



WATER ACT 2003  
WATER SUPPLY LICENSING

## **Guidance on secondary supplies**

July 2007



# Guidance on secondary supplies

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# 1. Introduction

## 1.1 Background to the water supply licensing regime

The Water Industry Act 1991 (WIA91)<sup>1</sup> permits a company that is the holder of a water supply licence (referred to in this guidance as a licensee) to have access<sup>2</sup> to a water undertaker's<sup>3</sup> supply system<sup>4</sup> to enable the licensee to supply water to eligible premises. Prospective licensees will have to obtain a water supply licence before they can supply water through a water undertaker's supply system in competition with the water undertaker. Prospective suppliers can apply for either of the following:

- **A retail licence** – a water supply licence that authorises the holder to use a water undertaker's supply system for the purpose of supplying water to the premises of its customers ('the retail authorisation'). A retail licence therefore permits the supplier to purchase a wholesale supply of water from a water undertaker and to retail it to customers at eligible premises<sup>5</sup>.
- **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 a water undertaker'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<sup>6</sup>.

Water supply licences apply to the supply of potable and/or non-potable water.

## 1.2 Background to secondary supplies

A water supply licensee can ask a water undertaker for a wholesale supply of water to enable it to supply its customers in a neighbouring water undertaker's area (known as the primary water undertaker). This is known as a secondary supply and the water undertaker who provides the supply of water is a secondary water undertaker. The legislation sets out the conditions under which the duty on a secondary water undertaker to provide a wholesale supply of water if asked to do so by a licensee does not apply. A licensee can ask us to determine whether any of the conditions are satisfied<sup>7</sup>. This is explained further in section 4.1.

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<sup>1</sup> In this guidance, references to WIA91 refer to WIA91 as amended by the Water Act 2003 (WA03).

<sup>2</sup> The term 'access' refers both to wholesale supplies of water by a water undertaker to a licensee for the purpose of the licensee's making a retail supply of water to the premises of the licensee's customer and to combined supplies (the introduction by the licensee of water into the water undertaker's supply system in order to make a retail supply of water by the licensee to its customer through the water undertaker's supply system).

<sup>3</sup> A 'water undertaker' is a company appointed under section 6 WIA91 to provide water services in respect of a defined geographic area of England and Wales.

<sup>4</sup> A water undertaker's supply system is defined in section 17B(5) WIA91.

<sup>5</sup> See sections 17A(1), (2) and (4) WIA91.

<sup>6</sup> See sections 17A(5) and (6) WIA91.

<sup>7</sup> Section 66D(1) WIA91.

The intention of the legislation is to promote the use of 'spare' water, by imposing on water undertakers a (qualified) duty to make that water available<sup>8</sup>. The reference to 'spare' follows from the first condition, which is listed in section 2.2, concerning existing or probable future obligations. If this condition is satisfied, a secondary water undertaker shall not be required by virtue of section 66C of the WIA91 to provide a supply of water to a licensee in response to a request by the licensee.

'Spare' water will be water that is not used by the secondary water undertaker for supply, contracted for supply or used as backup or headroom or other forms of security. It must also be compatible with the water in the primary water undertaker's system. For example, non-potable water must not be introduced into a primary water undertaker's potable supply system. Non-potable secondary supply arrangements can be made, but only by transferring water from one non-potable system to another.

Our 'Water supply licensing: Access codes guidance' (the 'access codes guidance') sets out how secondary supply arrangements involve two distinct transactions:

- the secondary water undertaker will sell the water to the licensee; and
- the licensee introduces that water into the primary water undertaker's supply system for supply to the licensee's customer.

The licensee will negotiate the details of the secondary supply alongside applying for an access agreement with the primary water undertaker. The process for introducing water from a water supply licensee's own source into the primary water undertaker's supply system is discussed in chapter 3. For further information on the process for applying to the primary water undertaker for access to its network, parties should refer to our access codes guidance.

### **1.3 Purpose and structure of this guidance**

This guidance explains the following:

- In chapter 2, how the water undertakers should assess whether secondary supply arrangements are possible, including assessing whether water is 'spare' and applying the conditions;
- In chapter 3, the process that water undertakers and water supply licensees should follow when arranging secondary supplies; and
- In chapter 4, how we will investigate disputes about the conditions for refusing secondary supplies, under the WIA91<sup>9</sup>.

This document sets out our understanding of provisions of the WIA91 and of other 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 any relevant case

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<sup>8</sup> See the Defra/Welsh Assembly Government 2002 consultation document 'Extending Opportunities for Competition in the Water Industry in England and Wales' at paragraphs 112-114.

<sup>9</sup> These dispute handling powers are explained in our 'Procedure for handling water supply licensing determinations'.

law. Anyone in doubt about how they may be affected by the WIA91 should seek legal advice.

Section 66D(4) WIA91 requires us to issue guidance in accordance with which the terms and conditions of agreements under sections 66A-66C WIA91 shall be made. This guidance is issued (in part) in accordance with that requirement. However, most of our guidance on the application process is non-statutory, except where we refer to matters to be covered in the terms and conditions of the agreement between the primary water undertaker and the licensee. Some parts are non-statutory because they explain, amongst other things, the process by which agreements are reached rather than the terms and conditions of those agreements.

Certain parts of the non-statutory guidance, concerning procedure, also bind water undertakers as a matter of law<sup>10</sup>. Condition R1 of water undertakers' Conditions of Appointment provides that a water undertaker shall have an Access Code which complies with Condition R and that it shall comply with its Access Code. The Access Code itself shall (a) conform to the guidance for the time being issued under section 66D(4) WIA91 and (b) set out (amongst other things) the water undertaker's procedure (including timetables) for dealing with a request made to it by a licensee under sections 66A, 66B or 66C (which procedure shall itself conform to any relevant guidance). This guidance constitutes 'relevant guidance' for the purpose of Condition R.

This guidance will be reviewed and updated in the light of experience and should be read in conjunction with our access codes guidance and other documents, including our 'Procedure for handling water supply licensing determinations' and the Customer Transfer Protocol. All WSL documents are available on our website and can be provided on request.

## **2. Assessing whether a secondary supply arrangement is possible**

Secondary supply arrangements can only be entered into for eligible premises where the total quantity of water estimated to be supplied is not less than 50MI per year. As long as this criterion is met, it is irrelevant whether the licensee supplies the premises by means of a secondary supply, or a mix of a retail supply and a secondary supply.

