

August 2021

# **Innovation Fund: Consultation on amendment to intellectual property right policy for the second Breakthrough Challenge competition**

## About this document

In August 2020, we published our [decision document](#) on the design and implementation of Ofwat's £200 million innovation fund. Since January 2021 we have run two innovation competitions as part of the innovation fund. We plan to run multiple competitions up to 2025.

As our attention turns to the design and implementation of future competitions, we have reflected on the feedback provided and learning gained to date.

As a result, the second round of the Water Breakthrough Challenge ('**Breakthrough 2**'), will bring together elements from the Innovation in Water Challenge 1 ('**IWC 1**') and Water Breakthrough Challenge 1 ('**Breakthrough 1**') to provide a unified and streamlined process for water companies in England and Wales to access the funding through two streams:

- **Catalyst stream** will be available for projects seeking funding of between £100,000 and £1 million; and
- **Transform stream** will be available for projects seeking funding of between £1 million and £30 million.

Breakthrough 2 will open on 11 October 2021. Further detail will be provided during the end of August and following our decision on this consultation in mid-September.

This document sets out for consultation our proposal to test a change to Ofwat's intellectual property rights ('**IPR**') policy for part of the catalyst stream within Breakthrough 2. This change will enable owners of background IPR to charge a licence fee at a fair, reasonable and non-discriminatory rate for the use of the background IPR solely to the extent necessary for water companies to receive the benefit of the foreground IPR. We do not propose to make any other changes to the background IPR policy.

For the other funding option under the Catalyst stream, we will retain the same IPR policy as was in place for IWC 1 and Breakthrough 1. However, we are also consulting on whether there is any merit in retaining the option that allows proposals for alternative IPR to be put forward.

For the Transform stream of Breakthrough 2, we will retain the same IPR policy as was in place for IWC 1 and Breakthrough 1.

## Contents

Responding to this consultation .....	3
1. Background and existing policy position .....	5
2. Proposed approach to background IPR for Breakthrough 2.....	8
3. Consultation questions .....	12
4. Next steps .....	13
A1 Intellectual property rights clause .....	14

## Responding to this consultation

We welcome your responses to the consultation questions set out at section 3 of this document. Please email them to [innovationconsultation@ofwat.gov.uk](mailto:innovationconsultation@ofwat.gov.uk), with subject 'Innovation IPR consultation August 2021'.

You can also submit your response by post to: Innovation IPR consultation, Ofwat, Centre City Tower, 7 Hill Street, Birmingham, B5 4UA.

The closing date for this consultation is Monday 6 September 2021 at 9am. If you wish to discuss any aspect of this consultation, please contact the innovation team or by email at [innovationconsultation@ofwat.gov.uk](mailto:innovationconsultation@ofwat.gov.uk)

We intend to publish responses to this consultation on our website at [www.ofwat.gov.uk](http://www.ofwat.gov.uk). Subject to the following, by providing a response to this consultation you are deemed to consent to its publication.

If you think that any of the information in your response should not be disclosed (for example, because you consider it to be commercially sensitive), an automatic or generalised confidentiality disclaimer will not, of itself, be regarded as sufficient. You should identify specific information and explain in each case why it should not be disclosed and provide a redacted version of your response, which we will consider when deciding what information to publish. At a minimum, we would expect to publish the name of all organisations that provide a written response, even where there are legitimate reasons why the contents of those written responses remain confidential.

In relation to personal data, you have the right to object to our publication of the personal information that you disclose to us in submitting your response (for example, your name or contact details). If you do not want us to publish specific personal information that would enable you to be identified, our [Privacy Policy](#) explains the basis on which you can object to its processing and provides further information on how we process personal data.

In addition to our ability to disclose information pursuant to the Water Industry Act 1991, information provided in response to this consultation, including personal data, may be published or disclosed in accordance with legislation on access to information – primarily the Freedom of Information Act 2000 (FoIA), the Environmental Information Regulations 2004 (EIR) and applicable data protection laws.

Please be aware that, under the FoIA and the EIR, there are statutory Codes of Practice which deal, among other things, with obligations of confidence. If we receive a request for disclosure of information which you have asked us not to disclose, we will take full account of

your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances.

