

# Water Codes Appeals: Competition and Markets Authority Rules

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## 1. Introduction, citation and commencement

- 1.1 These Rules are made by the Competition and Markets Authority (CMA) under paragraph 6(1) of Schedule 16 to the Water Industry Act 1991 for the purpose of regulating the conduct and disposal of appeals brought under Regulation 4 of the Regulations.
- 1.2 Before making these Rules, the CMA consulted such persons as it considered appropriate.
- 1.3 These Rules are to be known as the 'Water Codes Appeals Rules'.
- 1.4 These Rules have effect from 13 September 2017.

## 2. Interpretation

- 2.1 In these Rules:

**'the Act'** means the Water Industry Act 1991;

**'the Authority'** means the Water Services Regulation Authority;

**'the CMA'** means the Competition and Markets Authority;

**'designated codes'** means codes that have been designated for the purposes of section 207A(2) of the Act;

**'the Regulations'** means the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017;

**'sensitive information'** means information which is either commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which would, or might, in the opinion of the CMA, significantly harm the interests of that individual.

- 2.2 Words defined by Regulation 2 have the same meaning in these Rules as they have in the Regulations.
- 2.3 In these Rules, unless the contrary intention appears, words in the singular include the plural and words in the plural include the singular.

### **3. Overriding objective**

- 3.1 The overriding objective of these Rules is to enable the CMA to dispose of appeals fairly and efficiently and at proportionate cost within the time periods prescribed by Regulation 11. The CMA will apply these Rules so as to give effect to the overriding objective.
- 3.2 Parties must assist the CMA to further the overriding objective.

### **4. The CMA's addresses for service**

- 4.1 The address of the CMA for service is: Regulatory Appeals Team, Competition and Markets Authority, The Cabot, 25 Cabot Square, London, E14 4QZ.
- 4.2 The CMA's email address for service is [appeals@cma.gov.uk](mailto:appeals@cma.gov.uk).

### **5. Applications for permission to appeal**

- 5.1 Any person who is entitled to, and wishes, to bring an appeal under Regulation 4 must make an application for permission to appeal to the CMA within the period allowed by Regulation 6(1).<sup>1</sup>

The application must be marked Appeal under The Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 and must contain the following information:

- (a) the applicant's name and address and the name and address of the applicant's legal representatives, if applicable;
- (b) an address for service in the United Kingdom;
- (c) a copy of the decision to be appealed;
- (d) whether Regulation 4(2)(a), (b) or (c) applies to the applicant and a statement of how the interests of the applicant are materially affected by the relevant decision.

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<sup>1</sup> See paragraph 4.1 of *Water Codes Appeals: Competition and Markets Authority Guide* (CMA68) for joint appeals.

- (e) the names and addresses of any persons to whom a copy of the application for permission has been sent in accordance with Regulation 6(3)(b);
  - (f) the applicant's statement of case, stating the grounds of appeal and the facts and reasons relied upon, together with a clear and concise summary of that statement of case;
  - (g) a statement identifying which, if any, of the facts relied upon were in the belief of the applicant not known to the Authority at the time of the decision and why they were not brought to the attention of the Authority before it made the decision; and
  - (h) a statement of the relief sought and any directions necessary to give effect to that relief.
- 5.2 The applicant should lodge with the CMA any written evidence that it wishes to adduce in support of the appeal when it makes its application for permission to appeal.
- 5.3 When the applicant makes its application for permission to appeal, it should, if it is able, lodge any application for a direction to be made at the first case management conference.
- 5.4 At the time that it makes its application for permission to appeal the applicant must send by email and in writing:
- (a) a copy of the application for permission;
  - (b) a copy of any written evidence; and
  - (c) a copy of any further application
- to the Authority and to such other persons as appear to the applicant to be affected by the decision.
- 5.5 If the CMA considers that the application for permission is incomplete, or is insufficiently clear, it may take this into account in considering whether to grant permission, or whether to grant permission subject to conditions.
- 5.6 The summary statement of case should be in a form suitable for publication on the CMA's website.
- 5.7 Where the applicant believes that information contained in its application for permission, or any document lodged with that application, is sensitive information it may:

- (a) make a non-disclosure application to the CMA at the same time that it makes its application for permission to appeal; and
  - (b) pending the CMA's direction, excise that information from the application for permission and other documents provided to the Authority and persons other than the CMA.
- 5.8 The Authority and each person who receives a copy of the application for permission to appeal should acknowledge receipt to the CMA within three working days of being sent the application.
- 5.9 Those persons and the Authority may also make submissions as to whether the CMA should refuse permission to appeal on the grounds set out under Regulation 6(8) in their acknowledgement of receipt.
- 5.10 The applicant should provide the CMA with five copies of the application for permission to appeal, and of any evidence in support, at the time that it makes its application for permission to appeal.