For example, where a customer expects to consume 50MI of water a year, a licensee can supply that customer with 40MI through a combined supply and the remaining 10MI by purchasing a wholesale supply of water from the primary water undertaker. These arrangements can be agreed by the parties during their negotiations. This guidance applies to the process for all secondary supply applications, regardless of the proportions of water from different sources.

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<sup>10</sup> With the exception of two undertakers, namely Albion Water Ltd and Cholderton & District Water Company, which is commensurate with their size and circumstances?

Where a licensee is related to the secondary water undertaker, the water undertaker may provide the licensee with a secondary supply of water. Any such transaction between the secondary water undertaker and the licensee is required to be at 'arm's length' (see SLC7(1)(c)). In addition, our consent to any such arrangement will be required under Appointment Condition R5(1). Secondary water undertakers must treat applications from non-associated licensees in the same way that they would treat applications from associated licensees. Condition R requires that water undertakers do not show undue preference to, or undue discrimination against, actual or potential customers or any actual or potential licensees. This will prevent unwarranted distinctions between, amongst other things, a water undertaker's retail activities and licensees. Non-discrimination is covered in more detail in section 4.1 of our access codes guidance.

## **2.1 Step one — secondary water undertakers start to assess 'spare' water**

The duty on a secondary water undertaker to provide a wholesale supply of water only applies if that water can properly be described as 'spare'. If a secondary water undertaker is to offer any of its 'spare' water to the licensee for the purposes of entering into a secondary supply arrangement, then it needs to be clear about how to define what is 'spare'.

When considering whether it has any spare water, a secondary water undertaker will have to assess its headroom position in relation to the conditions under section 66C WIA91. This section outlines the approach to considering headroom. Further information on how the conditions will be applied is in section 2.2 below.

The difference between water available for use and demand (either under a 'dry year annual average' or 'critical period' planning conditions) is called available headroom. Target headroom is the amount of surplus water available over demand that a water undertaker needs to be able to continue to supply without restrictions on use. This depends on the possible fluctuations to elements of the water undertaker's forecasts of supply and demand that could occur; for example outages, pollution and variations in demand.

Since an assessment of 'spare' water will have to take into account any fluctuations in supply and demand, then the calculation of 'spare' water will start with a calculation of the difference between target headroom and available headroom.

The secondary water undertaker should begin any consideration of 'spare' water as follows:

- Where the dry year target headroom is equal to or greater than the dry year available headroom, then there will be no 'spare' water in that water resource zone (WRZ);
- If the dry year target headroom is less than the dry year available headroom, then the secondary water undertaker needs to start considering its critical period obligations and the impact on its customers, in order to complete its assessment of whether it has any 'spare' water.

The secondary water undertaker will also need to take account of each of the following before deciding whether it has 'spare' water available:

- For water undertakers who are wholly or mainly in England, whether any of its water supply area is designated by the Secretary of State as 'water stressed'.
- The potential effects of abstractions necessary to make secondary supplies available on the local environment, such as low flow rivers.

The secondary water arrangements must not put the secondary water undertakers' customers at a disadvantage. If, for example, as a consequence of making 'spare' water available to a licensee, the secondary water undertaker would have to impose restrictions on its customers, such as hosepipe bans, that would be unacceptable.

In general, the provision of 'spare' water should not materially affect any drought measures or the security of supply index (SoSi). If this is likely to happen, then water should not be considered as 'spare'. Water undertakers will also need to consider future legislative changes and changes in policy towards issues such as metering, leakage and water efficiency.

### **2.1.1 How the role of the Environment Agency affects the assessment of headroom**

In certain circumstances, the Environment Agency can vary or reduce the amount of water that can be abstracted by a water undertaker. This may result in a reduction in the amount of water that could be considered as 'spare' and, depending on timing, may affect some secondary supply applications. However, this should not affect existing secondary supply arrangements. These will be taken into account by the Environment Agency if they need to consider how much water is abstracted under a licence.

## **2.2 Step two – Primary and secondary water undertakers apply the conditions**

Once a secondary water undertaker has established its position in relation to headroom and drought measures, it must continue its consideration of whether the water can be considered as 'spare' by assessing:

- the financial implications of making the supply available to the licensee; and
- any other obligations it has that may affect the supply of 'spare' water.

A primary water undertaker will also have to consider the impact of accepting a supply from a secondary water undertaker. It will also need to consider the financial implications of the arrangement, and how the arrangement will affect its other obligations.

The duties under section 66C WIA91 on a secondary water undertaker to provide a secondary supply do not apply if either the 'first condition' or the 'second condition' is satisfied.<sup>11</sup>

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<sup>11</sup> Section 66C(4) WIA91.

The 'first condition' is that permitting the introduction of the water to primary water undertaker's supply system:

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

The 'second condition' is that there is a contravention of the prescribed requirements of regulations made under section 74 WIA91<sup>12</sup>, in relation to the water fittings used or to be used in connection with:

- the supply of water to the premises to be supplied by the licensee; or
- the use of water in those premises.<sup>13</sup>

The duty on the primary water undertaker to take steps to enable the introduction of a secondary supply into its supply system under section 66C WIA91 is subject to the same conditions.

We consider that the time for determining whether the first condition is satisfied is the point when the secondary supply arrangement is made, at the latest. It is not necessary to consider whether that condition remains satisfied during the period of the agreement.

**These conditions are unlikely to be met simply because a secondary supply arrangement has been requested. Water undertakers will need to have clear and transparent reasons why they consider that the conditions have been met and hence are unable to supply the licensee.**

We expect water undertakers to approach requests from licensees for secondary supplies in good faith and we will examine critically any claim by a water undertaker to invoke the conditions.

There are a number of different risks that the water undertaker will have to consider. These are considered further in the rest of this chapter.

Only one of the conditions in section 66C needs to be met, in respect of only one of the water undertakers involved, for the section 66C duty not to arise in respect of either water undertaker. This means that if the primary or secondary water undertaker has a robust reason why either the first or the second condition is satisfied then both water undertakers can refuse to enter into secondary supply arrangements without making any further assessment of that particular application.

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<sup>12</sup> The prescribed requirements are those prescribed by the Water Supply Licence (Prescribed Water Fittings Requirements) Regulations 2005 (SI 2005/3077)

<sup>13</sup> Section 66C(5) WIA91.

The licensee will be able to ask us to determine whether the conditions are satisfied<sup>14</sup> where a water undertaker claims that no duty arises under section 66C WIA91 (or section 66A or 66B WIA91). For that reason, both primary and secondary water undertakers will need to be prepared to provide sound, justifiable reasoning for any decisions they have made, in preparation for any determinations we may make.

The works that water undertakers have to carry out are covered in section 66C subsections (2) and (3) and water undertakers will have to assess the costs of this work.

