Neutral Citation Number: [2025] EWHC 1885 (Admin)

Claim No. AC-2024-LON-003804

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Before :

MR JUSTICE WAKSMAN

Date: 23 July 2025

BETWEEN:

THE KING (on the application of)

(1) SAFERWATERS LIMITED
(2) THE OXFORDSHIRE BRANCH OF THE CAMPAIGN TO PROTECT RURAL ENGLAND

Claimants

and

SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

and

(1) THAMES WATER UTILITIES LIMITED
(2) AFFINITY WATER
(3) SOUTHERN WATER SERVICES LIMITED
(4) WATER RESOURCES SOUTH EAST

Interested Parties

JUDGMENT

Hearing dates: 25-26 June 2025

Lord Banner KC and Matthew Henderson (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Claimants
Charles Streeten and Nick Grant (instructed by the Government Legal Department) for the Defendant
Suzanne Ornsby KC and Jonathan Welch (instructed by Eversheds Sutherland (International LLP) for the First Interested Party
James Maurici KC and Andrew Byass (instructed by DLA Piper LLP) for the Second Interested Party
Catherine Dobson (instructed by Southern Water Services Limited Legal Department) for the Third Interested Party

Table of Contents

INTRODUCTION

1. This is a claim for judicial review brought by the Claimants, Saferwaters Limited ("SW") and The Oxfordshire Branch Of The Campaign To Protect Rural England ("CPRE") challenging the decision of the Defendant, the Secretary of State for Environment, Food and Rural Affairs ("the SoS" and "DEFRA" respectively) dated 21 August 2024, by which he authorised the publication of the Water Resources Management Plans ("WRMPs") of the First and Second Interested Parties, Thames Water Utilities Limited and Affinity Water respectively ("Thames Water" and "Affinity"). SW contends that the SoS acted unlawfully in failing to order a public inquiry or hearing under Regulation 5(1) of the Water Resources Management Plan Regulations 2007 ("the Regulations") before making his decision.

2. SW is a not-for-profit company limited by guarantee. It was set up by the community-based campaign group, Group Against Reservoir Development ("GARD"). GARD campaigns for the identification and promotion of what are said to be viable solutions to meet the future needs of water users in and around Oxfordshire. GARD and CPRE had made representations in consultations held about earlier WRMPs. For present purposes I simply refer to both Claimants as "SW" unless the context otherwise requires.

3. The claim is advanced on two grounds: first, that the decision not to hold an inquiry was procedurally unfair (Ground 1); and second, in the alternative, that the decision had been reached irrationally (Ground 2).

4. The relief sought includes the quashing of the decisions to authorise the publication of Thames Water's and Affinity's WRMPs, the quashing of the WRMPs themselves, and a declaration that a public inquiry or hearing should take place before a (retaken) decision on those WRMPs and before a decision (not yet made) is taken on the proposed WRMP of the Third Interested Party, Southern Water ("Southern Water"). The Fourth Interested Party, Water Resources South East ("WRSE"), is an alliance of the six water companies that cover the South East region of England. It has played no part in these proceedings. The other Interested Parties all have.

5. The hearing of SW's claims took place before me on a "rolled-up" basis. The claims have been fully argued out over two days as if this was the substantive hearing. In my judgment I should simply give permission at the outset of this judgment on the basis the claims appear arguable and then proceed directly to a full judgment. That judgment is what follows.

EVIDENCE AND SUBMISSIONS

6. The Claimants adduced a witness statement ("WS") in support of their claims from Dr Derek Stork dated 19 November 2024 ("DS1"). Dr Stork is the Director of SW and the Honorary Chairman of GARD. They also adduced the second WS of Ashley Damiral, their solicitor dated 20 June 2025.

7. For the SoS, there is the WS of Martin Woolhead dated 31 March 2025 ("MW1"). He has been the Deputy Director for Water Sector Delivery in DEFRA since July 2023.

8. Finally, for Affinity, there is the WS of Stephen Plumb dated 27 March 2025 ("SP1"). He is the Director of Affinity's Asset Strategy and Capital Delivery, and was involved in the preparation of its WRMPs since 2021.

9. Apart from the parties' skeleton arguments lodged before the hearing, I also received post-hearing written submissions from SW and the SoS dated 30 June, 3 and 8 July 2025 on one particular point ("the Compulsory Acquisition Point") dealt with below.

THE STATUTORY SCHEME

10. I take much of what is said below from the helpful summaries contained in the SoS's Skeleton Argument at paragraphs 6 – 17. The parts reproduced are not controversial.

The Water Industry Act 1991

11. Thames Water, Affinity and Southern Water are all "water undertakers" for the purposes of Part III of the Water Industry Act 1991 ("the 1991 Act"). Section 37 (1) thereof provides as follows:

> "It shall be the duty of every water undertaker to develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made -
>
> (a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and
>
> (b) for maintaining, improving and extending the water undertaker's water mains and other pipes,
>
> as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part."

12. Section 37A of the 1991 Act imposes a duty on water undertakers to prepare, publish and maintain a WRMP, being a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under Part III (see section 37A(1)-(2)). As to such WRMPs:

    (1) By section 37A(3), a WRMP must address: (a) the water undertaker's estimate of the quantities of water required to meet those obligations; (b) the measures which it intends to take or continue for the purposes of satisfying its statutory duties; (c) the likely sequence and

timing for implementing those measures; and (d) such other matters as the Secretary of State may specify in directions. The latest direction is the Water Resources Management Plan (England) Direction 2022;

(2) By section 38A(5)-(6), a WRMP must be reviewed annually and revised if that review indicates a material change of circumstances, if the Secretary of State directs, or in any event at least every five years;

(3) By section 37A(8), before preparing its WRMP, a water undertaker must consult the Environment Agency ("EA"), the Water Services Regulation Authority ("Ofwat"), the SoS, and any relevant water supply licensee.