# 1. Background and existing policy position

## 1.1 Background to the innovation fund

We previously identified three key barriers to innovation in the water sector. Our December 2019 decision document '[Time to act, now: driving transformational innovation in the water sector](#)' highlighted the need for:

- a shift in company culture
- more effective joint working; and
- changing a general perception that the current regulatory framework does not sufficiently encourage innovation, particularly in the context of clear public health and environmental obligations companies must comply with.

We considered that the introduction of innovation funding and innovation competitions can help address these barriers, along with other initiatives such as the [one-stop-shop](#) innovation advice hub.

We set out our decision to make up to £200 million of additional funding available through an innovation competition for the regulatory period, 2020–2025 in our December 2019 decision document. Our decision was that funding would be provided through an increase in company revenues as set out in the 2019 price review and would be collected by water companies from their customers. Through the introduction of the innovation fund, our aim is to help the England and Wales water sector grow its capacity to innovate and meet the needs of customers, society and the environment, with funding targeted at tackling [key strategic challenges](#).

By targeting transformative innovation designed to address key strategic challenges and emphasising the need for stronger collaboration and partnerships across the sector and beyond, we believe innovation funding and innovation competitions will help accelerate change. In spring 2020 we consulted on [the design and implementation of the innovation fund](#) and in August 2020 we published our [decision document](#) on the design and implementation of the fund, including key policy areas such as IPR.

In January 2021 the IWC opened and made approximately £2 million available for entries up to the value of £250,000 each. In April 2021 we announced the [11 winning entries](#) for the competition.

In May 2021 we opened Breakthrough 1. This competition aimed to attract longer term, more strategic projects and made approximately £40 million available for entries valued at between £1 million and £10 million.<sup>1</sup> We will announce the winners at the end of September 2021.

## 1.2 Background to IPR policy

In our August 2020 [decision document](#) we set out our IPR policy for the innovation fund. Our IPR policy remains to ensure all water company customers benefit from the projects that receive money via the innovation fund, which is collectively funded, after considering other similar competitions, such as [Ofgem's Network Innovation Competition \(NIC\)](#), and the feedback we received when consulting on our proposed competition design.

The current rules achieve this by ensuring that customers are not subject to additional costs for projects that they have funded (i.e. by not having to pay twice to access IPR developed using funding from customers).

## 1.3 Current IPR policy

Our IPR policy differentiates between background IPR and foreground IPR. We recognise pre-existing IPR, which exists prior to the submission of any projects to the innovation fund, as **background IPR**, the rights to which our policy states should be retained by the participants that developed it. Where access to that background IPR is required to enable the project to go ahead, we stipulate that an appropriate form of licence should be granted to all participants to enable that.

In respect of **foreground IPR**, this is new intellectual property that is created through a project funded by the innovation fund. To ensure all customers benefit from the innovation fund, our current policy states that foreground IPR must be made available royalty-free and in perpetuity to all 17 water and wastewater companies and new entrant water and wastewater companies. Where a participant's background IPR is required for the purposes of using foreground IPR, we expect a limited appropriate form of licence to be granted by the participant, royalty free.

## 1.4 Feedback on IPR policy

We are currently in the pilot period of the innovation fund (January 2021-March 2022) and have been capturing learning and feedback from IWC1 and Breakthrough 1. We received a high level of good quality entries in these competitions. However, to help us evaluate the effectiveness of the policies around the fund design, we want to use this part of the pilot

---

<sup>1</sup> Entries with a lower value than £1 million were permitted for smaller water companies and NAVs if requested.

period to test some of our policies and processes to further improve the design and implementation of future competitions and to ensure that they have the greatest possible impact and meet the aims of the fund.

The feedback received, in respect of both competitions, has suggested that the current IPR policy, especially in relation to royalty-free access to background IPR solely to the extent necessary for water companies to receive the benefit of the foreground IPR, is a disincentive to some innovators, particularly very small and early-stage innovators, and those proposing digital, data-driven and AI-focused innovations, where revenue is often closely tied with IPR.

This feedback is reflected in the projects which were entered into the IWC and Breakthrough 1, with some water companies indicating that there were projects which they did not put forward because of the existing IPR requirements. Water companies indicated that a change to background IPR requirements may alter the projects they bring forward to a second round.