Primary and secondary water undertakers will need to consider the effect of requests for secondary supply arrangements on their obligations to supply. Water undertakers will need to consider these effects at present and in the future, in accordance with section 66C. In general, if the provision of water has an effect on these obligations, then this water cannot be considered as 'spare'.

### **2.2.1 Obligations**

This section lists the types of obligations that water undertakers will need to assess when considering the possible application of the first condition in section 66C(5) WIA91. These lists are not exhaustive and other issues will arise, depending on the specific circumstances of individual arrangements.

The obligations that a primary water undertaker will have to consider include the following.

- the levels of service to existing customers;
- the maintenance of standards of pressure and hydraulic performance;
- any implications of the arrangements on any fluoridated supplies;
- the effect of changes on the quality, taste, odour and other compatibility of its supplies;
- the effect on compliance with water quality regulations; and
- emergency planning.

The obligations that a secondary water undertaker will need to consider include the following.

- The effect of providing a supply of 'spare' water on its levels of service;
- The effect on its plans to ensure stability and reliability of sources.
- The effect of the arrangement on the terms of supply of:
  - any existing bulk supply agreements;
  - any existing secondary supply agreements;
  - any non-standard or special agreements;
  - any obligations towards any reservation capacity users with which the water undertaker has a long term contract.

The secondary water undertaker also needs to take account of the information available in its Water Resource Management Plans (WRPs) on supply/demand

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<sup>14</sup> Section 66D(1) WIA91

balance forecasts. It will need to know how much water it will need in the long-term and/or in the short-term to meet the licensee's demands. It will also need to consider the following.

- future headroom and resources and how this may change; and
- the effect on 'spare' water of the following:
  - variability of water supplies;
  - water or operational efficiency programmes; and
  - the balance between target and actual headroom.

Existing bulk supplies will take precedence over new secondary supply requests. However, a future bulk supply request would not override an existing secondary supply, which is a 'obligation' for the purposes of section 55 WIA91. It is our view that whether an existing bulk supply for renegotiation takes precedence over a new secondary supply request will depend on the terms of the existing bulk supply agreement and whether, for example, it contained a term requiring the supply to continue, subject to the price being renegotiated or settled by us in default of an agreement.

We consider that water undertakers should refer to the WRP planning horizon of twenty five years when making any decision about how long water may be considered as 'spare'.

### **3. Entering into a secondary supply arrangement**

There are two key stages to the process of agreeing a secondary supply arrangement.

- i) **Information gathering:** where the licensee and the water undertakers will exchange information about the process and the requirements for arranging a secondary supply.

Licensees may want to make enquiries about the general availability of 'spare' water in a water undertaker's area or about a particular location and customer. The process is explained in section 3.1.

- ii) **Application:** where the licensee submits relevant details to the relevant water undertaker, they discuss any issues arising and then agree to enter into a secondary supply arrangement. This is set out in section 3.2.

#### **3.1 Information gathering**

Secondary water undertakers should be prepared to provide up-to-date assessments of where the 'spare' water is likely to be available in response to queries. Licensees will want to find out about the overall balance of resources in the water resources zone that they want to operate in and, in particular, how much water is likely to be available. When asked to, water undertakers should also write to the licensee

explaining their answers and when and for how long water might be available. In addition, secondary water undertakers should be prepared to provide information on existing cross connections and their available capacity. This will help parties to assess their likely availability for the purposes of providing a secondary supply.

When responding to queries about these issues, secondary water undertakers should refer to information in relevant documents such as the WRPs or their business plans. The WRPs are the water undertakers' long-term strategic plans for developing water resources in their areas<sup>15</sup>. We do not expect water undertakers to divulge information from their WRPs if this is considered to be commercial in confidence or security sensitive until the formal application has been made and a confidentiality agreement has been signed. However, they must be prepared to answer any queries from licensees fully.

Secondary water undertakers should also refer to drought plans to help them assess whether water may be considered as spare. The Drought Plan Regulations<sup>16</sup> came into force on 1 October 2005. Water undertakers are required to set out in their drought plans how they will continue to meet their duties to supply wholesome water during drought periods with as little recourse as possible to drought orders or drought permits. Water undertakers are required to consult publicly on their drought plans. This information will help licensees to understand how the secondary supplies will be managed in a drought and to inform the management of their own supplies.

Secondary water undertakers should also make available any information that they may have relating to the quality of the water source, to enable the licensee to identify potential water quality issues.

Secondary water undertakers must treat requests for information from associated licensees in the same way that they would treat requests for information from non-associated licensees.

Where a licensee asks a secondary water undertaker for information, the water undertaker must provide clear details and be prepared to discuss any issues that may need clarifying with the licensee. For instance, the parties may need to discuss general capacity or transmission issues. However, a secondary water undertaker cannot provide information to a licensee where it relates to the specific details of a competing licensee's existing arrangements.

We expect secondary water undertakers to respond promptly to licensees' enquiries about water availability. Responses should be based on up-to-date information to enable the licensee to consider whether or not it could move on to a formal application.

Secondary water undertakers should aim to provide a general assessment of available water in their area within 15 working days of a request for general

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<sup>15</sup> The Water Act 2003 made it a statutory requirement for water undertakers to produce Water Resource Management Plans and submit them to the Secretary of State or Welsh Ministers. It provided for regulations to be made to enable water undertakers to produce and consult on water resources management plans (section 62 WA03).

<sup>16</sup> SI 2005 No. 1905.

information. When answering queries, they should be clear about what options are available and whether any additional modelling may be required. They must also explain how the assessment may be revised in the future, by listing the facts that will be need to be reviewed when more information about the proposal becomes available. They must also be able to explain how assessments of 'spare' water will be affected by future changes in the condition of the supply system, such as flow and pressure of network supplies, to enable the licensee to assess their supply options.

It is for secondary water undertakers to decide how they can best manage their systems to ensure that accurate and up-to-date information is readily available. One way may be to maintain a database of relevant information on an ongoing basis so that any queries can be responded to promptly. To help reduce the number of queries that are referred to them, secondary water undertakers may also want to make this information available on their website.

Providing responses to licensees should not represent a significant burden for secondary water undertakers since the information that they are likely to need is already available as part of their WRPs, business plans and other information systems.

Licensees will also want to make general enquiries to primary water undertakers about access to their water supply systems. The process for this is covered in the access codes guidance.

