

**New appointments and variations  
– a consultation on Ofwat’s policy  
relating to highway drainage**

## About this document

This document invites views on our updated policy on how highway drainage charges should be dealt with by new appointees.

New appointees are companies that have successfully applied for a licence (‘appointment’) to replace the existing water and/or sewerage company (‘existing appointee’) for a specific geographic area. If a company already has an appointment elsewhere and applies to serve a particular area, we vary its existing appointment to cover the site rather than grant it a new appointment.

We will use the comments we receive to update our policy in [‘New appointments and variations – a statement of our policy’](#). Until then our current policy remains in place. This is set out in section 7.4.2 of the guidance.

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## Responding to this consultation

We invite stakeholders to comment on our proposed policy by **28 October 2014**. We are seeking views on our position on highway drainage. In particular, we would like your views on each of the four principles listed on page 7.

You can email your comments to [richard.field@ofwat.gsi.gov.uk](mailto:richard.field@ofwat.gsi.gov.uk) or post them to:

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If you wish to discuss any aspect of this document, please direct your enquiry to Richard Field at [richard.field@ofwat.gsi.gov.uk](mailto:richard.field@ofwat.gsi.gov.uk).

We will publish responses to this document on our website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk), unless you indicate that you would like your response to remain unpublished.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with legislation on access to information – primarily the Freedom of Information Act 2000 (FoIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004.

If you would like the information that you provide to be treated as confidential, please be aware that, under the FoIA, there is a statutory ‘Code of Practice’ with which public authorities must comply and which deals, among other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances.

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on Ofwat.

## 1. Background

### New appointments and variations

Ofwat has granted 54 NAVs in total since 1997. This includes:

- 40 applications made by five new appointees, enabling new entrants to serve sites that were previously in the water supply or sewerage service areas of existing appointees; and
- 14 applications made by an existing appointee to vary its area of appointment to include eligible sites in adjacent appointees’ areas.

All NAVs provide water and/or sewerage services to the customers within their area. These services often include highway drainage.

### Highway drainage

Highway drainage is where water drains from a road into a public sewer. Under section 115 and section 146(4) of the Water Industry Act 1991 (WIA91):

- highway authorities are allowed to use the public sewer system for drainage of roads repairable by them (public roads); and
- sewerage companies are prohibited from charging highway authorities for that service.

Instead, sewerage companies bear the costs of highway drainage, which means that the burden is shared by all their customers who pay for highway drainage through their sewerage bills. So, highway drainage is different from other costs that customers bear in that the charge paid by each customer is unrelated to their use of the highways.

### Charging for highway drainage

Typically, a new appointee will agree a bulk discharge agreement with an existing appointee to enable the new appointee to provide sewerage services to a site within its area. The facts of a particular site and the negotiating parties will determine whether or not a bulk discharge price contains an element to account for highway drainage.

Ofwat is not involved in these negotiations and so we do not know the extent to which existing agreements include an element to account for the cost of highway drainage.

However, we are aware that some new appointees do not pay anything towards highway drainage. Other new appointees negotiate not to pay highway drainage if:

- there are no public roads on a particular site; or
- they have put in place an alternative solution. For example, a solution that means the roads on a site do not drain to the public sewers of the existing appointee.

Under section 142 of the WIA91, the obligation to set appropriate water and sewerage charges lies with each appointee. This includes highway drainage.

However, this is in respect of end user customers rather than wholesale customers. Potential wholesale customers can request a bulk supply of water or a mains connection from an existing appointee, and if the existing appointee agrees to that supply or that connection, the parties must negotiate the terms on which that supply or connection will be given.

## Ofwat’s role

Disputes may be referred to Ofwat for a determination where:

- an existing appointee refuses to provide a bulk supply;
- an existing appointee refuses to make a mains connection; or
- if the parties cannot agree on the terms on which that supply or connection should be made.

For example, if parties cannot agree a bulk discharge price because the existing appointee insists on including an element for highway drainage and the new appointee does not agree to its inclusion. We would have the power to make a determination as to whether or not the price proposed was reasonable and appropriate.

Section 110A of the WIA91 allows Ofwat to make a determination if there is no existing connection. However under section 110A we can only vary a prior order made by us (we cannot vary an existing agreement between parties). The Water Act 2014 seeks to resolve this by introducing a new section 110B to the WIA91 that provides that we may vary either an existing bulk discharge agreement or a prior order made by us.

