

June 2017

Trust in water

# Consultation on the Code for Adoption Agreements

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## About this document

The Water Industry Act 1991 (as amended by the Water Act 2014) requires us to issue codes for adoption agreements. These are the agreements that developers or self-lay providers enter into when they want an appointed water or sewerage company to take over responsibility for infrastructure that they have constructed.

We propose issuing a single Code covering the adoption of both water and sewerage infrastructure. Before issuing our Code, we are required to publicly consult on it. This document is the statutory consultation on the draft Code for Adoption Agreements that we propose to issue for water and sewerage companies whose areas are wholly or mainly in England. The Code itself is in [Appendix 1](#).

We are seeking the views of all interested parties and welcome feedback on our draft Code by 10 August 2017.

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## Responding to this consultation

We welcome your responses to this consultation by 10 August 2017. We would particularly welcome your views in response to the questions we have set out in the relevant sections of this document, which we have also listed for ease of reference in the section below.

In submitting your response, please identify:

- Which question number(s) your comments are in response to; and
- Whether your comments relate specifically to the adoption of water or sewerage infrastructure, or are applicable to both.

Please make sure that you clearly list any additional comments separately.

You can email your response to [AdoptionCodes@ofwat.gsi.gov.uk](mailto:AdoptionCodes@ofwat.gsi.gov.uk). You can also submit your response by post to:

Code for Adoption Agreements Consultation  
Case Management Office  
Ofwat  
Centre City Tower  
7 Hill Street  
Birmingham, B5 4UA

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with access to information legislation – primarily the Data Protection Act 1998 and from May 2018 the General Data Protection Regulations (**GDPR**), Freedom of Information Act 2000 (**FoIA**), and the Environmental Information Regulations 2004.

If you would like the information you have provided 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 to be confidential. If we receive a request for disclosure of that 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 or a blanket request for confidentiality will not, in itself, be regarded as binding on Ofwat.

## Consultation questions

### Questions

- 1) Do you agree with our preferred approach in terms of the content and scope of our Code? Please explain your answer.
- 2) Do you agree with our proposed code principles and their definitions? Please explain your answer.
- 3) Do you think our proposed minimum information and publication requirements are appropriate and sufficient?
- 4) 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?
- 5) Do you agree with our proposed minimum requirements? Please explain your answer.
- 6) Do you agree with our proposed approach to deviations? Please explain your answer.
- 7) 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?
- 8) 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?
- 9) 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?
- 10) Do you have any comments on our proposed transitional arrangements to enable companies to comply with the Sector Documents and Model Adoption Agreements?

## Executive summary

Ofwat is the economic regulator for the water sector in England and Wales. Our shared vision for the water sector is one where customers and wider society have trust and confidence in vital public water and wastewater services.

Providing new water and sewerage infrastructure is currently one of the areas of the sector where customers in England and Wales can choose their service provider or provide the service themselves rather than having to buy the service from their local appointed water or sewerage company. It is important that developers and self-lay providers of infrastructure can have trust and confidence that they can receive the services they want from water and sewerage companies, when they need them and on fair terms. It is also essential that end-user customers served by that infrastructure have trust and confidence that water and sewerage companies will only adopt quality, resilient infrastructure.

In the Water Act 2014, the UK Government introduced new tools for Ofwat to use to facilitate the provision of new infrastructure connections in the water and sewerage sector and ultimately support house building. In particular, the Water Act 2014 placed a new obligation on Ofwat to issue statutory codes with respect to adoption agreements. Under sections 51CA and 105ZC of the Water Industry Act 1991, Ofwat must issue codes with respect to section 51A agreements (for the adoption of water infrastructure) and section 104 agreements (for the adoption of sewerage infrastructure).

We have considered various options for developing codes for adoption agreements and their potential impact on different stakeholders. On the one hand, we could issue very detailed and prescriptive codes. On the other, we could issue codes consisting of high level principles, within which the sector itself must develop the detail for delivery. Our proposed approach strives to strike a balance between these two options.

We are proposing a single Code for Adoption Agreements that includes:

- a set of over-arching principles;
- minimum information and publication requirements;
- obligations on water and sewerage companies to develop and maintain wider sector guidance documents and model adoption agreements in line with the Code principles and a minimum set of requirements;
- obligations on water and sewerage companies to comply with the sector guidance documents and model adoption agreements, only deviating from them when permitted by our Code; and
- governance requirements for the future management of the sector guidance documents and model adoption agreements, including requiring water and sewerage companies to set up panels with equal representation between water and sewerage company representatives and developer service customers.

## 1. Introduction

This document is the statutory consultation on the draft Code for Adoption Agreements (**the Code**) that we are proposing to issue under sections 51CA and 105ZC of the Water Industry Act 1991 (**WIA91**) for companies wholly or mainly in England.