13. The procedure for making representations in relation to, and publication of, a WRMP is set out in section 37B. In particular:

(1) By section 37B(3), water undertakers must publish the draft WRMP (excluding any commercially confidential information) in a manner prescribed by regulations or (in the absence of such prescription) in a way calculated to bring it to the attention of persons likely to be affected by it, together with a statement that any person may "make representations in writing about the plan to the Secretary of State before the end of a period specified in the statement";

(2) By section 37B(4), the Secretary of State must send to the water undertaker a copy of any representations received following publication of the draft plan under subsection (3) and give it a reasonable period of time within which to comment on those representations;

(3) Section 37B(5) empowers the Secretary of State to make regulations prescribing how any representations made and comments by the water undertaker on them are to be dealt with;

(4) Section 37B(6) gives the Secretary of State a discretion to provide, in the regulations prescribing the making of representations, a power enabling the Secretary of State to cause an inquiry or other hearing to be held in connection with a draft Water Resources Management Plan ("dWRMP");

(5) Under section 37B(7), the Secretary of State may direct a water undertaker that its WRMP must differ from the draft sent to him in a way specified in that direction, and the water undertaker must comply with that direction;

(6) Under section 37B(8), before preparing its WRMP (including a revised plan), the water undertaker must consult Ofwat, the EA and the SoS.

14. It is not stated explicitly within the 1991 Act or the Regulations that the permission of the SoS is required before the WRMP can be published by the water undertaker. However, this is implicit, is referred to in the Water Resources Planning Guideline ("the WRPG") below and is not in dispute between the parties.

The Regulations

15. The Secretary of State has exercised his power to make regulations under section 37B(5)-(6) by making the Regulations.

16. Under Regulation 2, a draft WRMP must be published both in paper form and on a website. A copy must be sent to the EA and Ofwat, as well as relevant local authorities, Natural England, Historic England, other relevant water undertakers and the Consumer Council for Water ("CCW").

17. Regulation 4 requires water undertakers to prepare and publish (in paper form and on its website) a statement detailing the consideration given to any representations received following publication of the draft WRMP, any changes made to the draft as a result of considering those representations (and the reasons for making those changes) and where no changes have been made, the reason why. That statement, referred to as the "Statement of Response" ("the SOR"), must also be sent to any person who has made representations in writing in relation to the draft WRMP.

18. Regulation 5 provides as follows:

> "**5.— Inquiries**
>
> (1) The Secretary of State or the National Assembly for Wales may cause an inquiry or other hearing to be held in connection with a draft water resources management plan.
>
> (2) Where the Secretary of State… causes an inquiry or other hearing to be held in accordance with paragraph (1), subsections (2) to (5) of section 250 of the Local Government Act 1972 shall apply to such inquiry or other hearing as they apply to inquiries under that section…".

("Regulation 5")

19. It is this provision which lies at the heart of the present dispute. It is common ground that in reaching his decision to permit Thames Water and Affinity to publish their plans, the SoS did not order an inquiry or other hearing pursuant to his power to do so under Regulation 5.

The WRPG

20. The latest version of this was published on 14 April 2023.

21. It is published by the EA and provides guidance to help water undertakers to draft WRMPs which comply with all the relevant statutory requirements and government policies. The following provisions within it are relevant here;

> "**1.4.1 Environment Agency**
> The Environment Agency is a statutory consultee for WRMPs. It leads on producing this guidance for you to use in compiling your WRMP. It has a statutory duty to secure the proper use of water resources in England. The Environment Agency will work with you as you prepare your plan and will provide a representation as part of your consultation.
> At the statement of response stage, its role changes and it becomes a technical advisor to the Department for Environment, Food & Rural Affairs (DEFRA) and the Secretary of State.
>
> **3.3 Pre-consultation**
> You should engage at an early stage with your Board, regulators, customers and interested parties, especially if your plan is likely to be complex or include significant change. This reduces the risk of issues being identified at a later stage. You should discuss your plan in the context of your previous WRMP and business plan, your progress with their delivery, and any expected variations.
>
> **3.8 Publish your final plan**
> The Secretary of State or the Welsh Ministers will review your draft plan, the representations made and your statement of response. They will also review technical advice from the regulators and decide whether your plan can be published. They may ask you to complete further work before you can publish your plan. If so, the Secretary of State or the Welsh Ministers will send you the necessary instructions.
> <u>If your plan has unresolved issues or significant public interest there may need to be a public hearing, inquiry or examination in public. The Secretary of State or the Welsh Ministers will decide if this step is needed and will inform you.</u>
> You must not publish your final plan until you have received permission from the Secretary of State or the Welsh Ministers. Before publishing your final plan you must:
> - follow any directions from the Secretary of State or the Welsh Ministers
> - undertake a final check of your plan to ensure it is ready to publish"

(underlining within paragraph 3.8 added for emphasis)

BACKGROUND FACTS

2008-2012

22. In May 2008, Thames Water published a dWRMP which featured a 100Mm3 (Mm3 = one million cubic metres) reservoir in Abingdon, Oxfordshire as part of its water resources planning. Abingdon is within Thames Water's operating area. At that time, the proposed reservoir was known as the Upper Thames Reservoir ("UTR"). A revised draft WRMP ("TW2009") was published in September 2009. The water to be provided by the UTR, which went beyond the existing supply/demand forecast, was said by TW to be necessary so as to cater for future additional uncertainties relating to reductions in the water available due to the need to protect the water environment by reducing water abstracted from it to meet the requirements of the Water Framework Directive. Thames Water referred to this as "long term risk". There was no provision for long term risk in the WRPG. The EA, in its advice to the then Secretary of State, rejected the concept of long

term risk, the additional 100Ml/d of water provision that it gave rise to and hence the need for the reservoir.

23. On 3 August 2009, the Secretary of State called for an inquiry pursuant to Regulation 5 of the 2007 Regulations. In March 2010, the Inspector was asked to report to the Secretary of State to enable her to decide whether Thames Water's revised draft WRMP was both fit for purpose and met statutory requirements or whether it be deemed to be so if amended in ways discussed at the Inquiry. The Inquiry opened on 15 June and sat for 22 days in total. It closed on 18 August.

24. The Inspector's Report was published on 13 December 2010. Its conclusions agreed with the EA and rejected the concept of long term risk, the 100Ml/d allowance and inclusion of the UTR in the plan and recommended its deletion.

25. On 1 March 2011, the Secretary of State wrote to Thames Water, accepting the Inspector's conclusions and recommendations. He directed that TW2009 should not be published without further amendment. In 2012, Thames Water published a further WRMP but it did not include the reservoir.

26. In 2009, Affinity and Southern Water had also had WRMPs. However, theirs did not include the UTR.

2014

27. Thames Water, Affinity and Southern Water all published subsequent WRMPs in 2014 but none featured the UTR.

2019

28. The next WRMPs came in 2019. Southern Water's WRMP was published in December 2019. It did not include the option of a reservoir at Abingdon.

