

*Draft Regulations laid before Parliament under section 213(1A) of the Water Industry Act 1991 and section 90(3) of the Water Act 2014, for approval by resolution of each House of Parliament.*

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DRAFT STATUTORY INSTRUMENTS

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**2017 No. \*\*\***

**WATER INDUSTRY, ENGLAND AND WALES**

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

*Made* - - - - **\*\*\***

*Coming into force in accordance with article 1(2)*

The Secretary of State makes these Regulations in exercise of the powers conferred by sections 207A(1) to (5) and (7), 207C, 213(2) and (2B) of, and paragraphs 1 to 5 of Schedule 16 to, the Water Industry Act 1991(1) and section 90(1) and (2) of the Water Act 2014(2).

The Secretary of State has consulted the Welsh Ministers, the Water Services Regulation Authority and such other persons as the Secretary of State considers appropriate in accordance with section 207A(8) of the Water Industry Act 1991.

A draft of these Regulations has been laid before, and approved by a resolution of, each House of Parliament in accordance with section 213(1A) of the Water Industry Act 1991(3) and section 90(3) of the Water Act 2014.

**Citation and commencement**

1.—(1) These Regulations may be cited as the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017.

(2) These Regulations come into force at the end of the period of 21 days beginning with the day on which they are made.

**Interpretation**

2.—(1) In these Regulations—

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- (1) 1991 c. 56; sections 207A and 207C and Schedule 16 were inserted by section 37(1), and (2) of, and Schedule 6 to, the Water Act 2014 (c. 21). Section 213(2) was amended by paragraph 28 of Schedule 1 to the Competition and Service (Utilities) Act 1992 (c. 43), by section 36(2) of the Water Act 2003 (c. 37) and by paragraphs 2 and 119(4) of Schedule 7 to the Water Act 2014. Section 213(2B) was inserted by section 52 of the Competition and Service (Utilities) Act 1992.
- (2) 2014 c. 21.
- (3) Section 213(1A) was inserted by section 58(1) and (8) of the Water Act 2003 and amended by section 37(1) and (3) of the Water Act 2014.

“the Act” means the Water Industry Act 1991;

“appellant” means a person who has been granted permission to appeal in accordance with regulation 6;

“authorised member of the CMA”—

- (a) in relation to a power exercisable in connection with an appeal, means a member of the CMA group who has been authorised by the chair of the CMA to exercise that power;
- (b) in relation to a power exercisable in connection with an application for permission to appeal, or otherwise in connection with an appeal in respect of which a CMA group is being constituted by the chair of the CMA, means—
  - (i) any member of the CMA Board who is also a member of the CMA panel, or
  - (ii) any member of the CMA panel authorised by the Secretary of State (whether generally or specifically) to exercise the power in question;

“Authority decision” means a decision taken by the Authority on or after the commencement date—

- (a) to revise a designated code; or
- (b) following consultation under the Act, not to revise a designated code;

“the CMA” means the Competition and Markets Authority;

“CMA Board” and “CMA panel” have the same meaning as in Schedule 4 to the Enterprise and Regulatory Reform Act 2013<sup>(4)</sup>;

“CMA group” means a group constituted by the chair of the CMA under Part 3 of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 for the purpose of carrying out functions of the CMA with respect to an appeal under regulation 4;

“commencement date” means the day on which these Regulations come into force in accordance with regulation 1(2);

“intervener” means a person who has become a party to an appeal in pursuance of a direction under regulation 7(5);

“sewerage licence” means a sewerage licence granted with a retail authorisation under section 17BA of the Act<sup>(5)</sup>, and “sewerage licensee” is to be interpreted accordingly;

“undertaker” means either a water or sewerage undertaker;

“water supply licence” means a water supply licence granted with a retail authorisation or a restricted retail authorisation under section 17A of the Act<sup>(6)</sup>, and “water supply licensee” is to be interpreted accordingly;

“Wholesale-Retail Code” means the relevant designated code in the table in the Schedule;

“working day” means any day other than—

- (a) a Saturday or Sunday;
- (b) Christmas Day or Good Friday; or
- (c) a day which is a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971<sup>(7)</sup>.