### **3.2 Formal applications for secondary supply arrangements**

Under section 66C WIA91, the secondary water undertaker has a duty to provide a secondary supply. The primary water undertaker also has a duty to allow the introduction of a secondary supply into its supply system. These duties are subject to various provisions under the WIA91<sup>17</sup>; including the first and second conditions set out above, but broadly speaking we take the view that water undertakers must take all reasonable steps to meet requests for secondary supply arrangements.

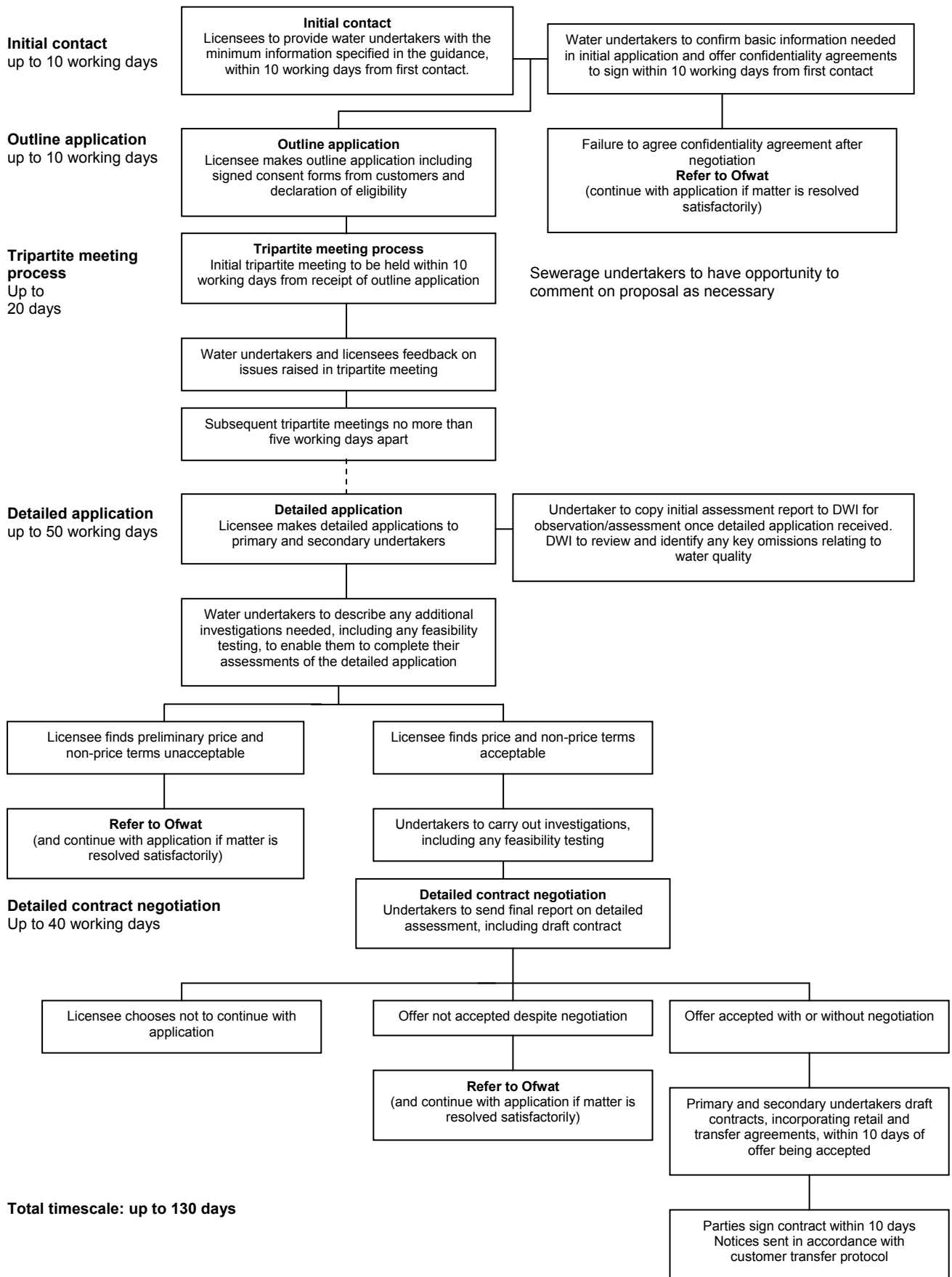
This section of the guidance lists the stages of the formal application for secondary supply arrangements. Water undertakers must treat applications from associated licensees in the same way that they would treat applications from non-associated licensees. The process is illustrated in the following flowchart.

All water undertakers should include confidentiality agreements in their published access codes.

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<sup>17</sup> See section 66C WIA91.

Figure 1: Secondary supply application process



In some circumstances, it may be possible to 'fast track' an application, for example where a cross-border supply has already been made and the licensee is simply taking up spare capacity within an existing arrangement of pipes. Water undertakers should take every opportunity to reduce the length of time taken on an application.

### **3.2.1 Initial contact**

The licensee must inform both the primary and secondary water undertaker of its interest in entering into a secondary supply arrangement.

At this stage, the primary and secondary water undertakers must both explain to the licensee their processes for handling applications. They must make their information requirements clear to the licensee and, where appropriate, to the other water undertaker within ten working days from first contact. In addition, all parties need to sign the relevant confidentiality agreements.

The licensee should provide the primary water undertaker with as a minimum the following information.

- The annual volume of water required to be supplied.
- Estimates of monthly, weekly and daily customer demand, including information about peak demand.
- The likely future demand, consistent with the timescales in the secondary water undertaker's WRP as far as is practicable.
- The likely duration of the arrangement.

The licensee should provide the secondary water undertaker with as a minimum the following.

- Estimates of annual, monthly, weekly and daily supply that will be required at the exit point.
- The likely duration of the required supply.
- The likely future supply/demand of water at the exit point, consistent with the timescales in the secondary water undertaker's WRP as far as is practicable.
- Details of the pressure requirements of the supply.

In addition to the above, the primary and secondary water undertaker may need details of the name and/or location of the water supply licensee's customers. If so, they should explain clearly why this information is necessary, for example, to help them determine the most appropriate exit/entry point.

The licensee must provide clear contact details and notify the sewerage undertaker of their interest at this stage<sup>18</sup>.

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<sup>18</sup> Standard licence condition 5(8) of the water supply licence (provision of information to relevant undertakers) requires the licensee to inform any third party sewerage undertaker who provides or will provide services to any premises which are connecting to the water undertakers supply system for the first time, to enable the sewerage undertaker to start bidding for new customers. Please also refer to the 'Guidance on Customer Transfer Protocol'.