## 2. Proposed approach to background IPR for Breakthrough 2

### 2.1 Policy

We are retaining our current policy that all water company customers must benefit from the projects that receive monies via the innovation fund.

However, we are proposing to trial the relaxation of the requirement at clause 4 of the current terms and conditions (see Annex A1) for a licence to be provided royalty free where a participant's background IPR is required for the use of the foreground IPR. Instead, owners of background IPR will be able to charge a licence fee at a fair, reasonable and non-discriminatory rate, if use of the background IPR is necessary to receive the benefit of the foreground IPR. Through the assessment process, entrants will be required to demonstrate value for money how, ultimately, customers will benefit from the project being funded, regardless of the licence fee.

We are considering whether by removing the requirement for a background IPR licence to be provided royalty free where it is required for the use of the foreground IPR, the need to allow for requests for alternative IPR arrangements may be obsolete. We are seeking feedback on this position via this consultation.

To note we are not proposing to amend:

- the definitions of foreground or background IPR in the current terms and conditions (although entrants will need to be able to articulate what they consider to be the background IPR that they are bringing to the project, and what the foreground IPR they will generate through the project, as part of the assessment process), or
- the requirement for an appropriate form of licence to be granted to all participants in any project to enable it to go ahead, or
- the current position on royalties.

### 2.2 Available funding

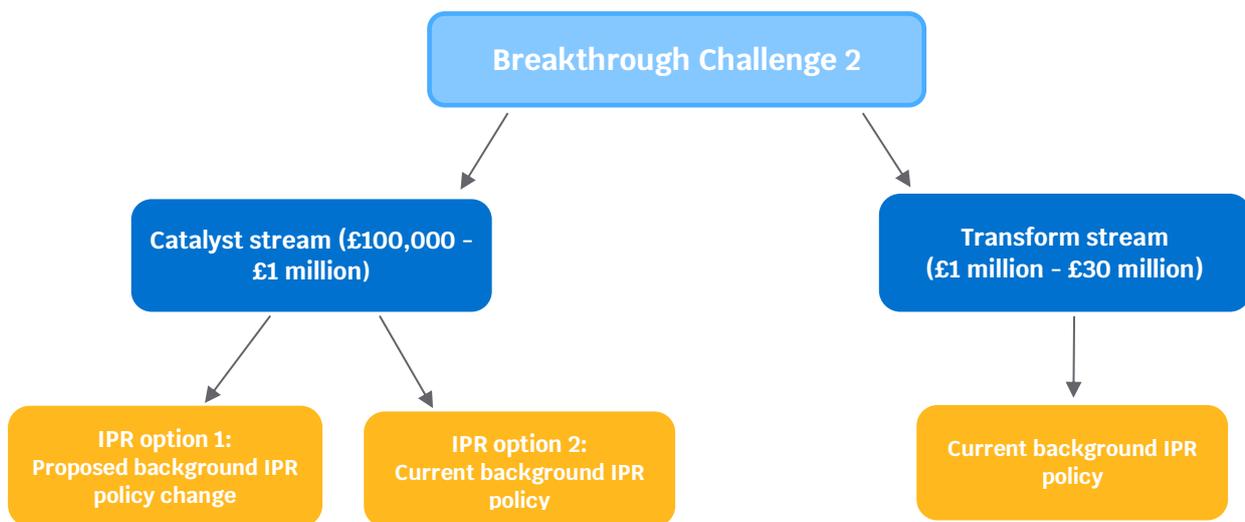
The second round of Breakthrough 2 will have two streams of funding for innovative projects which deliver benefits for customers, society and the environment and aligned to our [5 strategic themes](#):

- **Catalyst stream** will be available for projects seeking funding of between £100,000 and £1 million; and

- **Transform stream** will be available for projects seeking funding of between £1 million and £30 million.

We are planning to use up to half of the available funding for the Catalyst stream of Breakthrough 2 to trial this different approach to licensing background IPR.

The remaining half of the available funding for the Catalyst stream of Breakthrough 2 would apply the current IPR rules as default (see diagram below).



Entrants would be expected to choose at the entry stage which IPR terms of the Catalyst stream of Breakthrough 2 they would like their entry to be considered against. Entrants will need to make a clear choice taking into account the specifics of their project. Entrants would not be permitted to change options once their entry has been submitted.