## **6. Permission applications**

- 6.1 The CMA will normally consider applications for permission to appeal without a hearing. The CMA may hold a hearing to determine an application for permission, either of its own motion or on application. Where the CMA decides of its own motion to hold a permission hearing the CMA may give notice to the Authority and such other persons as it considers appropriate.
- 6.2 Where permission to appeal is granted, the applicant, the Authority and each person to whom the applicant provided a copy of its application notice will be notified of the CMA's decision and a copy of the permission will be published on the CMA's website.
- 6.3 If permission is refused, the applicant, the Authority and each person to whom the applicant provided a copy of its application notice will be notified of the CMA's decision and of the reasons for it. A copy of the refusal will be published on the CMA's website.

## **7. Reply (representations/observations by the Authority)**

- 7.1 Should the Authority wish to make representations or observations to the CMA about the decision in respect of which permission to appeal has been granted, its reasons for that decision, or the grounds on which the appeal is being brought, it must lodge its reply with the CMA within the period of 15 working days following the day: (i) of the making of the application for

permission to appeal; or (ii) if more than one application is made, of the making of the latest of these applications, in accordance, as specified in Regulation 9(1) and (2).

- 7.2 The Authority's reply must contain:
- (a) the Authority's address and the name and address of the Authority's legal representatives, if applicable;
  - (b) the Authority's address for service in the United Kingdom; and
  - (c) a clear and concise summary of the statement in reply that is in a form suitable for publication on the CMA's website.
- 7.3 If the Authority lodges a reply with the CMA it must at the same time lodge any written evidence it wishes to adduce in support of that reply.
- 7.4 At the time that the Authority lodges a reply it should, if it is able, lodge any application for directions.
- 7.5 At the time that it lodges its reply, or as soon as possible thereafter, the Authority must send by email and in writing:
- (a) a copy of the reply;
  - (b) a copy of any written evidence; and
  - (c) a copy of any other application
- to any applicant for permission, appellant or intervener.
- 7.6 Where the Authority believes that information contained in its reply, or any document lodged with that reply is sensitive information it may:
- (a) make a non-disclosure application to the CMA at the same time that it provides the CMA with its reply; and
  - (b) pending the CMA's direction, excise that information from the reply provided to the appellant, any intervener, and any person other than the CMA who either received a copy of the application for permission or who received a notice by which a person sought to intervene.
- 7.7 Each person who receives a copy of the reply should acknowledge receipt to the CMA not more than five days after receipt of the reply.
- 7.8 The Authority should provide the CMA with five copies of the reply, and of any evidence in support, while it lodges its reply.



## 8. Intervention

- 8.1 An intervention notice made under Regulation 7(1) must be marked 'Application for Permission to Intervene in Water Codes Appeal' and must contain:
- (a) the applicant's name and address and the name and address of its legal representatives;
  - (b) the applicant's address for service in the United Kingdom;
  - (c) the names and addresses of those persons, including the Authority, to whom the applicant has sent copies of its intervention notice;
  - (d) whether Regulation 4(2)(a), (b) or (c) applies to the applicant and a statement of how the interests of the applicant are materially affected by the decision under appeal;
  - (e) the applicant's statement of intervention, stating whether it supports or opposes the appeal; and
    - (i) if the intervention is in support of the appeal, identifying the grounds of appeal in relation to which the intervention is made, together with the facts and reasons relied on; or
    - (ii) if the intervention opposes the appeal, identifying the facts and reasons why it believes the appeal should not succeed, or why it believes the relief sought should not be allowed,together, in either case, with a clear and concise summary of the statement of intervention in a form suitable for publication on the CMA's website; and
  - (f) a statement identifying which, if any, of the facts relied upon were in the applicant's belief not known to the Authority the time of the Authority's decision and why they were not brought to the attention of the Authority before it made its decision.
- 8.2 The applicant should lodge with the CMA any written evidence that it wishes to adduce in the appeal at the same time that it gives its intervention notice.
- 8.3 When the applicant gives its intervention notice, it should at the same time lodge an application for any directions it wishes the CMA to make.
- 8.4 When it gives its intervention notice, or as soon as reasonably possible thereafter, the applicant must send by email and in writing:

- (a) a copy of the intervention notice;
- (b) a copy of any written evidence; and
- (c) a copy of any application

to each party to the appeal, to such other persons as appear to the applicant to be affected by the decision under appeal, and to such other persons as the Authority may require the applicant to keep informed about the appeal.

- 8.5 Where the applicant believes that information contained in its intervention notice, or any document lodged with that intervention notice, is sensitive information, it may:
- (a) make a non-disclosure application to the CMA at the same time that it gives its intervention notice; and
  - (b) pending the CMA's direction, excise that information from the intervention notice or other document provided to each party to the appeal, and to such other persons as appear to the intervener to be affected by the decision under appeal.
- 8.6 Each person who receives a copy of the intervention notice should acknowledge receipt to the CMA no more than within three working days of being sent the intervention notice.
- 8.7 The applicant should provide five copies of the intervention notice to the CMA, and of any evidence in support, while gives its intervention notice.
- 8.8 The CMA will normally consider an application to intervene without a hearing. However, the CMA may hold a hearing to decide whether to allow an intervention either of its own motion or on application. Notice of a hearing will be given to the person wishing to intervene, but will not normally be given to the parties to the appeal.
- 8.9 In deciding whether to allow an intervention, or to allow an intervention subject to conditions, the CMA will consider all the circumstances, including in particular the extent to which the intervention will assist the CMA to dispose of the appeal fairly and efficiently within the time allowed by the Regulations.
- 8.10 In deciding whether to extend the period in which an intervention notice must be given to the CMA, the CMA will consider all the circumstances, including in particular any reason why the intervention notice could not have been given within the period prescribed by Regulation 7(1)(a).

- 8.11 If the CMA considers that the intervention notice is incomplete or is insufficiently clear, it may take this into account in considering whether to allow the intervention, or whether to allow the intervention subject to conditions.
- 8.12 The applicant and the parties will be notified of the CMA's decision and a copy of the notice will be published on the CMA's website.

## **9. Amendment of an application for permission to appeal, reply or intervention notice**

- 9.1 An application for permission to appeal, a reply or an intervention notice may on application be amended with the permission of the CMA.

## **10. Consolidation**

- 10.1 Where there are two or more appeals pending in respect of the same decision, or in respect of decisions which in the view of the CMA are closely related, the CMA may require that the appeals should be heard together. The CMA will allow the parties a reasonable opportunity to make representations before making such an order.

## **11. Case management**

- 11.1 The CMA may at any time on the application of a party or of its own motion give such directions as it considers necessary for the conduct of the appeal.
- 11.2 The CMA may give directions:
- (a) as to the manner in which proceedings are to be conducted, including time limits to be observed and the conduct of hearings;
  - (b) as to the filing of a further statement of case, statement of reply or statement of intervention;
  - (c) as to the preparation and exchange of skeleton arguments;
  - (d) requiring persons to attend and give evidence or to produce documents;
  - (e) as to further evidence that may be required;
  - (f) as to the submission of further witness statements or expert reports;
  - (g) as to the examination or cross examination of witnesses;

- (h) as to the fixing of time limits in respect of any aspect of the proceedings;
- (i) as to the disclosure or the production of documents, or classes of documents, between the parties or otherwise, including directions as to the treatment of sensitive information;
- (j) as to the appointment and instruction of experts, whether by the CMA or by the parties, and as to the manner in which expert evidence is to be given;
- (k) for the hearing of a person who is not a party where it is proposed to make an order or give a direction in relation to that person;
- (l) for the production of interim statements of costs;
- (m) as to the variation of the provisions of these Rules in relation to the service of documents; and
- (n) for such other matters as appear to the CMA to be necessary to meet the overriding objective.