29. The Thames WRMP ("TW2019") did, again, feature a reservoir option at Abingdon. By now the UTR had become known as the South East Strategic Resource Option ("the SESRO"). Its proposed capacity was now 150Mm3. It would be a fully bunded reservoir, which would be located, again, in Oxfordshire. During periods of high flow in the River Thames, water would be abstracted from the river at Culham and transferred to the reservoir by tunnel. The water would then be stored in the reservoir. During periods of low flow in the river, water would be released back to the River Thames,

through the same tunnel, for re-abstraction further downstream, for treatment and then supply to customers.

30. Affinity's 2019 WRMP ("Affinity 2019") also identified the SESRO as being required to meet future demand. Even though the SESRO was not in its area, it was always contemplated that it would or could be used by adjoining water undertakers such as Affinity or Southern Water.

31. For both TW 2019 and Affinity 2019, there were two rounds of consultation with hundreds of responses. GARD responded extensively. There were requests for a public inquiry by both GARD and in Parliament. However, no public inquiry or hearing was directed to be held, nor was there any judicial review of the decision not to do so, or of the inclusion of the SESRO in either plan. The TW2019 and Affinity 2019 were published in April 2020.

32. It should be noted here that, as set out in paragraphs 29 and 30 of DS1, although the 150Mm3 version of the SESRO was approved ("SESRO150") as part of Thames Water's approved "Preferred Plan", there was no actual approved action on the project in the plan proposed by Thames Water for the period 2020-2024. Instead, the establishment of RAPID (Regulators' Alliance for Progressing Infrastructure Development) by Ofwat and the EA to progress strategic resources such as the SESRO and STT (Severn-Thames Transfer) through a "Gated" procedure was made, which was formally welcomed by GARD. There were consultation procedures about the SESRO in that context in which GARD again made representations in 2023 in which year the SESRO and some other schemes passed Gate 2. By then of course the proposed WRMPs for 2024 were under way.

33. On the basis of the required 5 year cycle, the next WRMPs were due for publication in 2024.

THE WRMPS IN ISSUE – THE FACTS

Introduction

34. On 3 October 2022, Thames Water, Affinity and Southern Water submitted draft WRMPs ("dWRMPs") to the SoS. Those from Thames Water and Affinity included a reservoir for 100 Mm3 at Abingdon. Southern Water's dWRMP ultimately included, as part of its water resources, the taking water from what was known as the Thames to Southern Transfer ("T2ST") pipeline which would move up to 120Ml/d of water from the SESRO scheme. This, however, would be at the end of a sequence of other water infrastructure projects.

35. Because the positions of Thames Water and Affinity were closely aligned and Southern Water also proposed to make use of the SESRO, it is appropriate to consider the chronology of events in respect

of all three water undertakers. It is necessary to do this in some detail because, in my judgment, the issues raised by Grounds 1 and 2 are highly fact-specific.

Affinity dWRMPs and GARD's response

36. On 9 November 2022, the SoS granted Affinity permission to publish and consult on its dWRMPs and it did so on 14 November 2022.

37. The detail of Affinity's dWRMP and the response to it is set out in Mr Plumb's WS. It was accompanied at the outset by a Strategic Environmental Assessment Scoping Report from July 2021. It identified a significant forecast water deficit in the Affinity region. A number of strategic solutions to address this were set out including the Grand Union Canal Transfer scheme ("GUC Transfer") and the SESRO. These were sequenced so that the GUC Transfer was needed before the SESRO. The former was regarded as critical for near-term water security. There were 233 responses to Affinity's consultation including from GARD.

38. On 20 February 2023, GARD made extensive technical submissions in response to Affinity's dWRMP in a 31 page document. It objected as a matter of principle to the inclusion of the SESRO among other things and suggested that Affinity had overestimated likely population increase. In addition, GARD disagreed with Affinity's assumptions about the extent of abstraction reduction, that is to say the forecast reduced amounts of water which could otherwise be made available by means of abstraction from other water sources. This meant that GARD contended that more water from abstraction could or should be made available than was assumed by Affinity. This would in turn reduce the need for infrastructure projects such as the SESRO. GARD put forward proposals which would mean that the SESRO was not needed at all. It is important to note here that GARD was objecting to the SESRO as a matter of principle as opposed to arguing for a smaller reservoir which would contain 100Mm3 ("SESRO100") instead of SESRO150. See MW1 at paragraph 34.

Southern Water's dWRMP and GARD's response

39. As for Southern Water, I take the position as summarised in its Skeleton Argument. This is not in dispute and is largely drawn from MW1.

40. Also on 9 November 2022, the SoS granted Southern Water permission to publish and consult on its dWRMP and it did so on 14 November 2022. Its dWRMP relies on a number of Strategic Resource Options ("SROs") and major infrastructure projects to meet its supply obligations. These are sequenced: two water recycling projects in Sandown and Littlehampton being the first to be completed, followed by the Havant Thicket Reservoir in Hampshire, the Hampshire Water Transfer

and Water Recycling and, ultimately, the T2ST pipeline transfer moving up to 120Ml/d of water from the SESRO scheme. In accordance with the 2022 Direction, Southern Water published its dWRMP for 2024 ("dWRMP24") which was based on WRSE's draft Regional Best Value Plan ("dRBVP"), which also includes SESRO as an option.

41. Southern Water received 591 responses to its consultation on the dWRMP24, including a short submission from GARD, which expressed disagreement with the inclusion on the SESRO in the dWRMP, referring to the reasons set out in GARD's response to WRSE's dRBVP.

EA's and Ofwat's response to Affinity's dWRMP

42. In its response dated 17 February 2023, the EA said that it expected Affinity to make improvements to its dWRMP. Among other things, this included revisiting the size of the SESRO. The EA outlined 5 recommendations and 11 improvements, in connection with a number of issues identified. One major issue concerned the justification for the size of the SESRO, noting that while Affinity had selected 100Mm3, the decision was marginal and 150Mm3 performed better on resilience metrics, while 100Mm3 performed better on environmental metrics. The EA therefore suggested that Affinity work with WRSE, Thames Water and Southern Water to review and further justify the selection of the size of the SESRO and consider the wider environmental benefits by delivering environmental destination that may be available with each size of the SESRO.

43. Ofwat's response is dated 20 February 2023. It included a number of areas where further information was sought. This included queries about the size of the SESRO (the 100Mm3 responding better on best value criteria but the 150Mm3 option responding better against resilience criteria), construction costs and the unit cost of transferring water from the SESRO.