## Resolving disputes

In February 2011, we issued:

- ‘[Bulk supply pricing – a statement of our policy principles](#)’; and
- ‘[New appointments and variations – a statement of our policy](#)’.

In these documents, we stated that we regard new appointees as potential wholesale customers of an existing appointee and competitors to existing appointees (see section 6.2 of our [policy statement](#)).

We also stated that bulk supply prices, including those between existing appointees and new appointees should be cost reflective (see section 2.1 of our [bulk supply pricing principles](#)).

In January 2014, we published ‘[Our framework for resolving pricing disputes involving bulk supplies](#)’, in which we said that in determining a dispute we would:

- take the price being disputed as the starting point for our investigation; and
- assess whether we should depart from that price for reasons related to the geographic location of the site, efficiency concerns and/or competition concerns.

If we are requested to make a determination, we will apply these policies as required.

We are likely to consider the price proposed by the existing appointee in the round in order to ensure that:

- it is appropriate given any site-specific factors; and
- it does not give rise to any efficiency or competition concerns.

This will apply whether or not that price includes an element for highway drainage. Even if there are public roads on a site, we will not necessarily conclude that it is appropriate to extend the highway drainage charge that applies to existing large users or other customers of the new appointee. This is because the new appointee is not an end user but a competitor of the existing appointee.

## 2. Why we need to update our policy

We consider the appointment of new appointees and the granting of additional sites to new appointees to be an important tool for introducing innovative ideas into the water sector in England and Wales.

For example, some new appointees have introduced sustainable drainage solutions at sites in their areas. Rather than the traditional drainage solution whereby a new appointee’s site connects to an existing appointee’s sewerage network for foul sewerage and surface water drainage, new appointees have in some instances made use of Sustainable Urban Drainage Systems (SUDS) and soakaways.

We consider that it is important that our approach to charges, including highway drainage charges, should ensure compliance with legislation without impacting on such innovation.

In general, if the parties to a negotiation are commercial entities that have access to their own legal and policy resources, we consider that they should negotiate a price without unnecessary intervention from us. This includes issuing prescriptive policies.

It is for companies to ensure that they comply with the relevant legislation and with their licences. This includes their obligations to ensure that their charges do not unfairly discriminate, and in respect of competition law. These obligations must be taken into account by companies when negotiating bulk supply agreements.

New legislation set out in the Water Act 2014 allows us to produce:

- codes in respect of bulk supply and bulk discharge agreements; and
- charging rules including in respect of bulk supplies and mains connections.

In developing any such codes and rules we are likely to consult further in due course on highway drainage charges. These codes and rules will need to:

- ensure that efficient companies can earn a reasonable return on their capital;
- encourage effective competition where appropriate; and
- enable new appointees to continue to introduce innovative ideas into the water sector in England and Wales.

However, until these codes and rules are in place, we need to clarify our policy expectations with regards to the payment of highway drainage charges by new appointees.

### 3. Our proposed policy on highway drainage

A bulk discharge agreement between a new appointee and an existing appointee is the product of a commercial negotiation. We will only intervene if that negotiation fails and the matter is referred to us under section 110A of the WIA91.

In the negotiations for a bulk discharge agreement, companies should take into account the facts of a particular site. This includes:

- the relevant costs for the prices being negotiated; and
- their legal obligations, including those under competition law.

If a matter is referred to us under section 110A WIA91, we will take into account the following in determining an appropriate bulk discharge price.

1. If a new appointee’s site contains public roads (roads which have been or may be adopted) and those roads drain to the sewers of the existing appointee, we are likely to consider that it is reasonable for the bulk discharge price to include a contribution to the existing appointee’s highway drainage costs.
2. If a new appointee’s site contains public roads that do not drain to the public sewers of the existing appointee, or there are no public roads on the site, we are likely to consider that it is reasonable for the new appointee not to contribute to the highway drainage costs of the existing appointee.
3. The amount of highway drainage charges payable should be a matter for commercial negotiation between new appointees and existing appointees, on a case-by-case basis.
4. A bulk discharge price should as far as possible be cost reflective, which should include taking into account the existence of efficient and sustainable drainage solutions which may result in less highway drainage entering the public sewers of the existing appointee.

## 4. Next steps

We would like responses to this document by **28 October 2014**.

Subject to the comments we receive, we expect to update our highway drainage policy contained within ‘[New appointments and variations – a statement of our policy](#)’. We expect to do this after mid-November 2014. The exact timing will depend on the number and complexity of responses we receive to this consultation.



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October 2014

ISBN 978-1-908116-84-0

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