



It's everyone's water

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**By email**

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## Draft rules of procedure and guidance for water redetermination references

Dear CMA,

Thames Water welcomes the opportunity to respond to the Competition and Markets Authority ("CMA") consultation on its draft rules of procedure and guidance for water redetermination references published on 1 August 2024. No part of this response is confidential, and we are content for it to be published in full.

Thames Water submitted its response to Ofwat's draft determinations on Wednesday 28 August 2024. In it we accept many of Ofwat's proposals, including most of the water performance commitments.

However, we have significant concerns in important areas that expose the company to a serious funding gap, disproportionate penalties and excessive downside risk. We have been clear in our response that Ofwat's draft determination is not investible, rendering our AMP8 plan unfinanceable and therefore not a plan we can deliver for customers and the environment.

We consider that there are changes Ofwat could make, within its framework and ahead of the final determinations, that would recalibrate key aspects of the settlement and give us the opportunity to secure the investment we need to deliver our plan. We have provided evidence and independent assurance to support Ofwat in reaching a regulatory settlement that is in the best interests of customers and the environment, and we are ready to work with our regulators on this.

We remain optimistic these issues will be addressed. Should our Board, however, consider that it is in the interests of customers, the environment, and the company to seek a

redetermination then the proposed Rules and Guide provide welcome support for all parties through the process.

We set out our responses to the specific consultation questions below. Please do contact me directly if you would like to discuss further any of these points.

Yours faithfully,



Cathryn Ross  
**Strategy and External Affairs Director**

Do you agree with the CMA's proposal of adopting new rules and guidance for water redetermination references? Please provide reasons for your answer.

We agree with the rationale for publishing separate rules and guidance for redeterminations. The option for the sector to seek redeterminations is a critical part of the price review process that rightly justifies its own guidance. The more information made publicly available the better companies and regulators are able to prepare and align with the CMA's process.

Taking a decision to appeal a price control will never be made without careful consideration. These two documents help provide some of the information necessary for management understanding of the process before a decision is made to commit further resources and go ahead with an appeal.

This is particularly timely given current elevated tensions between objectives of affordability, environmental performance and resilience.

Overall, are the Rules and Guide sufficiently clear and helpful?

Yes. We think the rules are sufficiently clear and helpful. They are appropriate for the audience and its level of knowledge for both the Rules and Guidance.

In general, we observe that the style of the documents may inadvertently mask the degree of discretion afforded to the CMA and appeals panel, and the amount of uncertainty that may arise in the process. For example, the overriding objective states the CMA will act "fairly, efficiently and at proportionate cost" but these words may have a wide degree of interpretation between parties.

We would also note that the original legislation appears to envisage a small number of material errors within a control will be a primary cause of an appeal. However, we would note the additional grounds that may attract an appeal could be where the regulator has made a series of judgments, arguably appropriate in isolation, that cumulatively may not meet the regulator's obligations in the round. This may require a broader investigation by the CMA than an appeal based on error.

What aspects of the Rules and Guide, if any, do you consider need further clarification or explanation? In responding, please specify which Rule and/or part of the Guide each of your comments relates to.

We make the following comments on the two documents.

#### 1. Draft water redetermination rules:

- Within paragraph 11.1 (p16) we are concerned that where the Group considers that it would not be appropriate to issue a provisional determination, it will determine an alternative procedure. The complexity of considerations within a redetermination process means it is critical for companies and regulators to be able to fully engage with the evidence and put forward their submissions following an understanding of the CMA's position. As such, we are of the view the provisional determination step is crucial. If the CMA retains these discretionary provisions for the Group, we ask that further information is given on the circumstances under which the Group would seek an alternative procedure, and what this procedure may entail.
- It would be helpful to outline in more detail the evidential standards required for the activities listed in Section 8 Procedure (p11) for the various directions or requests.

- The list of “matters” within paragraph 8.2 would benefit from further clarity in the case of site visits. In particular, which party may initiate these and how are they to be agreed?
- Page twelve of the reference document speaks about prioritisation and de-prioritisation of issues. Related to the point in response to the previous question, we would highlight that while individual issues may be considered low priority in isolation, they may be highly material when considered in the round with other interacting issues. It would be helpful to understand how the CMA would approach these matters.
- With regards to the enactments mentioned in paragraph 3.1 (p7), we would suggest including some further references to relevant enactments throughout the document or in a separate section.
- In section 4, Overriding Objective (p7) it would be useful to have further detail on the key terms used in the reference and how they might be interpreted.
- It would be helpful to have a fuller explanation of “own merits” in paragraph 5.5 (p8), relating to the determination of a redetermination reference.

## **2. Draft water redetermination guide:**

- The guide might wish to set out the types of error that could provide the basis for a successful appeal by, for example, citing examples from previous cases.
- We would suggest that the resilience objective could be afforded a short section of its own in the Reference Guide. As it stands there is a long yet crucial footnote in 2.4 (e) (p8), as this is likely to be the key driver of investment over the next two AMPs.
- It would be useful to outline in more detail the evidential standards required in paragraph 5.5 (p21) relating to hearings and meetings.

## **Is there anything else which you consider should be included in the Rules and/or Guide?**

We would suggest the following four additions:

1. A process map from indication to final decisions
2. An illustrative timeline of milestone events
3. Commentary on how the full set of regulators and their respective objectives will be accounted for within a redetermination process. Company business plans are materially driven by the requirements from different regulators, in particular the Drinking Water Inspectorate (“DWI”) and the Environment Agency (“EA”) and even Ministries via the WINEP process (Guide, paragraph 2.7, p9)
4. Links to key CMA web pages including the biographies and disclosure of interests of the specialist panel members (Rules, paragraph 5.1, p8).