Thames Water's dWRMP and GARD's response

44. In the meantime, Thames Water was granted permission by the SoS on 7 December 2022 to publish and consult on its dWRMP, and it did so on 13 December 2022. It received 1687 responses to its consultation.

45. Among these was a 153-page response from GARD dated 20 March 2023 which was supplemented by a further 70-page response on 30 April. There was also a 6-page response from CPRE dated 20 March 2023. GARD's principal response to Thames Water's dWRMP made the following points which can be discerned from its summary in the first 10 pages of the report:

(1) Thames Water had substantially overestimated the water deficits by 2025, the excess (i.e. incorrectly stated deficits) being 430Ml/d in the London zone, 33Ml/d in the SWOX (Swindon and Oxfordshire Water Resource Zone) and 90Ml/d in other Thames Valley zones;

(2) Its population growth assumptions were too high by 1.2 million as at 2050 and 1.8 million by 2100; this would then significantly reduce the estimated deficits also;

(3) A further saving of 74Ml/d would be achieved if Thames Water's leakage reduction targets were higher, as they should have been;

(4) The proposed Thames to Southern transfer (where the water would come from the SESRO) was not needed;

(5) The SESRO was not needed at all;

(6) On the detail of the SESRO, GARD said this about its size:

> "Size of reservoir
>
> Thames Water's plan says that the choice between the 150 Mm3 and 100 Mm3 Abingdon reservoir is a key topic for this consultation. The plan puts forward two spurious reasons for choosing the larger version. Firstly, the 150 Mm3 reservoir "has lower regrets if the future is worse than predicted" – it seems highly improbable that the future will be even worse than Thames Water's overly-pessimistic predictions. Secondly, the 150 Mm3 reservoir "Provides additional headroom for changes in environmental policy requiring further abstraction reductions or improved levels of service" – it seems inconceivable that the abstraction reductions will need to be more than the High scenario that Thames Water has assumed or that a future level of service will be more severe than a 1:500 drought. If an ill-judged decision was made to build a reservoir at Abingdon, we can see no valid reason for it to be the 150 Mm3 version, apart from benefits to Thames Water's shareholders.
>
> Most of the information on water resources modelling requested by GARD in mid-December 2022 has still not been received. Therefore, we have been unable to address various concerns relating to the deployable output of Abingdon reservoir, particular those related to its resilience to long duration droughts and, consequently, its deployable output. We expect the information to be available soon and will use it in an Addendum to this response, and in our submission to the RAPID Gate 2 process.
>
> The proposed Abingdon reservoir still only allows 6% of emergency storage, as compared to typically 20% for other major UK reservoirs. The last 6% of water will probably be of very poor water quality and is likely to be unusable. Increasing the emergency storage to a more prudent 20% would reduce the yield of the reservoir by about 15% or 30Ml/d."

(7) GARD also stated in relation to the SESRO that Thames Water's environmental assessment of it was inadequate, there would be a very large carbon footprint caused by its construction and that Thames Water had failed in its duty of due diligence in relation to its safety. Further,

the high capital cost of the reservoir would increase its asset value, yielding increased shareholder returns alongside a substantial increase in customer bills;

(8) The preferable alternative was the proposed Severn to Thames transfer scheme ("STT"), involving the construction of an aqueduct, whose introduction should be brought forward;

(9) Thames Water had not provided a clear cost comparison between the SESRO and the STT, but on GARD's own analysis the latter would be some 10% cheaper;

(10) The scheme to transfer water to Affinity from Thames Water's London supply should be brought forward;

(11) The GUC scheme proposed by Affinity would also be able to supply some of Thames Water's requirements.

46. GARD's further submission was in respect of Thames Water's new Pwyr model output which GARD had requested on 12 December 2022. It was not received by GARD in full until 22 March 2023 which was the day after the Thames Water consultation ended. Because of that, this otherwise late further submission was accepted. It contained reviews of the following matters:

(1) The validation of the Pwyr and GARD modelling, using Thames Water's previous WARMS2 modelling as a benchmark;

(2) The validity of stochastically generated river flow data;

(3) The Abingdon reservoir deployable output (DO) and drought resilience; and

(4) The STT deployable output.

EA's response to Thames Water's dWRMP

47. The EA produced its response to Thames Water's dWRMP on 21 March 2023. It made 16 recommendations in respect of the WRMP going forwards. Recommendation 4 stated the following:

> "Justify the size of the South East Strategic Resource Option (SESRO). A 100Mm3 reservoir is in Thames Water's preferred plan. However, the plan indicates that a larger reservoir performs better on some metrics and could also offer additional resilience and environmental benefits. If the company's preferred solution is a reservoir, it should ensure that it provides the best value solution for its customers and the environment. Thames Water should work with WRSE, and other companies to review and confirm the selection, size and alignment of its options. It should consider the wider benefits for the environmental destination that may be available with each size of SESRO."

48. Accordingly, the position adopted by the EA now was quite different from what it had said in 2010. Then, it had objected to the SESRO in principle because it was not necessary and that, in turn, was because of the use by Thames Water of the concept of "long-term risk".

Affinity's SOR and revised dWRMP

49. In these documents, Affinity moved to proposing 150Mm3 rather than 100Mm3 for the SESRO at Abingdon.

Southern Water's SOR and revised dWRMP and future matters concerning Southern Water

50. Southern Water's SOR was published on 31 August 2023. It here made a number of changes to its dWRMP. These included revised forecasts for the delivery of some of the strategic resource options which necessitated reliance on the use of drought permits and orders in Hampshire for a longer period in the event of a drought. As these revisions represented a material change to the dWRMP24 which had been consulted upon, Southern Water published a revised dWRMP24 for consultation on 11 September 2024, which closed on 4 December 2024. It received 1,176 responses to its consultation on the revised dWRMP, including one from GARD. This focused on Southern Water's need for the 120Ml/d T2ST. GARD's position was that the T2ST scheme is only needed to allow discontinuation of drought orders and permits on the Rivers Itchen and Test and that the use of drought orders in severe droughts should be preferred to having recourse to the T2ST scheme because their impacts are rare, minimal and temporary. GARD's response did not consider other aspects of the WRMP. In particular, it did not dispute the significance of the supply-demand deficit or the need for significant long-term water solutions.