11.3 Where necessary written notice shall be given of the CMA's directions.

11.4 The CMA may at any time put questions to the parties, invite the parties to make written or oral submissions on aspects of the proceedings, ask the parties or third parties for information or particulars, ask for documents or papers relating to the case to be produced and require the parties' representatives or the parties in person to attend meetings or hearings.

## **12. Case management conferences**

12.1 The CMA will hold a case management conference or pre-hearing review where it considers that to do so would further the overriding objective.

12.2 The CMA will fix a case management conference, if it considers one to be necessary, once it has given permission to appeal.

## **13. The production of documents, calling witnesses and the production of written statements**

13.1 Where the CMA wishes to require a person to produce a document, to attend and give evidence or to produce a written statement pursuant to Regulations 14, 15, and 16, it will provide a copy of the notice to each party.

## 14. Suspension applications

- 14.1 An application to the CMA for suspension of the Authority decision subject to appeal must be marked 'Application for a Suspension Direction in Water Codes Appeal' and must contain the following information:
- (a) the applicant's name and address and the name and address of its legal representatives;
  - (b) the applicant's address for service in the United Kingdom;
  - (c) if the applicant is not the appellant, a statement of why that person would have been entitled to appeal the Authority decision in accordance with Regulation 4(2);
  - (d) a statement of the significant costs that the applicant will incur if the application is not granted; and
  - (e) a statement of any further considerations that the applicant believes that the CMA should take into account in deciding the application.
- 14.2 The applicant must lodge with the CMA five copies of its application for suspension and of any written evidence that it wishes to adduce when it lodges the application, unless the applicant will rely on evidence already lodged by it with the CMA. Such evidence must be in the form of a witness statement.
- 14.3 When the application for suspension is lodged with the CMA, the application, and any evidence in support (unless the applicant relies on evidence already served on them) must be served on the Authority.
- 14.4 Unless the CMA intends to refuse to make a suspension direction on the grounds that the determination of the appeal will be made before the direction could have effect, the CMA may give directions for any further steps in the disposal of the application for suspension, including directions as to the submission of representations from the Authority on the application, the involvement of such other persons as the CMA considers appropriate and hearings.
- 14.5 The CMA may hold a hearing to determine an application for suspension.
- 14.6 Where the CMA makes a suspension direction, it will give appropriate directions to the Authority, which may include requiring the Authority informing such other persons as the CMA specifies of the suspension direction.

## **15. Other applications**

- 15.1 Any party to an appeal who wishes to make an application to the CMA in respect of an appeal or an application for permission to appeal should file an application notice.
- 15.2 The CMA may dispense with the requirement for an application notice.
- 15.3 A copy of the application notice must be provided to each party to the appeal.
- 15.4 An application notice must state what order the applicant is seeking and why the applicant is seeking the order.
- 15.5 The CMA will normally consider an application without a hearing.

## **16. Evidence**

- 16.1 The CMA may give directions as to:
  - (a) the issues on which it requires evidence;
  - (b) the nature of the evidence that it requires to decide those issues; and
  - (c) the way in which evidence is to be placed before the CMA.
- 16.2 Evidence in the appeal will normally be written evidence. Without the permission of the CMA evidence may not be relied on in the appeal unless it has been lodged with the CMA and served in accordance with these Rules or with an order of the CMA.
- 16.3 The CMA may use its powers under this Rule to exclude evidence that would otherwise be admissible.

## **17. Written evidence**

- 17.1 Subject to the direction of the CMA, written evidence must be in the form of a witness statement. This statement must be verified by a statement of truth signed by the witness.
- 17.2 If a person wishes to rely on facts contained in an application for permission to appeal, a reply, an intervention notice, or in any other application, those facts must be verified by a statement of truth. The statement of truth must be signed by the applicant, the Authority or the intervener, as the case may be, or by their legal representative.

17.3 The statement of truth verifying any of the documents should be: '[I believe] [The (applicant or as the case may be) believes] that the facts stated in this [name the document verified] are true'.

## **18. Oral hearings**

18.1 Proceedings will be opened and directed by the Group Chair or by such other member of the CMA as is appropriate.

18.2 If no previous direction has been made, at the start of the hearing the parties will be directed as to the length of their oral submissions, the issues on which the CMA wishes to concentrate at the hearing, and the order in which the CMA wishes to hear the parties. The CMA may hold one or more hearings for the purpose of determining the appeal and any related matter.