The Drinking Water Inspectorate (DWI) will be need to be involved as appropriate at any stage of the procedure. DWI will review the water undertaker's initial assessment report for any key water quality omissions at the start of the detailed application stage. Later in that stage, after the water undertaker's investigations, DWI will assess compliance with the relevant regulatory requirements<sup>19</sup>; identify any issues arising from its guidance on common carriage<sup>20</sup> and review against industry best practice. Please refer to our 'Guidance on applying for a Water Supply Licence' (July 2007) and DWI's Information letter 13/2004 for information on DWI's role in the licensing process. Our 'Procedure for handling water supply licensing determinations' explains how we will involve DWI when we consider disputes.

DWI has requested that it be given between two and three months' warning prior to its involvement in a combined application. Licensees and water undertakers are encouraged to inform DWI as early as possible of a proposed secondary supply arrangement.

In addition, we encourage potential secondary water undertakers to consult the Environment Agency informally whenever they become aware of a possible secondary supply application. In the event that the parties cannot agree on the potential secondary water undertaker's availability of water, Ofwat must consult the Environment Agency before determining a case referred to it under section 66D about the conditions under which secondary supply duties do not apply. More information on this is available in our 'Procedure for handling water supply licensing determinations'.

If a licensee has made an earlier successful application to the same water undertaker, both parties may agree to omit some of these stages. We also expect the time required to complete the stages to reduce with experience. The timescales expressed here are intended as limits, but should not stop the procedure from being completed sooner where possible. We recognise some applications may take longer to process, for example, where technical information is required from other parties such as DWI or the Environment Agency. In these circumstances, the water undertaker and the licensee might agree to 'stop the clock' until the relevant information is received.

### **3.2.2 Outline application**

The licensee needs to make:

- an outline application to the primary water undertaker for access to its supply system; and
- an outline application to the secondary water undertaker for a secondary supply.

An outline application from the licensee should include the following information:

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<sup>19</sup> The Water Supply (Water Quality) Regulations, SI 2000 No.3184, as amended by SI 2001/2885, SI 2002/2469 and SI 2005/2035, in England; Water Supply (Water Quality) Regulations 2001, SI 2001/3911 (W 323), as amended by SI 2005/2035, in Wales.

<sup>20</sup> DWI Information Letter 13/2004 'Common carriage: guidance on the drinking water quality aspects', 23 November 2004. On the DWI website [www.dwi.gov.uk/regs/infolett/2004/info1304.shtm](http://www.dwi.gov.uk/regs/infolett/2004/info1304.shtm).

- A signed consent from the licensees' proposed customers stating that they have expressed an interest in the licensee becoming their new supplier. Only customer consent forms that have been signed, or verified by the customer as in force, no more than two months prior to being submitted at the initial application stage should be accepted. This is to make sure that the customer is still interested in switching supplier.
- A waiver from the customer of any restrictions on the disclosure of information by the water undertaker to the licensee, which is necessary for the new supply arrangement; and
- Confirmation of the type of premises to be supplied and that they are eligible for supply.

Once the licensee has made the outline application, the three parties should agree to a tripartite meeting or a series of tripartite meetings, depending on the circumstances of the case. The first tripartite meeting should be held within 10 working days from the applications being made. Subsequent meetings should be held as swiftly as possible, and no more than a week apart.

### **3.2.3 The tripartite meeting process**

The secondary supply arrangements will need to be discussed over a series of tripartite meetings. The meetings process should provide all parties with the opportunity to discuss the relevant issues.

The timescale for completing the tripartite meeting process is 20 working days. This is based on arranging four meetings at intervals of five working days. We recognise that some meetings may take longer, or shorter, to arrange and that fewer or more meetings may be needed. As experience in this area grows, we expect this to be reflected in the overall time taken by parties to reach agreement.

At the first tripartite meeting, parties should have the relevant documentation to enable them to discuss the following.

The licensee should:

- confirm to the primary and secondary water undertaker what it requires in order to provide the specified levels of service to its potential customers;
- confirm to the primary and secondary water undertaker its exit/entry point proposals; and
- inform the sewerage undertaker and any regulators of their proposals, as appropriate. For example, the DWI, Environment Agency and Strategic Health Authorities.

The primary water undertaker should:

- outline the specifications for introducing the secondary supply into its system; these will include quality and compatibility issues and physical arrangements;
- outline the steps it needs to take to connect the secondary water undertaker's supply system to its own supply system, including discussing exit/entry points;
- explain the likely infrastructure requirements;

- discuss initial operational, quality or hydraulic issues; and
- if the primary water undertaker considers that the supply is likely to constitute a strategic supply, it will confirm the process at this stage<sup>21</sup>.

The secondary water undertaker should:

- provide an offer to the licensee outlining the volume of water that it is able to provide at particular locations, the flow and pressure of the water, the reliability of the supply and the water quality;
- discuss the exit/entry point proposals;
- explain the likely infrastructure requirements; and
- agree the specifications that it will meet and details such as how frequently and in how much detail ongoing operational information is to be provided.

Both the primary and secondary water undertakers should comment on the water licensee's applications and specify any further information that they need in order to complete the application process. They should, as far as possible, confirm the basic feasibility of the licensee's proposal and also explain the circumstances that might lead to an offer being amended so that the licensees understand how and why their offer may change later on. For example, 'spare' water may need to be transported from several locations in the WRZ rather than from one dedicated source.

All parties should discuss the optimum point of connection between the secondary water undertaker's supply system and the primary water undertaker's supply system.

Where necessary, the parties should make the sewerage undertaker aware of the aspects of the proposal that could affect its ability to acquire details for billing and any other issues that may have an impact on its other operational processes.

By the end of the first tripartite meeting, the licensee should receive preliminary price and non-price terms from both water undertakers with an explanation of how and why these estimates may be revised later. Price or cost terms offered at the end of the first meeting will not be binding, but should be as accurate as possible and enable the licensee to plan indicative proposals for supplying its prospective customers.

In some cases, there may be several alternatives for secondary supply arrangements. The licensee can ask for a variety of combinations of arrangements to arrive at their preferred solution. For each alternative, the water undertakers should provide clear and transparent costings to the licensee, with an explanation of what the different options involve. The licensee will then choose the most appropriate solution.

Parties should also have discussed and agreed an ongoing program of tripartite meetings which may incorporate the subsequent stages of the process, depending

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<sup>21</sup> For further information on this please see our access codes guidance and our separate 'Water supply licensing: Guidance on strategic supplies' (the Strategic supplies guidance).

on the circumstances of the case. In some cases, parties may decide that a bipartite meeting only is necessary.