(2) References in these Regulations to a party to an appeal are references to—

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(4) 2013 c. 24.

(5) Section 17BA was inserted by section 4(1) of the Water Act 2014 (c. 21). It is prospectively amended by paragraph 7 of Schedule 5 to the Water Act 2014 from a date to be appointed.

(6) Section 17A was inserted by paragraphs 1 and 2 of Schedule 4 to the Water Act 2003 (c. 37) and substituted by section 1(1) of the Water Act 2014. It is prospectively amended by paragraph 4 of Schedule 5 to the Water Act 2014 from a date to be appointed.

(7) 1971 c. 80.

- (a) the appellant;
- (b) an intervener; or
- (c) the Authority.

### **Designation of codes**

3. The codes listed in the table in the Schedule are designated for the purposes of section 207A(2) of the Act and the term “designated code” is to be read accordingly.

### **Appeals to the CMA**

4.—(1) An appeal against an Authority decision lies to the CMA.

(2) An appeal against an Authority decision may be brought under this regulation only by one or more of the following persons, where their interests are materially affected by it—

- (a) a water supply licensee;
- (b) a sewerage licensee; or
- (c) an undertaker.

(3) The permission of the CMA is required to bring an appeal under this regulation.

### **Exclusion**

5. A right of appeal under regulation 4 is excluded in respect of any decision to revise the Wholesale-Retail Code which is required to be set out in a notice under section 66DC(3) or 117H(3) of the Act(8).

### **Application for permission to appeal**

6.—(1) An application for permission to appeal may be made only by sending a notice to the CMA requesting the permission and must be made before the end of 15 working days following the day on which the decision was first published.

(2) An application for permission must be accompanied by all such information as may be required by appeal rules.

(3) The applicant must send a copy of the application and such other information as may be required by appeal rules to—

- (a) the Authority;
- (b) such persons (apart from the Authority) as appear to the applicant to be affected by the decision appealed against; and
- (c) such other persons as the Authority may require the applicant to keep informed about the appeal.

(4) The applicant must comply with the obligations in paragraph (3)(a) and (b) on the day the applicant sends notice to the CMA in accordance with paragraph (1).

(5) An application for permission must be determined by an authorised member of the CMA before the end of 10 working days following the day on which the application is received by the CMA.

(6) Where the CMA grants permission, it may be granted subject to conditions.

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(8) Sections 66DC and 117H were prospectively inserted by paragraph 4 of Schedule 2, and Schedule 4, to the Water Act 2014 from a date to be appointed.

- (7) Those conditions may include—
- (a) conditions which limit the matters to be considered on the appeal;
  - (b) conditions for the purpose of expediting the determination of the appeal; and
  - (c) conditions requiring the appeal to be considered together with other appeals (including appeals relating to different matters or decisions and appeals brought by different persons).
- (8) The CMA may refuse permission only on one of the following grounds—
- (a) that the appeal is brought for reasons that are trivial or vexatious;
  - (b) that the appeal has no reasonable prospect of success.
- (9) Following determination of an application for permission, an authorised member of the CMA must notify the decision to—
- (a) the applicant;
  - (b) the Authority; and
  - (c) each person who was sent a copy of the application in accordance with paragraphs (3) and (4).

#### **Addition of interveners**

7.—(1) This regulation applies if a person falling within paragraph (2) gives notice to the CMA asking to become an intervener—

- (a) within 20 working days following the day of the making of an application for permission to appeal; or
- (b) within such longer period as an authorised member of the CMA may allow.

(2) A person falls within this paragraph if the person is not the applicant for permission, but is a person who would have been entitled, at the time of the application, to make their own application to the CMA for permission to appeal against the decision in question.

(3) A person who gives a notice under paragraph (1) must send a copy of the notice, and such other information as may be required by appeal rules to—

- (a) the Authority;
- (b) the applicant;
- (c) such persons (apart from the Authority) as appear to that person to be affected by the decision appealed against; and
- (d) such other persons as the Authority may require that person to keep informed about the appeal.

(4) A person who gives notice under paragraph (1) must comply with the obligations in paragraph (3)(a) to (c) on the day that person gives notice to the CMA.