The WIA91 was amended by the Water Act 2014 (**WA14**), with the introduction of new provisions requiring Ofwat to issue codes on adoption agreements. For water and sewerage companies operating wholly or mainly in England, some of those provisions came into effect on 1 April 2017 and the balance of the provisions will come into effect on 1 October 2017.<sup>1</sup> The Welsh Government has not yet indicated when it intends to bring the provisions relating to adoption agreements into effect for water and sewerage companies operating wholly or mainly in Wales. This consultation, therefore, only applies to water and sewerage companies operating wholly or mainly in England.

The Code that we are consulting on is just one element of our work, and the sector's work, to improve the delivery of developer services. In December 2016, we published our Charging Rules for New Connections for water companies whose areas are wholly or mainly in England. While there are clearly links between our work on this Code and the charging rules, they are distinct and enabled by different provisions in the WA14. Charging issues will sit in our charging rules and not in the Code, which is more focused on the process for and wider terms and conditions of entering into an adoption agreement.

This document is structured as follows:

- [Chapter 2](#) sets out the background behind the development of our Code, including the legal framework;
- [Chapter 3](#) sets out the various options we have considered in developing the Code;
- [Chapter 4](#) sets out our preferred approach and what this would look like;
- [Chapter 5](#) sets out details of how we will monitor compliance with the Code and the tools available to us in the event of non-compliance;
- [Chapter 6](#) sets out next steps following the end of this consultation; and
- [Appendix 1](#) provides the draft Code that we propose to issue under section 51CA and section 105ZC WIA91.

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<sup>1</sup> [The Water Act 2014 \(Commencement No. 9 and Transitional Provisions\) Order 2017](#).

## 2. Background

Where a developer or a self-lay provider (**Developer Services Customers**) constructs new water or sewerage infrastructure itself, the WIA91 includes provisions by which they must, or may, transfer ownership of certain infrastructure to the local appointed water or sewerage company (including new appointees) by way of an agreement (known as an **Adoption Agreement**). The Adoption Agreement sets out the terms on which the local appointed water or sewerage company will take on responsibility for the new infrastructure. Following the adoption of the new infrastructure at an agreed date it becomes part of the local appointed water or sewerage company's network, and that company then has responsibility for maintaining the adopted infrastructure on an on-going basis.

So while Developer Services Customers are able to exercise some choice in the markets for providing new water and sewerage connections, they remain reliant on some non-contestable services from the local water or sewerage company. Such services include:

- applying for and agreeing the terms of an Adoption Agreement, which governs the delivery of the new connection infrastructure and its eventual adoption; and
- gaining the water or sewerage company's approval for the works so that the final adoption can take place.

Currently, water companies take different approaches to the provision of services with respect to Adoption Agreements. While the sector has jointly developed sector guidance documents<sup>2</sup> and model Adoption Agreements (described in more detail below), these are not statutory and water companies are not legally required to follow these documents. In addition, Ofwat has no formal powers to require them to do so. This means there are issues of consistency of approach and many water companies have their own specific arrangements in place. These company-specific arrangements are not always transparent and can create unnecessary complexity.

Also, to date the level, quality and accessibility of information provided by water and sewerage companies about self-laid infrastructure has varied greatly across the sector. Developer Services Customers report that it is often difficult to find the information they need, or that it is not readily available when they need it.

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<sup>2</sup> Sector guidance documents include the Code of Practice for Self-Laying of Water Mains and Services - England and Wales (2nd Edition) and Sewers for Adoption (7<sup>th</sup> Edition). We also understand that some companies are continuing to use Sewers for Adoption (6<sup>th</sup> Edition).

If a Developer Services Customer is dissatisfied with the service provided by a water or sewerage company in relation to an Adoption Agreement, the only remedy currently available to that customer is to appeal to us about the terms on which a water or sewerage company is offering to enter an Adoption Agreement.<sup>3</sup>

## **2.1 Legal framework**

The WA14 amended the WIA91 by introducing the following new provisions:

- Section 51CA WIA91 requires us to issue a code in relation to agreements for the adoption of water mains and service pipes.
- Section 105ZC WIA91 requires us to issue a code in respect of agreements for the adoption of sewers, drains or sewage disposal works.

Sections 51CA(2) and 105ZC(2) of the amended WIA91 set out that the codes may make provision for:

- a) procedures in connection with making an Adoption Agreement;
- b) procedures in connection with varying or terminating Adoption Agreements;
- c) procedures to be followed by Ofwat in determining whether to make an order requiring a company to enter into an Adoption Agreement and specifying the terms of that agreement;
- d) procedures to be followed by Ofwat in determining whether to vary or terminate an Adoption Agreement;
- e) the circumstances in which it is, or is not, appropriate for work to be done by a person other than a water or sewerage company;<sup>4</sup>
- f) the terms and conditions of an Adoption Agreement;<sup>5</sup>
- g) the principles for determining the terms and conditions that should or should not be incorporated into an Adoption Agreement; and
- h) the steps to be taken by Ofwat in determining whether a person is complying with the code.

