterVoice (now CCWater)