(5) An authorised member of the CMA may give a direction that a person who gives notice under paragraph (1) is to be an intervener.

(6) An authorised member of the CMA is not to give a direction under this regulation if the member considers that it would prevent the determination of the appeal within the period allowed by regulation 11.

(7) Where a direction is given under this regulation—

- (a) the application for permission; and
- (b) if permission is or has been granted, the appeal brought by the applicant and any other appeals that are considered with it;

are to proceed (subject to any direction under paragraph (8)(b)) as if the intervener had joined with the applicant in making that application and bringing the appeal.

- (8) A direction under this regulation—
  - (a) does not allow the intervener to rely on grounds of appeal not contained in the application for permission to appeal;
  - (b) may allow the intervener to become a party to the appeal for the purpose of opposing it; and
  - (c) may be given subject to conditions.
- (9) The conditions under paragraph (8)(c) may include—
  - (a) conditions which limit the matters that are to be considered on the appeal;
  - (b) conditions for the purpose of expediting the determination of the appeal.

### **Suspension of Authority decision**

8.—(1) Where permission has been granted to appeal against an Authority decision, an authorised member of the CMA may direct that, pending the determination of the appeal—

- (a) the decision is not to have effect; or
  - (b) the decision is not to have effect to such extent as may be specified in the direction.
- (2) The power to give a direction under this regulation is exercisable only where—
- (a) an application for its exercise has been made by the appellant or by another person who would have been entitled to appeal the Authority decision in accordance with regulation 4(2);
  - (b) the applicant for the exercise of the power would incur significant costs if the Authority decision were to have effect, or to continue to have effect, before the determination of the appeal; and
  - (c) the balance of convenience does not otherwise require effect to be given to the Authority decision pending that determination.

(3) A person making an application under this regulation may make such an application at any time before the determination of the appeal and must notify the Authority on the same day the application is made.

(4) Before determining whether to make a direction under this regulation, the authorised member of the CMA must give the Authority an opportunity of making representations about the matter unless the authorised member of the CMA intends to refuse to make a direction on the grounds that the determination of the appeal will be made before the direction could have effect.

### **Time limit for representations and observations by the Authority**

- 9.—(1) Where the Authority wishes to make representations or observations to the CMA about—
- (a) an Authority decision in respect of which permission to appeal has been granted;
  - (b) the Authority's reasons for that decision; or
  - (c) the grounds on which an appeal is being brought against that decision;

it must do so within 15 working days following the day of the making of the application for permission to appeal.

(2) Where more than one application for permission to appeal is made in respect of the same Authority decision, the period of 15 working days referred to in paragraph (1) begins on the day after the day of the making of the latest of those applications.

(3) On the day that the Authority makes any representations or observations to the CMA in accordance with paragraph (1) it must publish them on its website and send a copy to any applicant for permission, appellant or intervener.

### **Consideration and determination of appeal by CMA group**

- 10.**—(1) A CMA group must consist of three members of the CMA panel.
- (2) A decision of the CMA group is effective only if—
- (a) all the members of the CMA group are present when it is made; and
  - (b) at least two members of the CMA group are in favour of the decision.

### **Timetable for determination of appeal**

- 11.**—(1) The CMA must determine an appeal within 30 working days following the last day for the making of representations or observations by the Authority in accordance with regulation 9.
- (2) The CMA may on one occasion only extend the period in paragraph (1) by not more than 10 working days if the CMA is satisfied that there are good reasons for doing so.
- (3) The CMA must notify an extension under paragraph (2) to every party to the appeal.

### **Matters to be considered on appeal**

- 12.**—(1) This regulation applies to every appeal brought under regulation 4.
- (2) In determining the appeal, the CMA must have regard, to the same extent as is required of the Authority, to the matters to which the Authority must have regard in the exercise and performance of the powers and duties mentioned in section 2(1) of the Act (general duties with respect to water industry)<sup>(9)</sup>.
- (3) In determining the appeal, the CMA may have regard to any matter to which the Authority was not able to have regard in the case of the Authority decision appealed against.
- (4) In the exercise of the power in paragraph (3), the CMA must not have regard to any matter to which the Authority would not have been entitled to have regard in that case had it had the opportunity of doing so.