51. Southern Water submitted its final revised draft WRMP to the Secretary of State on 30 May 2025. On the same date, it published a further SOR. This included a specific response to GARD's submission which explained, inter alia, that T2ST is part of a package of solutions for long-term resilience (for both drought and non-drought scenarios) in Southern Water's Western and Central areas and the need for T2ST is largely unconnected with the continuation of the use of drought orders and permits on the Rivers Itchen and Test.

52. The SoS has not yet approved Southern Water's WRMP. He has not thus far ordered a public inquiry or hearing. In those circumstances it is not necessary to say any more about Southern Water in the context of setting out the facts.

Thames Water's SOR and revised dWRMP

53. On 31 August 2023, Thames Water produced its detailed SOR ("the Thames Water SOR") together with a revised dWRMP ("rdWRMP"). The SOR consisted of a main report of 119 pages together with 11 appendices comprising 1909 pages and a further 6,400 pages of responses to online consultation responses. Appendix G2 to the SOR contained a 91-page response to GARD's submissions. It dealt with each issue raised, covering need, demand management measures, alternative solutions, resilience of the SESRO, deployable output, costs comparisons, flooding and safety, and environmental assessments.

54. On the specific question of the size of the SESRO, at pages 64-69 of Appendix G2, it now said this:

> "We have revisited our programme appraisal, accounting for new information and updates to guidance (e.g., 110 l/h/d PCC target, revised option cost information).
> Changes made as a result of the revised draft WRMP24 programme appraisal process are detailed in Sections 10 and 11 of the rdWRMP, with the primary changes being: -
>
> Our consideration is that the 150 Mm3 SESRO option is the best value option for provision of long term resilience of water supplies - If the 110 l/h/d PCC target is achieved, SESRO provides sufficient resource and the Severn-Thames Transfer is deferred. Nevertheless, the Severn-Thames Transfer remains an important back-up option."

55. The reduction in planned water use to PCC (per capita consumption) target of 110 l/h/d had been specifically requested both by the EA and GARD. In addition, and as the reference to the deferral of the STT indicates, the STT was not now to be included in the revised dWRMP, although Thames Water would still develop the STT as a reserve option so that it could act quickly if additional water was needed in the future.

56. These three new features, the adoption of 150Mm3 as the size of the reservoir, the target of 110 l/h/d and the exclusion of the STT as a principal water resource option, were what amounted to the significant changes to Thames Water's WRMP.

57. Thames Water's SOR and rdWRMP were sent to the SoS, and also, as required, to all those who had made representations in writing at the consultation stage. They were also sent to the EA whose role now changed. This is because the SoS now sought the expert technical assistance of the EA as required by a combination of section 15 (2) of the Water Resources Act, and sections 6 (2) and 37 (2) of the Environment Act 1995. As noted in paragraph 1.4.1 of the WRPG, "its role changes and it becomes a technical advisor to the Department for Environment, Food & Rural Affairs (DEFRA) and the Secretary of State".

EA's November Advice on Affinity's dWRMP

58. The EA issued its advice to the SoS on Affinity's SOR and dWRMP on 24 November 2023 ("EA's November Advice"). It was produced in collaboration with other regulators (Ofwat and Natural

England). It said that Affinity had improved its plan but there remained some significant risks that should be resolved before it was published. It outlined 10 issues in Section 3, but overall recommended that Affinity Water be allowed to publish its plan with the changes required, following further review by regulators. A minor update to this advice was provided on 12 January 2024.

59. What this therefore shows, among other things, is that the EA had accepted the principle of the SESRO, based on a 150Mm3 capacity reservoir at Abingdon.

60. On 23 January 2024, DEFRA wrote to Affinity seeking further information in support of its revised dWRMP, based upon the EA's November Advice.

EA's First Advice on Thames Water's WRMP

61. On 20 December 2023, the EA produced its Advice Report to the SoS on Thames Water's dWRMP. This had been produced in collaboration with other regulators, namely Ofwat, Natural England, the CCW and Natural Resources Wales ("the EA First Advice").

62. It noted that there had been the three significant changes to the WRMP, as set out in paragraph 56 above. It further noted that there was significant public interest given the number of representations and the fact that many objected to the SESRO option. It outlined 14 issues including points raised by GARD about resource modelling and the size of the SESRO. Overall it recommended that Thames Water should not be allowed to publish its plan; instead, it should be required to make further changes which would be subject to review by the regulators before publication. Also, the EA advised that given the public interest, DEFRA should consider whether public scrutiny was required before publication.

63. The 14 issues which were to be addressed by Thames Water before publication of its final plan and which would then be reviewed by regulators were as follows:

    (1) Issue 1: Provide greater confidence to the regulators that the company is managing the risks identified at the beginning of the planning period;

    (2) Issue 2: Fully justify the selection of Teddington as best value, properly reflect current uncertainties around viability and progress development of Beckton water recycling scheme as a potential alternative should it be required;

    (3) Issue 3: Ensure transfers of water are aligned;

(4) Issue 4: Account for likely constraints on groundwater options;

(5) Issue 5: Need for a monitoring plan;

(6) Issue 6: Provide further detail around the company's water resources modelling. This was a point raised by GARD, and here, the EA noted that:

> "both the Group Against Reservoir Development (GARD) and ourselves raised concerns around the company's water resources modelling in response to the draft plan. The company has made some changes to its plan, but there are a number of topics where the company should provide further information before the plan is finalised and published including the:
>
> • calibration of the rainfall run off model
>
> • stochastic data set and its reflection of long duration droughts
>
> • relationship between the deployable output benefit of a strategic resource option and the deployable output benefit it brings to the London supply system";

(7) Issue 7: Increase leakage reduction in Swindon and Oxfordshire resource zone. This had also been raised by GARD and the EA noted that:

> "Thames Water's leakage programme is concentrated in London as this resource zone has the biggest deficit. It plans an approximate 55% reduction in London and an approximate 30% reduction in Swindon and Oxfordshire (SWOX) resource zone. SWOX is a zone with a significant baseline deficit, relatively high leakage and was shown to be vulnerable in the drought in 2022. The company should increase its leakage ambition in this resource zone.";

(8) Issue 8: Present the disaggregated best value scores for its programmes, including the different sizes of the SESRO. This was another point raised by GARD. Here, the EA noted that:

> "Thames Water has presented a comparison between the options selected for the Least cost plan, Best Value Plan and Best Environmental and Social Plan. It has not presented the individual best value metric scores for these programmes or those testing different sizes of South East Strategic Resource Option (SESRO). The scores provide important evidence for the selection of the candidate best value plan and should therefore be clearly presented. The company should also explain how Ofwat's public value principles have been used to inform best value decision making, and how the plan aligns with each principle.";