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<sup>3</sup> Under sections 51B and 105ZA WIA91 a person may apply to Ofwat to require the undertaker to enter into an Adoption Agreement. In addition sections 51C and 105ZB WIA91 provide that in certain circumstances Ofwat can by order vary or terminate an Adoption Agreement following a request to do so by a party to the agreement.

<sup>4</sup> Section 51CA(4) and section 105ZC(3) WIA91 state that this may include in particular provision about circumstances relating to the nature of the work; and the kind of premises supplied or to be supplied.

<sup>5</sup> Section 105ZC(4) WIA91 states that this may include in particular provision about terms and conditions about: constructing associated infrastructure; vesting associated infrastructure in a sewerage undertaker; and making a communication with public sewers.

The explanatory notes for the WA14 highlight that as a result the codes may set out:

- standard or specific terms and conditions between the parties which may be mandatory or not;
- principles for determining what terms and conditions are suitable for particular agreements, or more generally;
- the circumstances in which it is appropriate for the person seeking adoption to carry out works instead of the water or sewerage company; and
- the procedures for when a request to agree an Adoption Agreement is received by a water or sewerage company and steps to be taken to reach, amend or terminate an agreement.

Sections 51CB and 105ZD of the amended WIA91 set out the procedures Ofwat must follow before issuing codes with respect to Adoption Agreements for water and sewerage infrastructure respectively. This includes consulting relevant persons about a draft of the proposed codes.<sup>6</sup> For the code with respect to adoption agreements for water infrastructure, consultees include the Drinking Water Inspectorate.

Within 28 days of the end of the consultation period and before we issue the first Code, the Secretary of State or Welsh Ministers may direct Ofwat to not issue the Code, or to issue it with specified modifications.<sup>7</sup> We may not issue the Code until that 28-day period has expired.

Sections 51CA(10) and 105ZC(9) of the amended WIA91 state that Ofwat must, from time to time, review the codes and, if appropriate, issue a revised code. A revised code may include provision for retrospectively applying any of its revisions to section 51A/104 agreements made before the revised code comes into force.<sup>8</sup>

## 2.2 Sector Documents

Water and sewerage companies are, and have been, working with Developer Services Customers in, amongst other things, jointly developing guidance documents and model template agreements (**Sector Documents and Model Adoption Agreements**) for companies and Developer Services Customers to follow when entering into Adoption Agreements and adopting infrastructure. In addition, since 2015 water companies have voluntarily reported on their performance in delivering a series of developer services activities, some of which relate to steps within the

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<sup>6</sup> Sections 51CB(1) and 105ZD(1) WIA91.

<sup>7</sup> Sections 51CB(4) and 105ZD(3) WIA91.

<sup>8</sup> Sections 51CC and 105ZE WIA91.

process for requesting and completing an Adoption Agreement.<sup>9</sup> There are, however, issues remaining which include:

- significant variations between the quality of service companies provide;
- companies failing to consistently follow the guidance and instead using their own specific arrangements;
- difficulties in Developer Services Customers being able to access information before entering into an Adoption Agreement causing them delays and unnecessary administrative burdens; and
- Adoption Agreements often placing more risks and requirements on Developer Services Customers than on the water or sewerage company.

### **2.3 Our work to date**

In September 2016, we published a discussion paper to seek views from stakeholders on what our Code should or should not include.<sup>10</sup>

The responses we received to the discussion paper expressed a wide range of views on what should be included in our Code and how prescriptive it should be. We subsequently held a workshop with stakeholders in January 2017 to further explore the issues and to help us develop a clearer understanding of where a principle-based approach to our Code would be sufficient, and where a more detailed, prescriptive approach might be needed.

Some of the key themes we heard from stakeholders included:

- recognition of the progress made by the sector to improve developer services;
- recognition that stronger, better quality engagement between Developer Services Customers and companies earlier in the adoption process was a key improvement;
- concerns that levels of improvement and service are not consistent across the sector and a hope that this issue will be resolved via the Code;
- support to drive transparency and a common approach across the sector, for example, by requiring all companies to provide a minimum level of service (based on best practice);
- a desire that the Code should not prevent companies from providing a better level of service where this can be offered, or prevent innovation in service delivery;

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<sup>9</sup> Companies' performance can be found on [Water UK's website](#).

<sup>10</sup> Our September discussion paper and a summary of stakeholders' responses are available [here](#)

- support for building on the current Sector Documents and Model Adoption Agreements and driving more consistent use of these documents with deviations from them being the exception rather than the norm;
- a view that our Code and the Sector Documents and Model Adoption Agreements need to be agile and capable of evolving easily over time; and
- more specific suggestions around the need for our Code to facilitate more timely and effective resolution of complaints and disputes.