The policy and approach on IPR for the Transform stream of Breakthrough 2 will be the same as for previous competitions (including the option to request alternative IPR arrangements).

## **2.3 Reasons for proposing to trial a change to the background IPR licencing position**

We are proposing to trial a change to the background IPR licencing position for the following reasons:

### **To encourage broader participation in the fund**

The IPR policy has been consistently cited as potentially limiting the types of entries that are submitted and therefore the impact that the fund may have. From the feedback we have received on fund design, our understanding is that the default IPR position and the option to propose alternative IPR arrangements may not be sufficiently attractive, particularly to third parties, to encourage certain types of entry where revenue is often closely tied with IPR.

We therefore want to test what impact making a change to the IPR policy for Breakthrough 2 might have on encouraging broader participation in the competition and the types of innovation projects proposed.

### **To use the pilot period to test different approaches and gather evidence to inform future policy decisions**

We intend to review our current innovation fund policies more fully towards the end of the pilot period and intend to work with stakeholders and third parties to design changes and implementation of the innovation fund for years 3-5. To aid in this review process, we want to use this part of the pilot period to trial different competition design, including in relation to background IPR licences.

The relationship between our IPR rules and the impact of the innovation fund is complex. For example, the IPR rules applied to a competition can influence the nature, number and quality of projects that are submitted and finally realised. IPR rules can, therefore, impact the benefits and intended outcomes for the innovation fund.

A change to our policy on background IPR for part of the Catalyst stream of Breakthrough 2 will provide an important opportunity to test the impact of the current approach and whether it is having a prohibitive effect on potential entrants. We will be able to see if this change results in a wider range of solutions put forward which are more impactful and therefore provide greater benefits to customers, society and the environment.

By trialling this new approach under the Catalyst stream of Breakthrough 2, whilst also making available up to half of the funding pot for entries that wish to adhere to the current default IPR position, this will provide a more direct counterfactual to help us evaluate the impact of the trial and better inform future decision making around this important policy area.

As detailed above, we will put in place (via the assessment process) requirements to ensure that where background IPR is to be licenced at cost, entrants demonstrate value for money for water customers. This will ensure that customer money is not spent on a project where the results would only be available to water companies (and their customers) at a prohibitive rate.

## **Foreground IPR**

We are not proposing to make changes to the current position on foreground IPR.

Whilst we are aware from our previous consultation and engagement that our approach to dealing with foreground IPR may be considered a barrier for some entrants, we also note that foreground IPR is that created through a project funded by water company customers through the innovation fund. We do not consider that water companies' customers should have to pay twice to benefit from the foreground IPR, once to fund the project, and then again to access the benefit.

Instead, because of its nature, background IPR, i.e. IPR in existence prior to the submission of an application to the innovation fund, means that its development has not already been funded by water companies' customers, and therefore we consider that there is scope to enable reasonable recouping of monies by those that own the background IPR, should this be required to use the foreground IPR.

### 3. Consultation questions

Q1. In relation to the proposed policy changes which will allow participants to charge for a license for background IPR, to what extent do you think this may, or may not, result in:

- a) better access to the fund for innovators and third parties;
- b) a broader range of projects;
- c) higher quality of projects; and
- d) any other benefits or disadvantages.

Please provide any evidence and / or examples, including from your experience with the fund so far.

Q2. To what extent might the proposed approach benefit or disadvantage customers in comparison to the current policy?

Q3. Is there any merit in retaining the option to propose alternative IPR arrangements when submitting a bid given the changes we're proposing within this consultation document? If so, where do you consider that we should allow flexibility in the scope for any alternatives – e.g. Foreground IPR? Please provide specific examples in answering this question.

Q4. How do you think we could evaluate the impact of our proposed IPR policy changes to inform the next competition, including areas such as access to the competitions and ultimately the benefits to customers? What additional information do you think we should collect in order to help us to evaluate?

## 4. Next steps

This consultation closes at 9am on Monday 6 September 2021. We intend to issue a decision document in response to this consultation in mid-September, outlining how this decision impacts the design of Breakthrough 2,<sup>2</sup> which is scheduled to open on 11 October 2021.