(9) Issue 9: Consider using surplus in 2040s to benefit the environment;

(10) Issue 10: Account for uncertainty of climate on source yield;

(11) Issue 11: Justify some elements of its option selection. Here the EA stated that Ofwat has identified a number of areas where the company should provide further justification for its decision-making. For one area, which GARD also covered, Ofwat said that Thames Water should:

> "provide clear commentary, evidence and justification for the best value and regional benefit gained by the investment model selecting options that, in Average Incremental Cost terms, may not be the lowest cost. The company identifies why smaller options may be of lower unit cost (e.g. expanding current assets) but then doesn't explain why these option types are

> not explored more in feasible options and selected for the final plan. The concern about the selection of high unit cost schemes, including Strategic Resource Options, over alternatives has only been partially addressed.";

(12) Issue 12: Quantify and explain the baseline changes between the draft plan and the revised draft;

(13) Issue 13: Justify headroom allowance appropriately;

(14) Issue 14: Costs. Here, the EA said that a number of concerns around costs have not been adequately addressed, or addressed at all, by the company. The company should (in both its final plan and business plan where appropriate) address a number of points. One, also raised by GARD was that Thames Water should:

> "• provide transparency and assurance on option costs, including for SESRO. The company should provide full details and a breakdown of its costing approach. This is particularly important as the revised draft plan indicates that SESRO is selected on cost grounds.";

64. It follows from the above that the EA was not here objecting in principle to the SESRO. It would be odd if it had, given the position it took in respect of Affinity's WRMP (see paragraphs 58- 59 above). It had effectively rejected GARD's case on the lack of need for the SESRO, save on the question on greater leakage reduction (Issue 7), although it required further information from Thames Water on modelling, value and costs (Issues 6, 8 and 14).

65. On 5 February 2024 the SoS wrote to Thames Water, referring to the EA First Advice, and appending the issues raised by the EA requesting further information in support of the SOR before a decision would be made. A further, more detailed Annex was also sent later from the EA to Thames Water, where some of the issues were elaborated upon. I refer to both of these as "the DEFRA RFI".

The EA January 2024 Slide Presentation

66. A precursor to DEFRA's writing to Thames Water and Affinity was a meeting between representatives of the EA, Ofwat and DEFRA on 5 January 2024 about the dWRMPs submitted. This included a slide presentation from the EA, reflecting what it has said in its November Advice and its First Advice (to Affinity and Thames Water respectively).

67. The slides identified Thames Water's dWRMP as "high risk". More particularly, DEFRA here said that Thames Water had a plan which should work but there were short-term risks, with very high public interest in Thames Water's options, including the SESRO, and questions over its financial position and current issues with high leakage. They asked whether there was a need for further

public scrutiny, noting that the larger reservoir was not the preferred option in the draft plan consultation, although, as already noted, the EA's own position was that the larger reservoir was potentially preferable.

68. That said, and as noted at paragraph 37 of Thames Water's Skeleton Argument (which I did not understand to be in dispute) the EA did not here raise any issue in relation to the need for the SESRO in principle, including population projections or as to the use of high scenarios for climate change and water abstraction reductions. Nor did it raise any fundamental concern over the deployable output for the SESRO.

First Representations by GARD and others as to a public inquiry

69. In the meantime, by letter dated 20 December 2023 from its solicitors, CMS Cameron McKenna Nabarro Olswang LLP ("CMS"), to the SoS ("the First CMS Letter"), GARD sought a public inquiry in relation to Thames Water's and Affinity's dWRMPs (along with those submitted by Southern Water and WRSE). It said that there were significant unresolved issues and the matter was of sufficient public interest to warrant an inquiry. GARD by this point had seen Thames Water's and Affinity's SORs and dWRMPs. It also later obtained a copy of the EA's First Advice by a freedom of information request.

70. This call for an inquiry was supported by a letter from David Johnston MP dated 27 December 2023, a letter from Layla Moran MP dated 29 January 2024 and the Vale of White Horse District Council Green Group dated 18 March 2024.

71. DEFRA responded to the First CMS Letter by a letter dated 29 January 2024. The letter said that as would be appreciated, the SoS would decide on the next steps for the plans in due course.

Thames Water's response to the DEFRA Request for Further Information

72. This was provided to the SoS in a substantial document dated 29 April 2024. This included a further revision to the dWRMP (yet further revised on 27 July 2024 due to a typographical error). The body of this response consisted of 195 pages addressing each of the 14 issues as originally raised by the EA, and some of which had been raised previously by GARD. There were then 5 annexes running to a further 120 pages. As a matter of form, this response was described as an Appendix to Thames Water's original SOR.

73. The responses on Issues 6, 7, 8, 11 and 14 (which were areas also covered by GARD – see paragraph 63 above) occupied 42, 2, 9, 35 and 25 pages respectively.

The EA's Second Advice on Thames Water's dWRMP

74. The EA's second advice to the SoS, being an assessment of the Thames Water response of 29 April 2024 was provided by way of a 4-page letter dated 23 July 2024 ("the EA's Second Advice"). It began by stating the following among other things:

> "The Environment Agency, Ofwat and Natural England (the regulators) have reviewed the amended plan to assess that it meets regulatory and statutory requirements. The regulators believe the plan produced by Thames Water could be published and delivered. There however, are some risks and concerns surrounding the plan that we have raised below.
>
> Thames Water's plan includes two major water supply schemes: Teddington Direct River Abstraction (DRA) which is a water recycling scheme that would operate in the lower Thames in London, and a new large reservoir in Oxfordshire called the South East Strategic Resource Option (SESRO). Both schemes have attracted significant public interest and scrutiny of regulators to date.
>
> With such public interest in Teddington DRA and SESRO, there is a decision on whether further public scrutiny is required. The statutory Water Resources Management Plan process allows for further public scrutiny of the overall plan or specific parts of the plan, through either a public inquiry, hearing or examination in public. However, there is no precedent for calling for further scrutiny on public interest alone. The justification of need and the selection of the schemes are clearly demonstrated in the Thames Water plan that has followed the water resources planning guideline and legal Directions. Both schemes will have further scrutiny on design through the Development Consent Order process. We believe a decision on further public scrutiny is a Ministerial decision."