## 2.4 Our objectives

In light of the views stakeholders have shared with us and the legal framework that we must work within (see above), we have developed the following objectives:

- ensure a level-playing field for Developer Services Customers who wish to apply for and enter into Adoption Agreements;
- facilitate a clear, reliable process that is consistent across the sector;
- drive efficiency and effectiveness of processes, reducing the time and costs incurred by all parties entering into Adoption Agreements;
- ensure water and sewerage companies take ownership of their stakeholder relationships, including when things go wrong;
- ensure Ofwat can act as a safety net where parties are unable to resolve disputes themselves;
- enable innovation and a flexible service; and
- provide that end-user customers are still appropriately protected from the adoption of sub-standard infrastructure.

As well as testing the options available for the development of our Code (as set out in Chapter 3) against the objectives above, we will also compare the available options against the issues arising under the status quo. In addition, we have been mindful of the need to ensure that we demonstrate how our approach is consistent, to the extent possible, with our vision and approach as a regulator (**our regulatory model**).

Building on significant changes we have already made, we are moving away from prescriptive, ‘one size fits all’ approaches to regulation that focus the water sector on the regulator. Instead, we will use approaches that are based on frameworks that align the interests of companies and capital with customers (‘pro-market’) with proportionate and targeted action by us, supported by robust intelligence and assurance and a greater focus by companies on their customers. We are also adopting a strategic role in providing information on sector performance. This will be supported by us seeking and maintaining stronger relationships with our stakeholders and greater transparency in our regulatory work.

### 3. Options

**Table 1** sets out a summary of the different options we have considered in developing our Code. These options are then described in more detail in the remainder of this chapter.

Our options analysis looked at the inclusion of each of the following areas in our Code:

- code principles - our high-level expectations of how water and sewerage companies should be delivering the relevant services. We must ensure that the services they deliver with respect to Adoption Agreements comply with our Code principles;
- information and publication requirements<sup>11</sup> - requiring water and sewerage companies to make information, that Developer Services Customers need for applying for and entering into Adoption Agreements, publicly available and easily accessible;
- processes companies should follow with respect to Adoption Agreements;
- whether deviations from the Code should be permitted and what controls should be in place to govern deviations;
- the governance arrangements required for maintaining and amending the Code; and
- Ofwat's ability to step in when water and sewerage companies are not behaving as expected.

We have then assessed how the above areas in our Code would:

- a) meet the objectives in paragraph 2.4 above;
- b) impact on relevant parties; and
- c) be consistent with our vision and [regulatory approach](#).

As shown in **Table 1**, our options range from a purely principles-based and light touch approach to developing our Code, to a more detailed and prescriptive approach.

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<sup>11</sup> [Ofwat's information principles](#)

**Table 1: Summary of options**

→ **Moving to more prescriptive approach** →

← **Moving to more principles based approach** ←

					Preferred option	
	0	1	2	3	4	5
Option	No change	Light touch, principles based		More detailed requirements		Prescriptive
Principles	None	Code principles to always guide companies' behaviour when delivering services to Customers in relation to adoption agreements.				
Information and publication requirements	Only Ofwat's information principles.	Obligations on companies to publish on their website all information customers may need to apply for and enter into adoption agreements, including achieving adoption.				
Companies' processes and adoption agreements	Voluntary sector documents.	Company arrangements required to comply with the principles in the code.	Code sets out expectations that companies follow the current sector documents, but Ofwat cannot take enforcement action if they do not do so.	Companies required to develop and maintain sector documents in consultation with customers and according to minimum requirements.  Codes do not place obligations on companies to comply with sector documents.	Obligations to comply with sector documents and Ofwat can enforce if there is a failure to comply.	Processes and model agreements set out in code.  Companies are required to comply with code.
Permitted deviations from obligations	Not applicable – not required to comply with sector documents.	Not applicable – not needed.			Our code specifies that the sector documents must set out when deviations are permitted and any deviations must comply with our principles.	Not included in our code - companies must apply to us for derogations*.
Governance	Sector led.	Sector led governance.		Sector required to establish panel(s) to govern changes to sector documents.  Ofwat not involved in the governance of sector documents.	Ofwat approves the first, and subsequent changes to, the Sector Guidance and Model Adoption Agreements.	
Ofwat's ability to direct companies/enforce arrangements	Not applicable.	Scope limited to obligations set out in the code: principles and information requirements.		Scope limited to: compliance with principles, information requirements and the process for developing the sector documents.	Companies are required by our Code to comply with the sector documents so Ofwat can issue directions to companies that fail to comply.	All obligations are embedded in our code so Ofwat can issue a direction and take enforcement action for non-compliance.

\* A direction from Ofwat which relieves a company from compliance with certain of its obligations to comply with our Code

## Options 1 and 2 – light touch, principles-based code

Under **Option 1** our Code would **only** include:

- a) the principles which companies must comply with when entering into Adoption Agreements; and
- b) information and publication requirements.

**Option 2** is similar but in addition to the above, our Code would **reference the current Sector Documents and Model Adoption Agreements** and would set out our expectation that companies should follow these. However, this approach would not be able to place an enforceable obligation on companies to comply with the Sector Documents and Model Adoption Agreements nor set out requirements for how companies develop these documents.

