

Date: 6 September 2021

Ofwat
Centre City Tower
7 Hill Street
Birmingham
B5 4UA
By e-mail: innovationconsultation@ofwat.gov.uk

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

Dear Sir/Madam,

We welcome the opportunity to respond to the consultation on this important subject to enable the Ofwat Innovation Fund to continue to deliver transformational innovation for the water sector, attracting the most-cutting edge of innovators and contributing to better outcomes for our customers, society and the environment.

Below are our answers in response to the specific questions posed in the consultation document.

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.

South West Water is supportive of the proposed policy change.

We set out our thinking and position in broader terms in the subsequent answer, but experience from the first rounds of the competition tell us that we were unable to take forward two projects in the Water Breakthrough Challenge (WBC) owing to what was deemed to be an overly stringent IPR position, especially relating to licensing of background IPR, which arguably is the backbone of commercial entities' viability and central to their market offer. It was felt on these occasions that the companies with whom we were developing projects were simply not in a position to "hand over", free of charge and unlimited, access to the background IPR that would enable exploitation of foreground IPR generated in the project, if successful.

We are aware that other water companies have also experienced very similar situations and as expressed previously, any change that enables this barrier to be overcome is welcomed by us.

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

The following is a combined response to both questions one and two.

South West Water would be supportive of providing an option for participants to charge for a licence for Background IPR as we believe that this would attract more entrants and would potentially drive value for customers, as we explain below. However, this would need to be carefully managed and we would suggest that further policy detail is required on Ofwat's expectations in relation to different types of Background IPR and the calculation of the charge. Particularly, for background IPR charges continuing beyond the duration of the innovation project and the charging arrangements for new entrants (water companies not within the original project team) seeking to utilise the innovation.

Generally, we would like to be able to work with "start-up" entrants and other entrants who need to be able to charge for Background IPR but we are also conscious that the competitions should not become an opportunity for entrants to make money through selling Background IPR to the water industry as this would detract from the focus on innovation. Especially, if the foreground IPR developed through the competition enhances the value/attractiveness of the background IPR being introduced by the third party.

There is a suggestion on page 11 of the consultation that Background IPR would need to be "licenced at cost" [sic]. This would certainly make sense where the Background IPR is licensed to the relevant entrant by a third-party owner. In that scenario, it is relatively clear that the cost could be easily ascertained and the background IPR could then be licensed to just those water companies who choose to use the developed Foreground IPR after the competition.

However, an "at cost" charge would be less suited to Background IPR owned by an entrant itself, where the entrant has begun to commercially exploit that Background IPR. We would suggest that a policy, or an expectation, needs to be articulated for this. Ideally entrants would state in their submissions the proposed Background IPR charge from the outset and provide a justification, but this may deter some entrants who do not want to submit pricing information or who cannot yet ascertain the costs because these will only become clear at the end of the innovation development work.

In our negotiations with a university in relation to a potential entry, we had a discussion on a charge for use of the university's Background IPR and discussed a potential licence for Background IPR to be granted on a ***fair and reasonable basis on commercial terms no less favourable than any other entity where such a licence has been granted.***

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.

We consider that the option to propose alternative IPR arrangements is still vital. As we stated in our June 2020 consultation response, there are a number of factors that could affect arrangements for IPR such as:

- the kind of Foreground IPR that might be created, the legal rules around creation and ownership and the process and costs for protecting that IPR (for example comparing copyright with patents);

- the role of third-party innovators, such as universities and businesses, who will have their own strong views as to IPR and may be put off participating in competitions if the default arrangements are not aligned with their academic or commercial interests;
- practical arrangements and costs necessary for creating, maintaining and exploiting certain IPR (for example the need for a source code escrow account for software);
- whether it might make sense for Foreground IPR to vest in a special purpose vehicle created by the participants in order to best exploit that Foreground IPR.

Where necessary for the project and justified in terms of innovation and value for money for customers, alternative IPR arrangements should be considered.

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?

We believe the following metrics would provide a useful indicator as to the success of the proposed IPR changes. This would be achieved by comparing prior competition entries (pre IPR changes) against new submissions (post/proposed IPR changes), for the following:

- number of SMEs included in project delivery consortia
- number of “for-profit” organisations included in project delivery consortia
- number of academic institutions included in project delivery consortia
- number of alternative IPR arrangements being requested at application stage
- number of organisations choosing to pay to exploit background IPR following project completion

Should you require any further detail or information, or if have any queries relating to our consultation response, please feel free get in touch.

Yours sincerely,



Dr. Lisa Gahan
Regulatory Director
South West Water