75. The EA's Second Advice went on to say that Thames Water had mostly addressed the 14 issues. However some further matters needed to be dealt with before a final plan should be published. These included (by reference to the 14 Issues set out in the EA's First Advice - see paragraph 63 above):

(1) Providing further information and reporting and one change of the proposed leakage strategy in relation to Issue 1; the five bullet points set out what had to be done to resolve the outstanding issues here;

(2) A further point on Issue 2, which dealt with Teddington;

(3) Improved presentation of the information now provided within the plan documentation on water resources modelling, covered under Issue 6, the further detail requested having itself now been provided;

(4) Under Issue 8, while Thames Water has provided the information sought, it was currently spread throughout the plan in multiple sections and in different formats. This presentation should be improved prior to publication so as to show a single compendium of metric scores which is important evidence of the selection of the best value plan options. Also, Thames Water should continue to align the details published here with the information provided through the (separate) RAPID gateway assessment;

(5) Addressing concerns specifically raised by Ofwat but echoed by the EA, namely:

(a) Under Issues 1 and 7, ensuring that leakage improvements in SWOX are made without offsetting ambition in other water resource zones before the final plan is published;

(b) Under Issue 11.3, Thames Water is expected to make minor amendments to present which additional options it proposes to deliver over 2025-2030 in response to Ofwat's PR24 (2024 Price Review) draft determinations. Options may come from adaptive pathways, where best value and environmental assessments have already been demonstrated.

76. On a fair reading, what the EA's Second Advice showed was that Thames Water's dWRMP was now fit for publication with just a few limited matters to be addressed for the final version. In other words, the EA (and Ofwat) considered that the 14 issues raised by them and adopted by the SoS as matters which must be dealt with on the part of Thames Water had now been or would be dealt with. I agree with Thames Water's submission that this is a far cry from the position adopted by the EA (and indeed the Inspector) in 2010.

77. I should add here that on 17 July 2024, Ofwat sent its own advice to DEFRA. As was implicit in the EA's Second Advice referred to above, Ofwat was not now objecting to publication of the dWRMP. As explained at paragraph 82 of MW1, of the issues raised in the EA's First Advice, Ofwat considered Issues 2, 6, 8, 14, 11, and 12 resolved. While it had concerns regarding Issue 13 (headroom allowance) this could be dealt with via its 2024 Price Review and as the next drought plan and/or WRMP was developed, and no change to the dWRMP was required in this respect. On Issues 1 and 7 (leakage, PCC ambition and leakage reduction in the SWOX) it advised more stretching targets and leakage reductions be imposed.

Second Representations for a public inquiry

78. In the meantime, CMS wrote again to the SoS by letter dated 8 July 2024 ("the Second CMS Letter"). This made similar points to those set out in the First CMS Letter. However, GARD had since that date seen EA's First Advice, noting that the EA had said that DEFRA should consider whether further public scrutiny was required before publication. GARD took this to be a reference to the holding of a public hearing or inquiry. It said that a public inquiry rather than a hearing was required because of the nature of unresolved issues which would need expert evidence and testing under a hearing procedure with cross-examination. There should be a public inquiry into the dWRMPs of all three of Thames Water, Affinity and Southern Water. The unresolved issues were set out in Appendix 1 to the letter but summarised as follows:

(1) Need not proven; this included considering whether the "new" 150Mm3 option for the SESRO was required and that this was a "clear moving of the goalposts" from the original preferred option of Thames Water of 100Mm3; I would only add here that this does not seem to be entirely accurate because GARD specifically addressed in its response to the Thames Water dWRMP the whole question as to whether if there was to be the SESRO, it should have the larger as opposed to the smaller capacity;

(2) Demand management measures should be prioritised; this included addressing Thames Water's leakage rate which was higher than those of other water companies;

(3) Resilience of SESRO;

(4) Comparisons of deployable output against other options are flawed and biased;

(5) Comparisons of cost against other options are flawed and biased;

(6) Flooding and safety;

(7) Environmental assessment of impacts are insufficient and biased;

(8) The Strategic Environmental Assessment (SEA) is legally flawed.

79. As to those matters, from the EA's point of view, the first was not now an issue, the second was covered by its own Issue 7, the third and fourth by its Issue 6, and the fifth by its Issue 14. The sixth, seventh and eighth were points originally made by GARD but which the EA did not take up.

80. GARD added in its letter that there was significant public interest in and opposition to the SESRO. It highlighted the overlap between the concerns it had expressed and those expressed in the EA First Advice. However, it went on to say that the EA had not considered whether the plans addressed GARD's criticisms on a number of additional matters which included deficit forecast in general, population forecasts, excessive abstraction reduction allowances, lack of trial embankment, lack of downgrade analysis, water quality in the reservoir, erroneous scoring of biodiversity net gain, inadequate allowance for emergency storage in the reservoir, erroneous carbon assessments of the reservoir, lack of transparency of STT costs and absence of STT in the preferred plan despite strategic transfers being a key National Infrastructure Commission recommendation.

81. I follow that, although none of the parties in their submissions attempted to carry out an analysis as to whether those further points featured in the EA First Advice or not. What I think can be said is

that EA clearly took into account GARD's representations as well as its own concerns and concluded, as the SoS's independent technical adviser, that the key issues to be addressed constituted the 14 issues to which it referred.

82. There was no specific acknowledgement or other response from the SoS to CMS's Second Letter.

83. Of course, what neither GARD nor its solicitors had seen were the post-20 December 2023 documents, namely the SoS's Request for Further Information from Thames Water dated 5 February 2024, Thames Water's response thereto dated 29 April 2024 and EA's Second Advice dated 23 July and Ofwat's separate advice dated 17 July 2024, respectively. There is no separate public law claim that those documents should have been provided to GARD, that there should have been a re-consultation, or that EA's Second Advice, provided in its statutory capacity was in some reviewable sense defective. Grounds 1 and 2 focus exclusively on the non-exercise of the SoS's discretion to order a public inquiry.

The Ministerial Submission to the SoS

84. This was issued to the SoS on 24 July 2024 ("the Submission"). It related to a number of WRMPs proposed by various water companies, including Thames Water and Affinity. It did not relate to Southern Water because its WRMP was not in any event ready for publication. That would be the subject of further advice from the DEFRA officials in due course.