Under both options, placing minimum information and publication requirements on companies could:

- provide certainty to Developer Services Customers on what they can expect throughout the process helping them make informed choices on whether to lay their own infrastructure; and
- help drive efficiency and effectiveness by reducing Developer Services Customers' reliance on inputs from companies before they can submit and progress an application for an Adoption Agreement.

Both options would be broadly in line with our regulatory model and are unlikely to place significantly increased costs or additional burdens on companies. However, they do not address many of the issues raised by stakeholders, and are unlikely to drive a substantial improvement (compared to the status quo) in the way companies deliver services relating to Adoption Agreements. For example, they do not give certainty that companies will follow their published processes, nor do they address the differences in approach and quality of services across the sector.

Additionally, under both options 1 and 2, our ability to step in and take action to address issues of poor performance are limited to circumstances where a company fails to comply with the code principles and minimum information and publication requirements.

We consider, therefore, that whilst these options would meet some of our objectives they would not provide a robust or long-term solution to the issues arising under the status quo nor would they correctly target the areas of concern amongst Developer Services Customers. Taking this into account, we consider these options would fail

to maximise the opportunity to resolve those issues, via the new provisions introduced into the WIA91 by the WA14 (as described in section 2.1) and 12 fall short of aligning fully with the principles of our regulatory model.

## **Options 3 and 4 – more detailed code with requirements to develop and maintain Sector Documents and Model Adoption Agreements**

Under **Option 3** we would include code principles and information and publication requirements and, in addition, a **requirement on companies to collectively develop and maintain Sector Documents and Model Adoption Agreements**, in consultation with Developer Services Customers.

Under **Option 4**, we would take an almost identical approach to option 3, except **we would be part of the governance process** for the Sector Documents and Model Adoption Agreements and in particular, **we would approve the Sector Documents and Model Adoption Agreements** (and subsequent changes to those documents). Our approval of these documents would mean that **we are able to place obligations on companies to comply** with the documents. We would also be able to issue directions to companies that fail to comply.

This would be a similar approach to that taken in the electricity sector.

### **Electricity connections example**

In 2014, Ofgem carried out a review of the market for new connections to the electricity distribution network in response to concerns about whether the market was effective. Through the market review Ofgem found that a number of issues were limiting the development of competition in new connections, some of which related to the role of distribution network operators (**DNOs**) in the connection process.

As a result, Ofgem introduced a new licence condition for all DNOs to reduce the extent to which competitors depend on DNOs for essential services. Where DNOs are required to provide these services, they must provide them on the same basis to their competitors and to their own connection businesses. In addition, DNOs were required to harmonise their arrangements by collectively developing an enforceable code of practice according to minimum requirements set by Ofgem. DNOs are required to comply with this code of practice.

In terms of governing changes to the documents created under our Code, we would want to ensure Developer Services Customers are involved by being represented on a panel that would consider changes to the Sector Documents.

Panels have a number of benefits, including:

- allowing the interests of all relevant stakeholders to be more clearly balanced by ensuring that all groups are involved in the development of sector arrangements;
- providing an efficient route for all market participants to feed views into the development of the sector arrangements; and
- allowing regulators to draw on the technical expertise of a panel to consider changes in areas where the regulator may not have the specific skills and knowledge needed (e.g. technical and operational practices), while enabling the regulator to retain overall oversight of the sector arrangements.

Under **Options 3 and 4**, our Code would place requirements on the sector to set up and administer panels comprising equal numbers of company and Developer Services Customers' representatives to consider changes to the Sector Documents and Model Adoption Agreements. The key difference would be that under **Option 4** we would expect those panels to make recommendations to us enabling us to approve the first set of documents and any subsequent changes to those documents.

While there would be costs to companies in jointly developing the Sector Documents and Model Adoption Agreements, we are aware that companies are already in the process of revising the current version of these documents. We consider, therefore, that **Options 3 or 4** would not be significantly costly or burdensome to implement.

Under **Option 4** the Sector Documents and Model Adoption Agreements would be brought within our remit, and we would be able to take action in instances of non-compliance. For example, if we became aware that a company was not acting as required in accordance with the Sector Documents or Model Adoption Agreements, we could issue a direction to the water or sewerage company to do, or not do something, with the aim of bringing the company back into compliance with the Code or Sector Document. Failure to comply with this direction would be enforceable by us under section 18 WIA91.

To ensure flexibility and scope for innovation we would, however, consider allowing deviations from our Code where this was appropriate.

In summary, we consider that **Options 3 and 4** would address the concerns that would remain under **Options 1 and 2**, namely by:

- clarifying which Sector Documents and Model Adoption Agreements companies should follow and the extent to which companies adhere to these - for example, there are two different sewerage guidance documents currently in use;
- aligning the Sector Documents and Model Adoption Agreements with a single set of objectives and principles; and

- requiring engagement with Developer Services Customers in the development of the Sector Documents and Model Adoption Agreements.