### **Matters that may be disregarded**

- 13.** The CMA may, if it thinks it necessary to do so for the purpose of securing the determination of an appeal within the period allowed by regulation 11 or for any other reason, disregard any matters raised—
- (a) by the appellant that were not raised at the time of the application for permission to appeal;
  - (b) by an intervener that were not raised in the request made in accordance with regulation 7;
  - (c) by the Authority that were not raised in representations or observations made in accordance with regulation 9.

### **Production of documents**

**14.**—(1) The CMA or an authorised member of the CMA may by notice require a person to produce to the CMA the documents specified or otherwise identified in the notice and may require such documents to be produced—

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<sup>(9)</sup> Section 2(1) was amended by sections 36(2), 39(1) and (2) of the Water Act 2003 (c. 37) and paragraphs 2, 3(1) and (2) of Schedule 7 to the Water Act 2014 (c. 21).

- (a) at the time and place specified in the notice; and
- (b) in a legible form.

(2) No person is to be compelled under this regulation to produce a document that the person could not be compelled to produce in civil proceedings in the High Court.

(3) An authorised member of the CMA may, for the purpose of the exercise of the functions of the CMA, make arrangements for copies to be taken of a document produced under this regulation.

### **Oral hearings**

**15.**—(1) For the purposes of determining an appeal or any application under these Regulations, an oral hearing may be held.

(2) Evidence may be taken on oath and oaths may be administered—

- (a) by the person considering an application for permission to bring an appeal;
- (b) by the person considering an application for a direction under regulation 7 or 8; or
- (c) by the CMA group determining an appeal.

(3) The CMA or an authorised member of the CMA must give notice of the time and place of the oral hearing to any applicant, appellant or intervener and the Authority and may by notice require a person—

- (a) to attend at a time and place specified in the notice; and
- (b) at that time and place, to give evidence to a person or the CMA group mentioned in paragraph (2).

(4) At any oral hearing, the person or CMA group conducting the hearing may require the following persons to give evidence or to make representations or observations—

- (a) any applicant, appellant or intervener, if they are present at the hearing; or
- (b) a person attending the hearing as a representative of a person mentioned in subparagraph (a) or of the Authority.

(5) A person who gives oral evidence at the hearing may be cross-examined by or on behalf of the applicant or any party to the appeal.

(6) If a person is not present at a hearing to be subjected to a requirement under paragraph (4), the person or CMA group conducting the hearing may determine the application or appeal without hearing that person's evidence, representations or observations.

(7) No person is to be compelled under this regulation to give evidence which that person could not be compelled to give in civil proceedings in the High Court.

(8) Where a person is required under this regulation to attend at a place more than 10 miles from their place of residence, an authorised member of the CMA must, if requested, arrange for that person to be paid the necessary expenses of their attendance.

### **Written statements**

**16.**—(1) The CMA or an authorised member of the CMA may by notice require a person to produce a written statement to the CMA, or to the CMA group determining an appeal, with respect to a matter specified in the notice.

(2) The power to require the production of a written statement includes power—

- (a) to specify the time and place at which it is to be produced;
- (b) to require it to be verified by a statement of truth.

(3) A written statement which is required to be verified by a statement of truth in accordance with paragraph (2)(b) must be disregarded unless it is so verified.

(4) No person is to be compelled under this regulation to produce a written statement with respect to any matter about which that person could not be compelled to give evidence in civil proceedings in the High Court.

### **Enforcement of requirements in relation to evidence etc.**

**17.**—(1) This regulation applies where a person (“P”)—

- (a) fails to comply with a notice or other requirement issued or imposed under regulation 14, 15 or 16;
- (b) in complying with a notice under regulation 16, makes a statement that is false in a material particular; or
- (c) in providing information verified by a statement of truth required by appeal rules, provides information that is false in a material particular.

(2) An authorised member of the CMA may certify to the High Court—

- (a) the failure;
- (b) the fact that P has made a false statement in circumstances described in paragraph (1)(b); or
- (c) the fact that P has provided false information in circumstances described in paragraph (1)(c).