The water undertaker may find that a feasibility study at the detailed application stage is not necessary if the information provided at the outline application stage is sufficient. This will help prevent any further costs being incurred from unnecessary feasibility studies at a later stage. If a water undertaker believes that a licensee's proposal is not feasible at this stage, it should set out the reasons in writing to the licensee. If the licensee does not agree with the water undertaker's reasons, it can refer the matter to be resolved by us as part of a determination under section 66D(1) WIA91.

### **3.2.4 Detailed application**

Water undertakers should aim to complete full assessments of secondary supply applications within 50 working days of receiving the required information from the licensee. It may also be necessary to ask for input from the DWI, Environment Agency, strategic health authorities, the Welsh Ministers or Department for the Environment and Rural Affairs (Defra).

The water supply licensee should now make detailed applications:

- to the primary water undertaker for access to its supply system; and
- to the secondary water undertaker for a secondary supply.

The licensee should generally only make a detailed application in relation to the single option that is their preferred arrangement, rather than making applications for different options. The detailed applications should enable both the primary and secondary water undertakers to carry out any feasibility studies and testing that may be needed to determine proposed terms for access. However, feasibility studies for secondary supplies should not be undertaken until the primary water undertaker has agreed, in principle, to allow the licensee and the secondary water undertaker access to its supply systems.

### **3.2.5 Further information exchange and feasibility testing**

The licensee will need to confirm any information that it has already provided and, where necessary, provide the primary and secondary water undertakers with further details. In general, as there is no technical difference between a bulk supply and a secondary supply, water undertakers should treat licensees no differently from water undertakers arranging bulk supplies.

The information that the licensee may need to provide will include the following:

- any additional supply and demand information that may be requested;
- details of any supply or demand management contingency arrangements, including how the supplies will be managed during a drought;
- relevant proposals relating to obligations, liabilities, insurance, indemnities, etc; and

- for the primary water undertaker – evidence to demonstrate the licensee’s systems for informing customers of emergencies.

The secondary water undertaker and primary water undertaker will need to exchange the following information:

- water quality assessments; including the predicted quality of water entering the system;
- history of contamination of the raw water source, where relevant;
- the level of treatment proposed, with particular attention to disinfection practices and any additional treatment requirements such as plumbosolvency control and fluoridation;
- operational requirements;
- the safeguards and procedures in the event of treatment failure;
- the water quality requirements of potential customer(s);
- proposals for monitoring to ensure compliance with water quality regulations;
- hydraulic requirements; and
- emergency contacts.

The licensee should be kept informed by both the primary and secondary water undertaker about what information is exchanged.

The licensee should keep both water undertakers fully informed if any of the information supplied changes, or if further relevant information becomes available. If the water undertakers consider that any changes require further investigation they will inform the licensee as soon as possible and may modify the price or non-price terms previously quoted. Both water undertakers should keep the licensee fully informed if any circumstances that may affect the secondary supply arrangements change.

The parties will also be able to discuss issues such provision of water for fire fighting and leakage on the primary water undertaker’s supply system. The approach to these issues is covered in our access codes guidance, as these are matters that also apply to applications for combined supplies.

Any feedback on the detailed application should include preliminary price and non-price terms proposed by the water undertakers that will not be binding, but should be as accurate as possible and should provide the licensee with enough certainty to enable formulation of indicative proposals to supply prospective customers. It is therefore important for the water undertakers to base their proposals on as clear an understanding as possible of the required secondary supply arrangements.

After the relevant information has been exchanged, the parties should enter into the feasibility study stage.

The parties should agree the scope of any feasibility studies before they are started. The most appropriate solution may only become apparent following analysis of the options during the feasibility testing. They should also agree how they will communicate the results of the studies between themselves.

The water undertakers should approach DWI if there are any water quality issues arising from the studies. The licensee should keep DWI fully informed where it proposes to introduce a secondary supply into potable supply systems. Due regard should be given to DWI's guidance on common carriage<sup>22</sup>, and any updated versions of that or other relevant guidance that DWI may produce.

After the water undertakers have carried out the necessary investigations and reported the results, including and confirming feasibility of the licensee's proposals with any necessary modifications, they should make a firm offer of price and non-price terms. These offers should be made, in writing, to the licensee within 10 working days of completing the feasibility study. These offers will be subject to all parties signing a necessary agreement.

### **3.2.6 Cost recovery**

In our access codes guidance, we explain that water undertakers cannot recover from licensees any costs that are related to discussing, negotiating and agreeing terms and conditions of a wholesale master agreement. This will include the costs of feasibility studies, modelling, answering queries and processing applications. Similarly, secondary water undertakers should bear these costs when developing secondary supply agreements. We will review this policy as the market progresses and in the light of our review of competition.

Primary and secondary water undertakers can recover some costs from licensees but should not be charged by different water undertakers for the same work or cost. Primary water undertakers can recover the costs of permitting the introduction of a secondary supply to its system. This is likely to include the costs of work such as installing pipes to the point of connection, balancing hydraulic requirements or making the secondary supply compatible with the primary water undertaker's supply. Primary water undertakers will also be able to recover an access charge from the licensee. For more information on calculating access charges, please refer to our access codes guidance.

Secondary water undertakers will be able to recover the costs of providing a secondary supply. This is likely to include costs such as installing new infrastructure for the purposes of facilitating the secondary supply arrangement, the water supply or meeting the primary water undertaker's specifications.

For more information on cost recovery and pricing, please refer to our access codes guidance.

### **3.2.7 Contractual arrangements**

The contractual relationships cover two arrangements.

- The agreement between the licensee and the primary water undertaker covers access to the primary water undertaker's supply systems; and

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<sup>22</sup> DWI Information Letter 13/2004 'Common carriage: guidance on the drinking water quality aspects', 23 November 2004. Available on the DWI website at: [www.dwi.gov.uk/regs/infolett/2004/info1304.shtm](http://www.dwi.gov.uk/regs/infolett/2004/info1304.shtm)

- The agreement between the licensee and the secondary water undertaker covers the arrangements for a secondary supply.

These could be covered in a single agreement or in two separate agreements. Where there are two agreements, the transfer of water will need to be covered in both. It is for the water undertakers and the licensee to decide which contractual arrangement suits the particular situation that has arisen.

There are three areas that need to be covered in the secondary supply agreements.

i) Access to the primary water undertaker's supply system, including:

- arrangements for the transfer of water;
- duration of supply;
- quantities;
- balancing;
- quality;
- metering;
- drought and emergency planning;
- termination provisions;
- price and payment terms;
- arrangements for dealing with outstanding debt;
- operational requirements;
- customer contact;
- liability for contaminated supplies;
- responsibilities for work and maintenance;
- service level agreements; and
- confidentiality.

