

October 2023

**Consultation under section 12A
of the Water Industry Act 1991 to
modify Condition P3.4 of the
Conditions of Appointment
(licence) of ESP Water Limited**

About this document

This document sets out our proposal to modify the Conditions of Appointment (licence) of ESP Water Limited, a new appointee (NAV). It constitutes a statutory notice under section 12A of the Water Industry Act 1991 (WIA91).

Under section 12A of the WIA91, we are able to modify the conditions of an English water company's licence subject to the procedural requirements set out in sections 12A-12I of the WIA91.

Before making modifications under section 12A, Ofwat must give notice. This document constitutes a statutory notice under section 12A of the WIA91.

Proposed modification drafting is shown in the Appendix.

This consultation will close on 6 December 2023.

Responding to this consultation

We would welcome any comments on this document. Please email them to licensing@ofwat.gov.uk or post them to:

Licensing Team - Consultation response
Ofwat
Centre City Tower
7 Hill Street
Birmingham B5 4UA

The closing date for this consultation is 6 December 2023. If you wish to discuss any aspect of this consultation, please contact the Licensing Team by email at licensing@ofwat.gov.uk.

We intend to publish responses to this consultation on our website at 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, 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.

Contents

1. Background	5
2. Proposed modification	6
Appendix: Proposed modification drafting	8

1. Background

This consultation relates to the Ultimate Controller undertaking requirements in Condition P of ESP Water Limited's licence.

Ultimate Controller is defined in the licence as "any person which, whether alone or jointly and whether directly or indirectly is, in the reasonable opinion of Ofwat, in a position to control or in a position to materially influence the policy or affairs of the Appointee or any Holding Company of the Appointee".

The Ultimate Controller undertaking is a legally enforceable obligation provided by the Ultimate Controller(s) of the Appointee. Given their responsibilities as monopoly providers of essential infrastructure, all Appointees need the active co-operation and support of their owners in carrying out their functions. Appointees have a condition in their licences that requires them to obtain legally enforceable undertakings from their Ultimate Controller(s) and, where the United Kingdom Holding Company of the Appointee is not the Ultimate Controller of the Appointee, their United Kingdom Holding Company. For NAVs such as ESP Water Limited, the entities giving the undertakings are currently required to (in summary):

- provide the Appointee with any information it needs to comply with its licence;
- refrain from any action that may cause the Appointee to breach any of its obligations under the Water Industry Act 1991 and its licence; and
- maintain a minimum number of independent non-executive directors on the board of the Appointee; and
- provide the Appointee with the resources it requires to comply with its obligations under the WIA91 and its licence.

These undertakings help to protect customers by strengthening the ability of the Appointee to comply with the conditions of its licence and to maintain its autonomy as a standalone business.

2. Proposed modification

We have reviewed current requirements in relation to Ultimate Controller undertakings in ESP Water Limited's licence and we are proposing to change the wording in current Condition P3.4 to align it more closely with the wording in most other NAVs' licences¹.

P3.4 currently reads:

"P3.4: at all times make available to the Appointee such money as Ofwat determines in writing is necessary to enable the Appointee to comply with its obligations under the Act or the conditions of the Appointments."

We are proposing to change this to:

"P3.4: at all times immediately and on receipt of written demand from the Appointee make available or will procure that there are made available to the Appointee all necessary resources, including management and financial resources, personnel, fixed and moveable assets, rights, licences (but in respect of the latter to the extent that it is legally able) and facilities, on such terms and with all such rights as may be necessary to enable the Appointee to comply with its obligations under the Water Industry Act 1991 or the conditions of the Appointments."

We are proposing this change in order to bring ESP Water Limited's licence in line with the equivalent requirement in most other NAV's licences as this will create greater consistency and sets out what is required of ESP Water Limited's Ultimate Controller(s) more clearly for both the Ultimate Controller(s) and wider stakeholders, including ESP Water Limited's customers.

Early effective date

When we consult on a proposal to modify the licence of a water company under section 12A of the WIA91, we are required to consult for a period of 42 days. During that period, the Secretary of State (in the case of English companies' licences) may direct us not to make the modification.

Following that consultation, having considered any representations (and unless the Secretary of State has directed us not to), we may decide to modify the licence and we must give notice of that decision, stating the date on which the modification will have effect. That date must usually be not less than 56 days from the date of the decision and during that period the

¹ Albion Water Limited, Albion Eco Limited, County Water Limited, Icosa Water Services Limited, and Independent Water Networks Ltd.

companies whose licences are affected (as well as any person whose functions include representing these companies, or the Consumer Council for Water, CCW) may appeal against our decision to make the modification to the Competition and Markets Authority (CMA).

However, section 12B provides Ofwat with the power to reduce the period between the decision and the taking effect of the modification where we consider it necessary or expedient for the modification to have effect sooner, and where we have in our original consultation stated the date from which the proposed modification should have effect, set out our reasons for proposing the earlier effective date and explained why it is our view that this earlier effective date would not have a material adverse effect on any person holding an appointment as an undertaker or a licensee.

In order to allow the licence modification to take effect as soon as reasonably practicable, we have decided to reduce the length of the period between our decision and the taking effect of the modification to 14 days in accordance with section 12B of the WIA91.

It is our view that this earlier effective date will not have a material adverse effect on any person holding an appointment as an undertaker or a licensee. Before issuing this consultation document, we provided early drafts of the proposed licence modification to ESP Water Ltd to allow it to raise any concerns with the proposal, and ESP Water Ltd confirmed it did not have any concerns. We do not anticipate the proposed modification to materially adversely affect ESP Water Limited or any other person. Therefore, we conclude that it is expedient to reduce the length of the consultation period under section 12B of the WIA91 in order to complete the modification of ESP Water Limited's licence as soon as reasonably practicable.

Appendix: Proposed modification drafting

Delete existing sub-paragraph 3.4 of Condition P and replace it with the following text:

"P3.4: at all times immediately and on receipt of written demand from the Appointee make available or will procure that there are made available to the Appointee all necessary resources, including management and financial resources, personnel, fixed and moveable assets, rights, licences (but in respect of the latter to the extent that it is legally able) and facilities, on such terms and with all such rights as may be necessary to enable the Appointee to comply with its obligations under the Water Industry Act 1991 or the conditions of the Appointments."

**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 2023

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.

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.

Any enquiries regarding this publication should be sent to mailbox@ofwat.gov.uk.

OGL