(3) The High Court may—

- (a) inquire into the failure or act certified to it under paragraph (2); and
- (b) punish P as if P had been guilty of contempt of court if it is satisfied, after having heard any witness against or on behalf of P and any statement in P’s defence, that—
  - (i) the certified failure or act took place; and
  - (ii) P did not have a reasonable excuse for the failure or act.

(4) Where P is a body corporate, the High Court may punish any director or other officer of that body either instead of or in addition to dealing with the body corporate.

(5) A person who wilfully alters, suppresses or destroys a document that the person has been required to produce under regulation 14 is guilty of an offence and is liable—

- (a) on summary conviction, to a fine;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

### **Determination of appeals**

**18.**—(1) This regulation applies to every appeal brought under regulation 4.

(2) The CMA may allow the appeal only if it is satisfied that the Authority decision appealed against was wrong on one or more of the following grounds—

- (a) that the Authority failed properly to have regard to the matters mentioned in regulation 12(2);
- (b) that the Authority failed properly to have regard to the purposes, listed in column 3 of the table in the Schedule, for which the designated code in question was issued;
- (c) that the Authority failed to give the appropriate weight to one or more of those matters or purposes;
- (d) that the Authority’s decision was based, wholly or partly, on an error of fact;



- (e) that the Authority's decision was wrong in law.
- (3) Where the CMA does not allow the appeal, it must confirm the Authority decision appealed against.
- (4) Where the CMA allows the appeal, it must do one or more of the following—
  - (a) quash the Authority decision appealed against or part of it;
  - (b) remit the matter to the Authority for reconsideration and redetermination in accordance with any directions given by the CMA;
  - (c) where it quashes an Authority decision not to revise a code or part of it, give directions to the Authority as it considers appropriate for securing that the relevant designated code has effect as if it had been revised as proposed or with modifications.
- (5) The Authority must not be directed under paragraph (4) to do anything that it would not have power to do.
- (6) The decision of the CMA on the appeal—
  - (a) must be contained in an order made by the CMA which sets out the reasons for the decision;
  - (b) takes effect at the time specified in the order or determined in accordance with provision set out in that order;
  - (c) must be notified by the CMA to the parties to the appeal; and
  - (d) must be published by the CMA in such manner as it considers appropriate for bringing it to the attention of other persons likely to be affected by it.
- (7) The CMA may exclude from what it publishes under paragraph (6)(d) any information which it is satisfied is—
  - (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of an undertaking to which it relates;
  - (b) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm that individual's interests.

## **Costs**

- 19.**—(1) A CMA group that determines an appeal must make an order requiring the payment to the CMA of the costs incurred by the CMA in connection with the appeal.
- (2) Where the appeal is allowed, the order must require those costs to be paid by the Authority.
  - (3) Where the appeal is dismissed, the order must require those costs to be paid 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.
  - (4) The CMA group that determines an appeal may make an order requiring a party to the appeal to pay the costs of another party to the appeal incurred in connection with the appeal.
  - (5) A person required by an order under this regulation to pay a sum to another person must comply with the order within the period of 28 days beginning with the day after the day on which the order is made.
  - (6) Any unpaid balance remaining after the period mentioned in paragraph (5) expires accrues interest at such rate as may be determined in accordance with provision contained in the order.
  - (7) Any costs payable by virtue of an order under this regulation and any interest that has not been paid may be recovered as a civil debt by the person in whose favour that order is made.

### Consequential amendments

20. In Schedule 4 to the Enterprise and Regulatory Reform Act 2013<sup>(10)</sup>—

(a) in paragraph 35(3), in the definition of “specialist utility functions” after sub-paragraph (e) insert—

“(ea) an appeal under regulation 4 of the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (SI 2017/XXX);”;

(b) after paragraph 48(4)(c)(v)<sup>(11)</sup> insert—

“(vi) the Water Industry Designated Codes (Appeals to the Competition and Markets Authority) Regulations 2017 (SI 2017/XXX).”.

Date

*Name*  
Parliamentary Under Secretary of State  
Department for Environment, Food and Rural  
Affairs

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<sup>(10)</sup> 2013 c. 24.