Overall, however, we consider that **Option 4** would better satisfy all of the objectives we set out in section 2.4, in particular by ensuring water and sewerage companies need to comply with the Sector Documents and Model Adoption Agreements so that we would be able to step in if this was not happening.

Whilst **Option 4** may seem to move away from the framework-based approach within our regulatory model, we consider it to be a proportionate and targeted approach to concerns and issues stakeholders have raised with us about the current arrangements. We consider, therefore, that it does offer a customer focussed and targeted solution, which addresses the areas of most concern, whilst meeting our objectives and maximising the opportunity presented by introduction of the new provisions into the WIA91 which require us to develop our Code.

## Option 5 – detailed, prescriptive code

Under this final option we would still include code principles, and place information and publication requirements on companies. However, instead of requiring companies to develop Sector Documents and Model Adoption Agreements, **we would instead prescribe the detailed processes and requirements** with respect to Adoption Agreements. **Our Code would in effect replace the current Sector Documents.**

The Code would specify where companies are permitted to have local arrangements and would only allow deviations from the Code with our approval and on a site-specific basis.

It is difficult at this stage to understand the likely impact of this option on companies in terms of time and cost. We would need to evaluate the scale of the impacts as the detailed requirements under this option were developed.

While the approach under this option would provide customers with certainty as to what they can expect at each step in the process to enter into and complete Adoption Agreements, we consider that it does not align fully with our regulatory model principles of being framework-based, or proportionate as it would be overly prescriptive and we would have a number of concerns such as:

- the risk of companies focussing on engaging with us on the development of the Code, rather than engaging with their Developer Services Customers to understand and provide what services they need (which would go against our regulatory model principle of acting in a manner that is customer focussed);
- the potential administrative and cost burden for all relevant parties of having to seek site-specific approvals for any variation from the Code; and
- a lack of flexibility and an inability to evolve and innovate over time created by an overly prescriptive code that would include a slower and less agile change process compared with the other approaches that we could take.

## 4. Our preferred option

After evaluating the different options presented in [Chapter 3](#), we consider that, in line with **Option 4**, a Code comprising all of the following components would be most effective:

- code principles;
- minimum information and publication requirements;
- obligations on water and sewerage companies to develop and maintain Sector Documents and Model Adoption Agreements in line with the code principles and a minimum set of requirements;
- obligations on water and sewerage companies to comply with the Sector Documents and Model Adoption Agreements, only deviating from them when permitted by the Code;
- governance requirements for the future management of the Sector Documents and Model Adoption Agreements, including requiring water and sewerage companies to set up panels with equal representation of water and sewerage company representatives and Developer Services Customers to maintain and consider changes to the documents; and
- approval of the Sector Document and Model Adoption Agreements by Ofwat (including subsequent changes to those documents).

In arriving at our preferred approach, we have been mindful of the need to strike the right balance between greater prescription and a more principle-based approach. This is in the context of our objectives for this work (see section 2.4), the legal framework within which we must develop our Code and the practical implications of our Code on relevant stakeholders.

In particular, we have considered how the options allow us to step in to protect customers when companies' provision of services falls short of what is expected or where disputes arise.

Companies are required to comply with our Code under the WIA91. By using our Code to require companies to develop, maintain and comply with Sector Documents and Model Adoption Agreements and ensuring Ofwat is part of the governance arrangements, we are bringing compliance with these those documents within our remit, as if they were part of our Code.

In particular, by requiring companies to comply with the Sector Documents and Model Adoption Agreements, companies will also be required to comply with the levels of service and reporting requirements within them.

This will, in effect, make the levels of service in the Sector Documents and Model Adoption Agreements a regulatory requirement.

**Question**

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

On the basis of our preferred option, in the sections below we set out more detail on the specific areas that our Code would cover. In doing so, the following sections cross-refer to the draft Code we have included as [Appendix 1](#) to this document.

#### **4.1 Code principles**

Our proposed Code principles will provide the foundations for our Code and will govern a number of aspects of the Code. The principles we are proposing to include and their definitions are set out in Chapter 2 of the Code.

**Question**

- 2) Do you agree with our proposed code principles and their definitions? Please explain your answer.

#### **4.2 Information and publication requirements**

We are proposing to place minimum information and publication requirements on companies in relation to the services they provide their Developer Services Customers with respect to Adoption Agreements. This is vital to ensure those customers have access to the information they need to be able to make informed choices and, if they wish, to successfully apply for and enter into Adoption Agreements, and to achieve adoption of the self-laid infrastructure.

We are, therefore, proposing to require companies to make publicly available and easily accessible the information set out in Chapter 3 of the Code.

We are aware that the sector may prefer to make this information available on a central sector website. Our Code will allow the sector to take this approach if companies wish. Where companies do use a central sector website, our Code

requires company websites to provide clear and sufficient sign-posting to where the information can be found.

### Question

- 3) Do you think our proposed minimum information and publication requirements are appropriate and sufficient?

