STATUTORY INSTRUMENTS

2017 No. 447

WATER INDUSTRY, ENGLAND AND WALES

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

Made - - - - 17th March 2017

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—

"the Act" means the Water Industry Act 1991;

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

(**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.

"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(**4**);

"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(**5**), 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(**6**), 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(**7**).

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

(a) the appellant;

(b) an intervener; or

(**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.

(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.

(7) Those conditions may include—

(a) conditions which limit the matters to be considered on the appeal;

(**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.

(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.