For the purposes of reaching an access agreement, the physical arrangements relating to the supply of water from the secondary water undertaker should be treated in the same way as the physical arrangements for a wholesale supply of water from a water supply licensee in a combined supply arrangement. For more information on how to approach the relevant issues, please refer to our access codes guidance.

ii) Transfer of water from the secondary water undertaker's system into the primary water undertaker's system, including:

- hydraulic and quality specifications;
- terms and conditions for the transfer, including network balancing and balancing of ingoing supplies;
- ongoing operational requirements;
- responsibility for maintenance and repairs; and
- emergency arrangements and contacts.

iii) Agreement for secondary supplies, including:

- outline of the amount of water needed;
- outline of the specifications for supplying the water;
- payment terms;
- emergency arrangements and contacts;

- arrangements for outstanding debt; and
- service level agreements.

The process of negotiating and developing contracts should be flexible to meet the needs of each individual secondary supply arrangement. Parties should agree whether the tripartite meetings are necessary throughout the whole process or whether certain aspects of the arrangements can be discussed without the presence of one of the parties.

Primary and secondary water undertakers should assess the water supply licensee's detailed application, including any feasibility testing, within 50 working days of receiving the required information from the licensee. They may also need information from other parties such as the Drinking Water Inspectorate, Environment Agency, the Strategic Health Authorities, the Welsh Ministers or Defra. This timescale corresponds with the timescale for entering into a combined supply agreement, as set out in our access codes guidance. The water undertakers should then offer their terms and conditions.

### **3.2.8 Detailed contract negotiations**

Terms and conditions should be offered in the form of a draft contract. We expect water undertakers and licensees ordinarily to complete detailed contract negotiations within 40 working days. The terms and conditions of draft contracts will cover standard issues, relevant to each arrangement, as well as individual issues, relevant to the specific cases.

If either water undertaker or the licensee asks for a change in the terms and conditions, then they should explain the reasons for the change to the licensee. Depending on the changes requested, the other water undertaker may also need to be consulted about the suggestions.

Where any changes are requested, all parties involved should aim to agree these within 10 working days and, in any case, to complete negotiations within the 130 day overall timescale set out in the flowchart at figure 1.

If the licensee accepts the terms, the primary and secondary water undertakers will send the necessary contracts, within 10 working days. The licensee will sign this and return it within 10 working days. Once the final offers have been made the water supply licensee should notify its customers of the intended change of supplier and expected transfer date.

Once an agreement has been made, the process moves to the Customer Transfer Protocol, which covers the process for transferring customers between suppliers.

## **4 Handling disputes**

Water undertakers and licensees are encouraged to resolve issues between themselves. We expect water undertakers to have procedures in place for handling

any disputes arising. If the matters cannot be resolved, then we have powers to investigate disputes that are referred to us by licensees in certain circumstances. Our 'Procedure for handling water supply licensing determinations' sets out how we will investigate issues that are referred to us and includes our timescale for handling these.

## 4.1 Our powers

A licensee can ask us to determine whether any of the conditions outlined in chapter 2 above are satisfied. For example:

- where a primary water undertaker refuses to allow a licensee to introduce water into its supply system in connection with a retail supply to the licensee's customer, or
- a secondary undertaker refuses to provide a supply of water to a licensee; and
- in either case, the refusal is justified by reference to the conditions listed in sections 66C(5) and (6) WIA91;

the licensee may refer the issue to us. If we decide that the condition in question is not satisfied, the water undertaker would be required to facilitate a secondary supply arrangement.

The licensee can also refer disputes about the period, terms and conditions of secondary supply agreements to us<sup>23</sup>. This will include situations where the primary or secondary water undertaker seeks to impose conditions that the licensee considers are unreasonable.

If a licensee wants to refer an issue to us, it will need to enclose all relevant information about its proposed arrangements and the response to the proposal that it has received from both primary and secondary water undertakers. We will then write to both primary and secondary water undertakers asking for more information.

When investigating disputes, we will follow the process set out in our 'Procedures for handling water supply licensing determinations'. This includes details of the timescales that we will aim to meet. We must consult the Environment Agency, the Secretary of State and/or Welsh Ministers before we issue determinations of the terms and conditions of agreements or the conditions for refusing secondary supplies. This section explains the approach that we will take when considering policy issues in cases that are referred to us.

Licensees and water undertakers must be active, flexible and transparent in their negotiations, as this will help to reduce complaints and disputes. For example, where a water undertaker refuses to permit an introduction or to provide a supply, because it considers that to do so would require it to incur unreasonable expenditure as set out in the condition above, but the licensee is content to pay the costs of carrying out those works, the water undertaker should reassess its decision to refuse a secondary supply arrangement.

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<sup>23</sup> Section 66D (2) WIA91

#### 4.1.1 Disputes relating to the first condition

We anticipate that there will be two issues affecting our assessment of disputes relating to the first condition in section 66C(5) WIA91 (as set out in section 2.2 above).

- the expenditure that would have to be incurred by the water undertakers in carrying out works in order to meet all the relevant obligations (that is, its existing obligations to supply water for domestic or other purposes, together with its probable future obligations to supply buildings and parts of buildings with water for domestic purposes); and
- the nature and extent of water undertakers' existing or probable future obligations.

To make a determination of whether the conditions have been met we will need to assess whether the water undertaker will incur 'unreasonable expenditure', as set out in the first condition. For this reason, we need to consider how to define 'unreasonable' and, by default 'reasonable' expenditure.

We will ask water undertakers to provide clear and transparent costing's for any works that they consider are necessary and then we will consider whether these costs are reasonable. We expect water undertakers to be able to demonstrate that their costs for the work have been subjected to market testing, whether by competitive tendering or appropriate comparisons.

In chapter 3, we set out what obligations that water undertaker must consider when assessing an application for a secondary supply or access to the supply system. When determining a dispute, we will need to consider the impact of any secondary supply request on those obligations. We will ask water undertakers to provide a list of the obligations that they have and clear details about why they consider these are at risk if it was to provide or receive a secondary supply. We will expect them to justify the position they have taken and we will then assess whether or not we agree with the water undertaker's view.

Water undertakers already have to assess a number of issues when considering bulk supply arrangements. They should treat licensees no differently from water undertakers arranging bulk supplies.

For the purpose of making a determination on this issue, we will only consider obligations to be at risk if there is a significant threat to existing customers, either at present or in the future, of:

- a disruption to supplies;
- a disruption to the pressure or hydraulic standards of their supplies; or
- a detrimental impact on quality, taste, odour and discolouration of water supplies.

