



Water Services Regulation Authority  
Code for Adoption Agreements Consultation  
Case Management Office  
Centre City Tower  
7 Hill Street  
Birmingham  
B5 4UA

14 August 2017

Dear Sirs

### **Consultation on the Code for Adoption Agreements**

Thank you for providing the opportunity to respond to this consultation.

In responding to this consultation, we have focused on the provisions of the draft Code as they relate to water undertakers. Nevertheless, we consider that the responses given will, in most cases, have equivalent application to the provisions of the draft Code relating to sewerage undertakers.

Our responses to the specific questions raised by the consultation are in the appendix to this letter. We thought, however, that it would be helpful to provide some general observations about the draft Code in this covering letter to provide the context for our specific responses.

#### **General observations**

1. We consider there should be separate codes issued for the adoption of water assets and sewerage assets. This is consistent with the separate deliverables for the adoption of water and sewerage assets provided for in the draft Code:

- Water Sector Guidance
- Model Water Adoption Agreement
- Sewerage Sector Guidance
- Model Sewerage Adoption Agreement

Having separate codes would make each Code more accessible to market participants and would obviate the need for an updated code to be made by Ofwat in respect of water, where a change is required only in relation to sewerage (and vice versa).

2. The draft Code makes references to the Code placing legally enforceable duties and binding obligations on water and sewerage companies to comply with the Code. This is a misinterpretation of the relevant enabling powers which provide, in summary, that:

- Ofwat has a duty to make a Code (Section 51CA(1))
- Ofwat has the power to direct a water undertaker to do or not to do a particular thing in the Code where Ofwat considers that a water undertaker is not acting as required by the Code (Section 51CA(6))
- A water undertaker has a duty to comply with a direction issued by Ofwat under Section 51CA(6) and this duty is enforceable by Ofwat under Section 18 (Section 51CA(8))

Accordingly, the Code, per se, is not legally binding on water undertakers and references to this should therefore be removed

3. The provisions of the draft Code extend beyond the provisions which may be included in a code by virtue of Section 51CA(2)-(5). For example, the provisions relating to information and publication requirements and the governance arrangements for developing draft Sector Guidance and making Change Proposals do not appear to have a statutory basis.
4. The Code is not designated under the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (SI 2017/447) and therefore no right of appeal to the CMA is currently available to water companies under Section 207A of the Water Industry Act 1991. We consider that the Secretary of State should make regulations designating the code for the purposes of Section 207A.
5. The structure of the draft Code should be aligned to the powers granted by Section 51CA(2) and set out under the following section headings:
  - (a) Procedures for making an agreement under Section 51A
  - (b) Procedures for varying or terminating a Section 51A agreement
  - (c) Procedures to be followed by Ofwat in determining whether to make a Section 51B(4) or Section 51C(1) order
  - (d) Circumstances in which it is appropriate for work to be done by a person other than a water undertaker
  - (e) The terms and Conditions of a Section 51A agreement
  - (f) The principles for determining the terms and conditions that should be incorporated into a Section 51A agreement
  - (g) The steps to be taken by Ofwat in determining whether a person is complying with the Code

As currently drafted, the Code appears to cover only the matters provided for in Section 51CA(2)(a), (e) and (f). No provision has been made in the draft Code for the procedures to be followed by Ofwat in determining:

- whether to make an order under Section 51B(4) or 51C(1)
- whether to exercise its power to vary or terminate a Section 51A agreement.

These omissions should be addressed before the Code is finalised.

6. The consultation does not include a specific question on the minimum contents for Model Water Adoption Agreements or assurance terms to be included.

We are supportive of the terms described in Paragraph 3.3 being included in a Model Water Adoption Agreement to be prescribed under the Code.

With respect to control point supervision and defects liability retention payments (Paragraphs 3.4.4 to 3.4.7) we would expect the level playing field principle to apply such that a company can require these matters where it can demonstrate that it would apply the same terms to its own contractors constructing requisitioned water infrastructure assets.

7. Affinity Water's recommends the following approach is taken:

- Processes and model agreements should be set out in the Code
- Deviations from model agreements are acceptable, recognising that this would require the agreement of both the water company and the self lay provider/developer and may be beneficial to the latter
- Changes to the Code should be undertaken in accordance with the procedure set out in Section 51CA

Outside of the Code, Affinity Water is supportive of water companies working together with developer services customers to produce a Model Water Adoption Agreement that can be recommended to Ofwat so that it can be included in the Code. However the Model Water Adoption Agreement and Code should not operate to inhibit self lay providers and developers from innovating and agreeing different commercial and operational approaches with water companies, should they wish.

We would, of course, be willing to discuss this response in more detail if Ofwat would find this helpful.