<sup>(11)</sup> Paragraph 48(4)(c)(v) was inserted by paragraph 2(4) of Schedule 5 to the Financial Services (Banking Reform) Act 2013 (c. 33).

## SCHEDULE

Regulation 3

## Table of Designated Codes

<i>Designated Code</i>	<i>Description</i>	<i>Purpose</i>
Market Arrangements Code(12)	The code issued by the Authority to be made under Condition R3 of an undertaker’s conditions of appointment <sup>(1)</sup> and Part B of the standard licence conditions of water supply licences and sewerage licences.	To provide for the establishment and operation of the arrangements for the retail market <sup>(2)</sup> .
Wholesale-Retail Code(13)	The codes issued by the Authority under sections 66DA and 117F of the Act(14).	To provide for arrangements between undertakers and water supply licensees with retail authorisations and restricted retail authorisations.  To provide for arrangements between undertakers and sewerage licensees with retail authorisations.

(1) “Appointment” means an appointment under Chapter 1 of Part 2 of the Act.

(2) “Retail market” means the provision of services relating to the supply of water, in accordance with Chapter 2A of Part 3 of the Act<sup>15</sup>, or the provision of sewerage services, in accordance with Chapter 2A of Part 4 of the Act<sup>16</sup>, to premises that are not household premises.

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations set up a right of appeal to the Competition and Markets Authority (the “CMA”) against a decision (an “Authority decision”) by the Water Services Regulation Authority (the “Authority”) to revise or not to revise a code designated for the purposes of section 207A(2) of the Water Industry Act 1991 (c. 56) (the “Act”). The relevant codes are designated in regulation 3 and are listed in a table in the Schedule.

Regulation 4(2) provides a list of persons that can appeal an Authority decision, and regulation 4(3) provides that such a person requires the permission of the CMA to bring an appeal. Regulation 5 sets out the decisions against which a right of appeal is excluded. Regulation 6 sets out the procedure for applications for permission to appeal.

(12) The Market Arrangements Code was published at [www.ofwat.gov.uk](http://www.ofwat.gov.uk) on [date to be inserted] and copies are available from Ofwat, Centre City Tower, 7 Hill Street, Birmingham B5 4UA.

(13) The Wholesale-Retail Code was published at [www.ofwat.gov.uk](http://www.ofwat.gov.uk) on [date to be inserted] and copies are available from Ofwat, Centre City Tower, 7 Hill Street, Birmingham B5 4UA.

(14) Sections 66DA and 117F are prospectively inserted by paragraph 4 of Schedule 2, and Schedule 4, to the Water Act 2014 (c. 21) from a date to be appointed.

Regulation 7 allows the CMA to direct that a person be added to an appeal as an intervener, provided that they would have been entitled, at the time of the application, to make their own application to bring an appeal against the Authority decision.

Regulation 8 allows the CMA on application to suspend the Authority decision appealed against pending determination of the appeal.

Regulation 9 provides the time limit for the making of representations and observations by the Authority to the CMA about the Authority decision appealed against.

Regulation 10 makes provision in relation to the composition and decision making process of any CMA Group established to determine an appeal.

Regulation 11 provides a timetable for the determination of an appeal.

For the purposes of determining an appeal, the CMA may require by notice the production of documents (regulation 14), an oral hearing to be held (regulation 15) or written statements to be produced (regulation 16). Regulation 17 sets out the penalties for failing to comply with such a notice, making false statements, providing false information or wilfully altering, suppressing or destroying documents which are required to be produced.

Regulation 18 provides for the determination of an appeal, including the grounds on which the CMA may allow the appeal (see regulation 18(2)).

Regulation 19 permits the CMA to make orders for costs in connection with an appeal.

Regulation 20 sets out two consequential amendments to Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (c. 24) to allow for the appointment of CMA panel members for the purposes of these Regulations.

Impact assessments were prepared in respect of the Water Act 2014 and copies can be obtained from the Water Services Team, the Department for Environment, Food and Rural Affairs, Area 3D, Nobel House, 17 Smith Square, London SW1P 3JR. These impact assessments are published alongside the Water Act 2014 at [www.legislation.gov.uk](http://www.legislation.gov.uk).