18.3 Hearings will consist of submissions by the parties and questioning by members of the CMA.

18.4 Subject to these Rules and any direction made by the CMA, the procedure at a hearing shall be such as the Group Chair, or other member of the CMA Group, shall direct.

## **19. Representation at hearings**

19.1 At a hearing a party may be represented by:

(a) a qualified lawyer having a right of audience before a court in the United Kingdom; or

(b) such other person as the CMA allows.

## **20. Decision**

20.1 A copy of the CMA's decision on the appeal will be provided to the parties.

20.2 In each appeal the CMA will also publish on its website ([www.gov.uk/cma](http://www.gov.uk/cma)):

(a) a notice stating that it has received an application for permission to appeal;

(b) a summary of each statement of case, statement of reply and any intervention notice;

(c) the CMA's decision on the application for permission to appeal and on any intervention notice;

- (d) a summary of any application for suspension of the decision of the Authority and the CMA's decision on that application;
- (e) the directions given and other orders made during the appeal; and
- (f) the CMA's decision on the appeal.

## **21. Inter partes costs**

- 21.1 The CMA will normally order an unsuccessful party to pay the costs of the successful party, but may make a different order.
- 21.2 In deciding what order to make, the CMA will have regard to all the circumstances including:
- (a) the conduct of the parties, including:
    - (i) the extent to which each party has assisted the CMA to meet the overriding objective;
    - (ii) whether it was reasonable for a party to raise, pursue or contest a particular issue;
    - (iii) the manner a party has pursued its case or a particular aspect of its case;
  - (b) whether a party has succeeded wholly or in part; and
  - (c) the proportionality of the costs claimed having regard to the matters in issue and the resources of all the parties.
- 21.3 Before making any order for costs under this Rule, the CMA will provide the parties with a provisional determination on costs and a draft of the costs order and give them a reasonable opportunity to make representations on each. The CMA will normally publish non-confidential versions of any final determinations on costs and orders for costs on its website.
- 21.4 The party ordered to pay has to do so within a period of 28 days. This period begins the day after the order has been made. Interest will be charged in case of failure to comply with the order.



## **22. The CMA's costs**

- 22.1 The CMA will make an order for the payment of its own costs incurred in connection with the appeal. Such an order must require those costs to be paid:
- (a) where the appeal is allowed, by the Authority;
  - (b) where the appeal is dismissed, by the appellant – but if there is more than one appellant, the order may specify that one or more of the appellants is to pay those costs, in such proportions as specified in the order.
- 22.2 Before making any order for payment of its own costs, the CMA will provide the parties with a provisional determination on the CMA's costs and a draft of the costs order and give them a reasonable opportunity to make representations on each. The CMA will normally publish non-confidential versions of any final determinations on costs and orders for costs on its website.

## **23. Withdrawal**

- 23.1 An appellant may apply to the CMA for the summary determination and dismissal of its appeal.
- 23.2 The Authority may apply to the CMA for a summary determination allowing the appeal.

## **24. Access to the CMA's record**

- 24.1 Any person within the scope of Regulation 7(2) may apply to the CMA for permission to inspect the CMA's record pending the determination or other conclusion of the appeal, and the CMA will grant permission if it believes that the applicant has good reason.
- 24.2 Permission shall not be given to inspect any document for which an application for non-disclosure is pending, or any document in relation to which the CMA made a non-disclosure order.
- 24.3 The CMA's record in each case will normally comprise the application for permission to appeal, any reply and intervention notice, applications and orders, interim statements of costs, and correspondence between the CMA and parties and third parties.

## **25. Slip rule**

- 25.1 Where any order or decision of the CMA contains a clerical error, or a slip or omission, that error, slip or omission may be corrected and a further order or decision issued by any person who could have made the original order or decision.

## **26. Miscellaneous**

- 26.1 The CMA may appoint counsel to assist it with an appeal or any related proceedings.
- 26.2 Subject to the provisions of these Rules, the CMA may determine its own procedure.

## **27. Commencement**

- 27.1 These Rules shall come into force on 13 September 2017.