Yours faithfully



**Tim Monod**  
Director of Legal and Assurance

## APPENDIX

### Code for Adoption Agreements Consultation Responses

Please note Affinity Water's responses to the consultation questions below should be read in conjunction with the general observations on the draft Code provided in the letter.

**Q1 Do you agree with our preferred approach in terms of the content and scope of our Code? Please explain your answer.**

Please see paragraphs 1 to 7 of this letter.

**Q2 Do you agree with our proposed code principles and their definitions? Please explain your answer.**

Part 2 of the draft Code provides that:

*"Regard must be given, by Water and Sewerage Companies, to the following principles when interpreting this Code and, in the development, maintenance and application of the arrangements under this Code."*

This is beyond the scope of the power under Section 51CA(f) for a code to make provision about ***"principles for determining the terms and conditions that should or should not be incorporated into a section 51A agreement."***

The eight principles proposed each relate to "arrangements under the Code", rather than the terms and conditions that that should or should not be incorporated into a section 51A agreement.

As provided for by Section 51CA, principles included in the Code should be limited to the terms and conditions to be included in the Model Water Adoption Agreement and should not extend to the arrangements by which the Model Water Adoption Agreement is developed. By adhering to the enabling power, the principles can be simplified and targeted more effectively at the provisions to be included in the Model Water Adoption Agreement.

We do not think a principle should cross refer to principles that may be developed outside of the Code by Ofwat under its Information Principles. This is particularly important if there is to be no right of appeal afforded to companies in respect of the Code.

**Q3 Do you think our proposed minimum information and publication requirements are appropriate and sufficient?**

Affinity Water is willing to collect and publish the information set out in Paragraph 4.1 of the draft Code. However, it is not evident that the provisions of Part 4 regarding the publication of information fall within the matters that can be included in a code made under Section 51CA.

**Q4 Do you agree with our proposed approach of requiring companies to develop Sector Documents and Model Adoption Agreements in consultation with Developer Service Customers, according to a set of minimum requirements?**

We agree that the sector is best placed to develop Sector Guidance and Model Adoption Agreements in consultation with Developer Service Customers which can then be prescribed by Ofwat in its Code.

While Affinity Water is committed to participating in sector-wide arrangements for this purpose, we are doubtful that the provisions relating to recommendations on Sector Guidance and the development of Model Adoption Agreements fall within the ambit of the powers granted to Ofwat under Section 51CA.

**Q5 Do you agree with our proposed minimum requirements? Please explain your answer.**

Affinity Water considers that the minimum requirements for the draft Water Sector Guidance are appropriate, but that the requirement to develop draft Sector Guidance falls outside the scope of Section 51CA.

**Q6 Do you agree with our proposed approach to deviations? Please explain your answer.**

Paragraphs 5.1 and 5.2 of the draft Code purport to place obligations on water companies to comply with Water Sector Guidance and the Model Water Adoption Agreement. For the reasons given in paragraph 2 of this letter, we do not consider that water companies are legally obliged to comply with the Code.

Further, the Model Water Adoption Agreement and Code should not operate to inhibit self lay providers and developers from innovating and agreeing different commercial and operational approaches with water companies, should they wish.

**Q7 Do you have any comments on our proposed approach to governing the initial approval of and subsequent changes to the Sector Documents and Model Adoption Agreements?**

Subject to the overall point that we do not consider the proposed approach is capable of being included in a Code made by Ofwat under Section 51CA, we consider that, in general, outside of the Code, the proposed governance arrangements are workable.

However, we do not consider Ofwat should have a role in approving the Model Adoption Agreements under the governance arrangements envisaged by the draft Code. The Model Water Adoption Agreement should form part of the Code prescribed by Ofwat.

**Q8 Do you consider the proposed timeline for submitting the Sector Documents and Model Adoption Agreements to us for approval to be realistic and achievable? If not, what would you consider to be a suitable timeline?**

Subject to our preferred approach set out in paragraph 7 of this letter, we consider the proposed timeline for developing a Model Adoption Agreement to be achievable.

**Q9 Do you have any comments on the assurances the sector will be required to provide to us when submitting the Sector Documents and Model Adoption Agreements to us for approval?**

We are supportive of working with other water companies and self lay providers/developers to draft a Model Water Adoption Agreement which can then be prescribed by Ofwat in its Code.

The provisions relating to recommendations in Paragraphs 3.6.1 to 3.6.3 are unclear as to who is to give the recommendations envisaged by these paragraphs. This creates a risk that no company will make a recommendation or one or more or all companies may make different recommendations in seeking to follow these provisions.

**Q10 Do you have any comments on our proposed transitional arrangements to enable companies to comply with the Sector Documents and Model Adoption Agreements?**

While we are content with the timetable for companies to submit a draft Model Water Adoption Agreement to Ofwat by 1 March 2018, we do not think this is an obligation that can be imposed on water companies by a code made under Section 51CA.