We consider that 'significant' interruptions will cover events that involve either a severe, prolonged interruption or a series of interruptions, especially where these incidents will cause either of the water undertakers to fail to meet their obligations

imposed under appointment conditions or statutory or other enforceable requirements.

#### **4.1.2 Disputes relating to the second condition**

The second condition listed in section 66C WIA91 relates to the situations where there is a contravention of the requirements of regulations under section 74 WIA91 governing the supply and use of water to the relevant premises<sup>24</sup>. This relates to the use of the water and the use of fittings that are in the eligible customers' premises.

These premises are located in the primary water undertakers' area. Furthermore, it is more likely to be the primary undertaker's supply system that will suffer if there is any contravention that affects water quality. Primary water undertakers will assume the main responsibility for checking compliance on this subject. They should follow the same procedures that it would follow when checking the compliance of their own customers. They should also communicate clearly to the licensee what its requirements are, to avoid possible disputes.

If we were to receive any disputes on this subject, our preference would be to mediate between the parties and to encourage them to resolve the issue by agreement, instead of undergoing a formal determination.

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<sup>24</sup> The prescribed requirements are prescribed by the Water Supply Licence (Prescribed Water Fittings Requirements) Regulations 2005 (SI 2005/3077)

## Appendix A: Glossary of terms

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

**Abstraction licence:** the authorisation granted by the Environment Agency to allow the removal of water from a source.

**Access:** The wholesale supply of water by a water undertaker to a licensee for the purpose of making a retail supply of water to the premises of the licensee's customer; and the introduction of water by the licensee into a water undertaker's supply system for that purpose (common carriage).

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

**Access code:** A water undertaker'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. The access code comprises the standard terms and conditions common to all water undertakers and the terms and conditions specific to that water undertaker.

**Access terms:** The terms under which a water undertaker and a licensee agree access to a water undertaker's supply system.

**Combined licence:** A retail licence with the supplementary authorisation, authorising the holder to introduce water into a supply system and to retail that water to a customer's eligible premises (section 17A(5) and (6) of the Water Industry Act 1991).

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

**Drought plan:** Statutory plans produced by the water undertakers that detail the action each would take in the event of a drought to manage the supply of water. Each Environment Agency Region and the Environment Agency Wales also have a drought plans in place that sets out how they plan for and manage drought.

**Drinking Water Inspectorate (DWI):** The DWI was set up by the Government in 1989. It is responsible for enforcing drinking water quality standards in England and Wales and making sure that the water undertakers comply with the requirements of the drinking water regulations. For more information, see the DWI website at [www.dwi.gov.uk](http://www.dwi.gov.uk).

**Eligible premises:** Premises that satisfy the eligibility requirements in section 17A(93) of the Water Industry Act 1991 (WIA91). Each of the following three requirements must be satisfied in relation for each of the premises so that they can be considered to be eligible.

- The customer's premises must not be 'household premises' (as defined in section 17C WIA91).
- When the licensee first enters into an undertaking with a customer to give the supply, the total quantity of water estimated to be supplied to the premises annually by the licensee must not be less than 50 megalitres (the 'threshold requirement', section 17D WIA91).
- The premises may only be supplied by one licensee (but may also be supplied by one or more water undertakers).

**Environment Agency:** The Environment Agency came into being on 1 April 1996 following the 1995 Environment Act, joining together the National Rivers Authority, Her Majesty's Inspectorate of Pollution and water regulations authorities. The Environment Agency has a statutory duty to protect and enhance the environment in England and Wales. It is responsible for water abstraction and water quality in rivers, lakes, reservoirs, estuaries, coastal water up to three miles from the shoreline and water stored naturally underground. In addition, it has powers to decide if water quality is up to standard and if not to determine how to improve it. The Environment Agency also controls the amount of water that can be taken from rivers and boreholes.

**Headroom:** A buffer between supply and demand designed to cater for uncertainties.

**Licensee:** A company holding either a retail licence or a combined licence. Also known to as a licensed water supplier.

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

**Potable:** Water for drinking and food production purposes that is required to be wholesome at the time of supply. This is defined in section 68 of the WIA91 and section 4 of the Water Supply (Water Quality) Regulations.

**Primary water undertaker:** For the purposes of section 66A (wholesale water supply by primary water undertaker) and section 66C of the Water Industry Act 1991 (wholesale water supply by secondary water undertaker), a water undertaker is the primary water undertaker of a licensee if its supply system is to be used for the purposes of making the supply to the premises of the licensee's customer.

**Retail authorisation:** An authorisation to allow a licensed water supplier to use a water undertaker's supply system for the purpose of supplying water to the eligible premises of its customers (section 17A(2) of the Water Industry Act 1991).

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

**Secondary water company:** A water undertaker other than a licensee's primary water undertaker (section 66C(1)(a)(i) of the Water industry Act 1991).

**Supplementary authorisation:** An authorisation to a company to introduce water into a water undertaker's supply system for the purpose of making a retail supply of water to a customer.

**Supply system:** Any water mains and other pipes used for the purposes of conveying water from a water undertaker's treatment works to its customer's premises and any non-potable networks that are not connected to any potable system. This term is defined in section 17B(5) of the Water Industry Act 1991.

**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 bylaws in England and Wales and are largely enforced by the water undertakers.

**Water Industry Act 1991 (WIA91):** This Act (as amended) sets out how the water undertakers are appointed and regulated, and the powers of regulator.

**Water Resource Plan:** A water undertaker's long-term strategic plan for water resource development in its area.

**Water resource zone (WRZ):** The largest possible zone in which all water resources, excluding external transfers, can be shared. Hence, it is the zone in which all customers experience the same risk of supply failure from a resource shortfall.

**Water Supply Licence (WSL):** Introduced by the Water Act 2003. 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 and 2005/2035) for supplies made using water undertakers' supply systems wholly or mainly in England and the Water Supply (Water Quality) Regulations 2001 (SI 2001/3911 (W. 323) amended by SI 2005/2035) for supplies made using water undertakers' supply systems wholly or mainly in Wales. The regulations specify:

- the standards used to define wholesomeness of drinking water;
- the level of monitoring requirement;
- treatment requirements;
- reporting requirements; and
- the requirements for using approved substances and products.

The Drinking Water Inspectorate (DWI) enforces these regulations. For more information; see the DWI website at [www.dwi.gov.uk](http://www.dwi.gov.uk)

**Water undertaker:** A company appointed under the WIA91 to provide water services in respect of a defined geographic area of England and Wales and which owns the supply system and other infrastructure.

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





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