### 4.3 Obligation to produce draft Sector Documents and Model Adoption Agreements

Under our preferred approach companies will be required to develop, in consultation with Developer Services Customers:

- A water Sector Document and a Model Adoption Agreement covering the adoption of water infrastructure that can be subject to an Adoption Agreement entered into under section 51A WIA91; and
- A sewerage Sector Document and a Model Adoption Agreement covering the adoption of all sewerage infrastructure that can be subject to an Adoption Agreement entered into under section 104 WIA91.

We are aware that the sector is already in the process of revising the water Sector Document and will soon be initiating a review of the sewerage Sector Documents. We expect that the sector will be able to meet the obligations in the Code to develop Sector Documents and Model Adoption Agreements by building on the work to date. We set out more information on how we expect the first Sector Documents to be developed and implemented in the section below on transitional arrangements.

The Sector Documents and Model Adoption Agreements will need to comply with the code principles and also the minimum requirements set out in the Code. In developing the minimum requirements we have taken into account the content of the current Sector Documents and Model Adoption Agreements. Chapter 3 of the code sets out our requirements in respect of these.

In April 2016, we published an [information notice](#)<sup>12</sup> setting out our general expectations about the assurance terms a water company may seek in a self-lay agreement entered into under section 51A of the WIA91. We published this

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<sup>12</sup> [IN16/06: Assurance terms in self-lay agreements entered into under section 51A of the Water Industry Act 1991](#)

information notice as a result of our consultation '[Trust and confidence: self-lay provision of new connections](#)'.

When we issue our Code for Adoption Agreements, we are proposing to retract the information notice and incorporate its contents into Chapter 3 of the Code as minimum requirements for the Model Adoption Agreements.

We are also proposing that where relevant, similar provisions on assurance terms are included within the minimum requirements for sewerage Model Adoption Agreements.

### Questions

- 4) 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?
- 5) Do you agree with our proposed minimum requirements? Please explain your answer.

## **4.4 Compliance with the Sector Documents and Model Adoption Agreements and permitted deviations**

Under our Code, it will be a regulatory requirement for companies to comply with the Sector Documents and Model Adoption Agreements.

Respondents to our September 2016 discussion paper, and attendees at our workshop in January 2017, expressed strong support for our Code providing flexibility to allow parties to deviate from standard practice where this is necessary or is likely to deliver benefits. However, this should be balanced against the need to ensure Developer Services Customers, as a minimum, always receive a good level of service and have certainty about the process to get infrastructure adopted.

We agree that the Code for Adoption Agreements should not prevent water and sewerage companies from providing a better level of service, or stand in the way of increased collaboration with Developer Services Customers or opportunities to innovate. We have, therefore, considered a range of different approaches for allowing deviations from the Sector Documents, including:

- prohibiting all deviations but allowing companies to submit requests to us for deviations on a case-by-case basis;
- specifying in detail where deviations are permitted, for example, according to size and complexity of sites or works; or
- providing a high-level framework for deviations, for example, requiring deviations to be justified by the Code's principles and to have written agreement from the relevant customer.

We recognise Developer Services Customers have tight development timescales and a process that requires permission from Ofwat for every deviation from the Sector Documents is unlikely to be timely enough to meet their needs. Additionally, only allowing deviations for very specific or exceptional circumstances is unlikely to create better outcomes as it would be difficult to capture all the circumstances where flexibility might reasonably be needed.

In light of the above, to provide a reasonable amount of flexibility, we propose to allow deviations where this aligns with the high level framework of the Code's principles and where both the water or sewerage companies and the Developer Services Customer agree to a deviation from the Sector Documents and Model Adoption Agreements.

In addition to the high-level framework for permitting deviations, we propose that our Code also specifies where a company may depart from the definition of contestable works in the Sector Documents. We are aware that by requiring companies to comply with the definition of contestable works in the Sector Documents, we are removing companies' current ability to take reasonable steps to mitigate the risk to end-user customers if site-specific circumstances justify this. However, we also think companies should not be routinely taking a narrower view of contestable work from the definition in the Sector Documents. We propose, therefore, to limit companies to only taking a narrower view where it is justified by the site-specific circumstances and the company has evidence that the associated risk to the provision of services to end-user customers is unacceptable.

In terms of the scope for taking a wider definition of contestable works, the definition in the Sector Documents will be the minimum definition of contestable works. Companies will, therefore, be free to take a wider view of contestable works without it being considered a deviation from the Sector Documents. Where companies do take a wider view of contestability, they will be required to make this information publicly available so that Developer Services Customers can understand the scope of the works they could deliver, and the requirements they must meet to be allowed to do so.

**Question**

- 6) Do you agree with our proposed approach to deviations? Please explain your answer.

#### **4.5 Governance of Sector Documents and Model Adoption Agreements**

We are proposing that the first set of Sector Documents and Model Adoption Agreements is approved by us and that following that approval, the sector establishes two panels: one to consider the water documents, and another to consider the sewerage documents. The role of the panels will be to consider change approvals and submit change recommendations to Ofwat, in accordance with Chapter 3 of the Code. We will consider the panel's recommendations and publish our decision whether to approve or reject the change.