We intend to review our current innovation fund process and policies more fully towards the end of the pilot period and intend to work with stakeholders and third parties to design changes and implementation of the innovation fund for years 3-5.

---

<sup>2</sup> Initial information about the design of Breakthrough 2 will be issued by the end of August 2021.

## A1 Intellectual property rights clause

Below are the IPR terms for Breakthrough 1.

4.1 In these terms and conditions:

“IPR” shall mean any copyright and related rights, patents, rights to inventions, registered designs, database rights, design rights, topography rights, trademarks, service marks, trade names and domain names, trade secrets, rights in unpatented know-how, rights of confidence and any other intellectual or industrial property rights of any nature including all applications (or rights to apply) for, and renewals or extensions of such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

“Background IPR” is IPR, which exists prior to the submission of the application to the Challenge.

“Foreground IPR” is all IPR that is created through a project funded by the Challenge.

4.2 Each participant shall retain all rights in and to its Background IPR. Where necessary an appropriate form of licence should be granted to all participants in any project, which is the subject of a bid, for the sole purpose of the project, in order to enable it to go ahead.

4.3 With regards to the ownership of Foreground IPR, where a project funded through the Challenge involves more than one participant, then any jointly created IPR should be shared proportionately as agreed by the project participants, however where any IPR is created independently by one of the project participants then it should be owned by the participant who created it, rather than by all the project participants.

4.4 You and your partners hereby grant to all appointed Water Companies (whether currently existing or existing in the future) in England and Wales a non-exclusive, perpetual, sub-licensable, irrevocable, royalty-free licence to:

4.4.1 use your Foreground IPR for any purpose related to their operations as a water company. If the Foreground IPR contains any third party IPR you must ensure that such third party IPR is also licensed on the same basis set out in this clause 4.4.1; and

4.4.2 use a participant’s Background IPR solely to the extent necessary for them to receive the benefit of the licence granted at clause 4.4.1 above. If the Background IPR contains any third party IPR you must ensure that such third party IPR is also licensed on the same basis set out in this clause 4.4.2.

4.5 To the extent that an applicant or any of its partners receive any royalties:

4.5.1 Foreground IPR will be made available royalty-free to the appointed Water Companies in England and Wales by all project participants (water companies, business retailers and other third parties).

4.5.2 Foreground IPR royalties earned by appointed Water Companies and water retailers in all sectors in England and Wales, which for the avoidance of doubt shall include the water sector in England and Wales, will be shared with water company customers (in proportion to the funds that customers have contributed to the project). This includes where there are joint bids.

4.5.3 Foreground IPR royalties earned by other third parties (i.e. those other than the appointed water companies and business retailers) in other sectors in England and Wales, do not need to be shared with water company customers.

4.5.4 All project participants may retain royalties earned outside England and Wales.

4.6 Requests for alternative IPR arrangements will be considered on a case-by-case basis. Where applications to the Challenge propose alternative IPR arrangements, your application must clearly show how the project will benefit all customers of water companies and any alternative arrangements do not result in additional costs to customers.

4.7 It is important that the benefits of the Challenge flow back to those customers funding it, and ensure strong alignment between the customer needs and priorities of the sector and the focus of innovation. In order to ensure this, the default for IPR arising as a result of the Challenge shall be treated in accordance with this clause 4 unless any alternative arrangements are agreed by Nesta, in consultation with Ofwat, in writing in a Challenge award letter.

**Ofwat (The Water Services Regulation Authority)  
is a non-ministerial government department.  
We regulate the water sector in England and Wales.**

Ofwat  
Centre City Tower  
7 Hill Street  
Birmingham B5 4UA  
Phone: 0121 644 7500

© Crown copyright 2021

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit [nationalarchives.gov.uk/doc/open-government-licence/version/3](https://nationalarchives.gov.uk/doc/open-government-licence/version/3).

Where we have identified any third party copyright information, you will need to obtain permission from the copyright holders concerned.

This document is also available from our website at [www.ofwat.gov.uk](https://www.ofwat.gov.uk).

Any enquiries regarding this publication should be sent to [mailbox@ofwat.gov.uk](mailto:mailbox@ofwat.gov.uk).

**OGL**