Each panel will need to have an equal number of representatives from companies and Developer Services Customers. Where there is a sector-recognised accreditation scheme the relevant panel must include a representative from the scheme's advisory panel, but their attendance will be advisory only and will not include the ability to vote on Change Proposals.

**Question**

- 7) 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?

#### **4.6 Transitional arrangements**

The provision in the WA14 requiring us to issue our Code for Adoption Agreements comes into effect on 1 October 2017 for companies operating wholly or mainly in England. We anticipate being in a position to issue our Code shortly after that date.

Due to our preferred approach, we have specified in the Code transitional arrangements for:

- how and when the different obligations in the Code will be brought into effect;
- Ofwat's review and approval process for the first Sector Documents and Model Adoption Agreements under the Code; and

- specifying when these new detailed arrangements will apply and therefore be a regulatory requirement on companies.

We are aware that the sector is revising the water self-lay guidance document and will soon be initiating a review of the sewerage guidance documents. We expect, therefore, that the sector would be able to meet the obligations in the Code to develop Sector Documents and Model Adoption Agreements by building on the work to date.

We are, therefore, proposing that water and sewerage companies must develop the Sector Documents and Model Adoption Agreements in consultation with their Developer Services Customers with a view to submitting to us the first set of Sector Documents and Model Adoption Agreements developed under our Code by 1 March 2018.

Alongside the Sector Documents and Model Adoption Agreements, we are proposing that the sector must also submit to us assurances confirming that:

- the documents comply with the code principles and minimum requirements in the Code;
- Developer Services Customers have been appropriately consulted during the development of the documents, providing evidence of how they have been included and the extent of their involvement; and
- the documents reflect the broad consensus of opinion among market participants, and where this is not the case, set out any outstanding points of difference and how these have been addressed in the documents submitted to us for approval.

We expect that we would review and approve the Sector Documents and Model Adoption Agreements by 1 April 2018. However, we will not approve these documents if we are not satisfied that there has been full consultation with Developer Services Customers and that the final document is appropriately reflective of their views and positions.

Once the Sector Documents and Model Adoption Agreements have been approved, we propose giving companies a short time to adjust, with the obligations to comply with those documents coming into effect on a date specified by us, a date may not be earlier than one month after our approval of the documents. Based on this, we anticipate that companies would be required to comply with the Sector Documents and Model Adoption Agreements for all new applications for Adoption Agreements from no later than 1 May 2018.

Similar to the approach we are taking to Charging Rules for New Connections, where an application has been submitted before the effective date, we propose that the customer could request and agree with the company to be subject to the Sector Documents and Model Adoption Agreements produced under the Code.

### **Questions**

- 8) 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?
- 9) 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?
- 10) Do you have any comments on our proposed transitional arrangements to enable companies to comply with the Sector Documents and Model Adoption Agreements?

## 5. Monitoring and reporting

Currently, companies voluntarily report their performance in relation to the delivery of a range of developer services via Water UK. This includes performance against a number of target levels of service relating to Adoption Agreements.

In line with our general approach to monitoring, we are not requesting companies to report their performance against the Code directly to us. Instead, under our proposed approach to our Code we would expect companies to continue to report their performance via Water UK, with the target level of service aligned to that set out in the Sector Documents. This level of service will be a statutory requirement due to the obligation to comply with the Sector Documents.

In terms of companies' annual performance reporting, company boards will need to consider the obligations under our Code when signing and submitting their annual risk and compliance statement to us. They will need to assure themselves that they fully understand their company's obligations under our Code and are satisfied that they have sufficient processes and internal systems of control in place to fully meet these obligations.

If we have concerns about the quality of companies' reporting, or become aware of a particular risk or issue, we will step in and may request more information from companies. In addition, we may use targeted reviews to further investigate any issues.

### **Taking action**

As a result of the amended WIA91 and the approach we propose to take to our Code we will be able to take action where a water or sewerage company does not comply with our Code, including where they do not meet the requirements in the Sector Documents.

In line with our [Casework Strategy](#), we take a proportionate and targeted approach in addressing allegations of non-compliance and the action we take will depend on the nature, seriousness and impact of the contravention. Where the contravention is trivial in nature, we are not required to take enforcement action.

Further information on our approach to enforcement is available [here](#).

## **6. Next steps**

We welcome feedback to our consultation by 10 August 2017. In particular we welcome feedback on the specific questions set out throughout the document.

We will consider all the responses we receive and subject to considering any confidentiality requests, we aim to publish all of the responses we receive to this consultation.

The relevant provisions requiring us to issue codes with respect to Adoption Agreements come into effect on 1 October 2017. Our aim is to issue our final Code shortly after these provisions come into effect.

The Welsh Government has not yet indicated when it intends to bring the provisions relating to our issuing of our Code into effect for water and sewerage companies operating wholly or mainly in Wales.