85. The Submission provided as follows, among other things:

> **"Recommendations**:
> 3. You agree that the WRMPs (Annex A, Part 1) meet statutory requirements and that you do not require them to undergo further development.
> 4. You agree that officials write to the water companies to inform them of your decisions.
> 5. You agree not to require an inquiry or hearing be held in connection with the Thames and Affinity draft plans which propose the SESRO reservoir…
> **Options and Analysis**
> 7. Under the Water Industry Act 1991, water companies have a statutory duty to provide a secure supply of water for customers, efficiently and economically. Statutory Water Resources Management Plans (WRMPs) show how companies will continue to meet this duty and manage water supply and demand for at least the next 25 years. In their plans, water companies must consider all options, including demand management and new water resources infrastructure. The Secretary of State is to be provided with a WRMP in draft, before the water company publishes it, in order for him to consider whether any changes should be made to it first. He also has the power to call for a hearing or inquiry for further scrutiny.
> 8. The WRMPs take account of various factors and government and water regulators issued regulations, guidance and legal directions on how water companies should prepare and publish their WRMPs. The Environment Agency's (EA) review of draft regional water resources plans found an additional 5 billion litres of water a day will be needed in England by 2050 to meet water supply pressures. This deficit is driven by the needs of a healthy environment and of a growing population and economy, the impacts of climate change and drought resilience improvements.

9. The draft plans are a step change from what we have seen previously. Water companies propose significant further increases in investment over the period of 2025-2030 amounting to £6 billion (subject to Ofwat PR24 final determinations). This includes increased water demand management to support delivery of statutory targets, including action to reduce leaks and widespread rollout of smart meters. This is alongside investment for multiple new infrastructure schemes by 2050, including at least 9 new reservoirs (further detail on some of the planned infrastructure is provided in Annex B).
10. Since they involve major infrastructure projects, these plans do not presuppose the outcome of the various individual decisions, approvals and consultations which may be required. However, it is appropriate for water companies to plan to resolve future water supply deficits. Thames Water's proposed new reservoir in Oxfordshire, the South East Strategic Reservoir Option (SESRO) have attracted significant public interest. SESRO has seen calls for a public inquiry on the plan; you have the power to order such an inquiry. There is a risk (considered below) that publication of the plans will result in further pressure to hold an inquiry or other hearing/consultation at this stage on the subject of the SESRO or other controversial elements of the plans.
11. We do not feel an inquiry/hearing into the Thames plan (and hence the SESRO) is necessary. There was an inquiry on the SESRO proposal in 2010, but at that point the regulators were not supportive of the WRMP or think [and did not think] that Thames had properly justified the reservoir. This time is different: EA and Ofwat are both content that the WRMP is published (subject to some minor changes we will ask the company to make before the plan is published). There will be remaining design issues to resolve but the company should resolve these as it prepares for development consent, which must involve further consultation and public examination/inquiry.
12. There is local interest, but we feel this should be balanced with the urgent need to improve the resilience of water supplies in the South East and the water environment. An inquiry will probably delay development by approximately a year.

Next Steps

13. We believe water companies listed at Annex A, Part 1, have produced plans that meet their statutory requirements and comply with the guidelines, subject to minor amendments prior to publication being actioned. Water regulators have advised the WRMPs will provide a secure and sustainable water supplies.
14. It is important these plans are published to allow water companies to begin delivery, helping avoid similar issues that we see in Cambridge and North Sussex. The plans represent a step change in ambition and carry risks if not delivered. We will work with regulators to closely monitor delivery through annual reviews and performance checks…

Comms and media handling

19. Water security and water company investment are issues that attract national media attention, and we would expect the publication of the WRMPs by individual water companies to be picked up widely, although this may be staggered depending on the individual publication dates. We will take a proactive approach with further details laid out in a full comms plan to follow.
20. We would expect some local negative media around some of the more controversial projects and would prepare reactive lines for those specific schemes."

86. It can be seen, therefore, that the question of a public inquiry was specifically addressed in paragraphs 10 - 12. The reference to calls for a public inquiry on the SESRO must be back to the First and Second CMS Letters, as well as similar calls from MPs. There was also specific reference back to the 2010 inquiry but, as was the case, noting that the position was very different then, since neither EA nor Ofwat supported the WRMPs proposed then and did not consider that the SESRO was justified. Now, they did.

The Decisions of the SoS

87. On 29 July, the SoS informed his department that he agreed with the recommendations contained in the Submission. Some further information was requested which was provided on 8 August 2024.

88. Accordingly by separate letters dated on 21 August 2024 from Mr Woolhead, the SoS wrote to Thames Water and Affinity, stating that he was satisfied that they should now publish their WRMPs ("the Thames Water Decision Letter" and the "Affinity Decision Letter" respectively).

89. In the Thames Water Decision Letter, the SoS noted that he had considered the original draft WRMP, the representations made in respect of that draft plan and its SOR and revised draft WRMP, the EA's technical advice report and the further information in support of the Statement of Response (submitted 29 April 2024). The SoS also required that the final published plan address the points set out in Annex A to the letter which contains the outstanding points from the EA Second Advice, referred to in paragraph 75 above.

90. The SoS also noted that:

> "As part of giving careful consideration as to whether to approve the publication of your WRMP, the Secretary of State has concluded that the strategic need for the following projects has been demonstrated:
>
> 1. The South-East Strategic Reservoir Option, being a new 150 million cubic metres (Mm3) reservoir in Oxfordshire;
>
> 2. The Teddington Direct River Abstraction, being a new abstraction on the River Thames upstream of Teddington Weir, supported by recycled water, to provide up to 75 million litres per day in drought conditions; and
>
> 3. Any water resources solution that, through the adaptive pathways set out in section 11 (The Overall Best Value Plan) of the WRMP, is identified as forming part of the best value plan."

91. The Affinity Decision Letter stated that the SoS had considered the relevant documents and required the final published plan to incorporate the further information required by Annexes A (which referred to significant issues which Affinity had agreed to address in the final WRMP) and B to that letter. These were different from Annex A to the letter to Thames Water, and focussed instead on points which had been raised by EA and Ofwat previously. These were not related to the SESRO, but rather to the GUC scheme and other matters.

Publication of the WRMPs

92. According to paragraph 45 of Thames Water's Skeleton Argument (which I did not understand to be in dispute), Thames Water updated its SOR to incorporate the additional work required and made consequential changes to the rdWRMP24. Between 11-16 October 2024, TW obtained confirmation

from the EA, Ofwat and Natural England that the additional work had been completed to the necessary standard. It then published its WRMP on 18 October 2024.

93. As for Affinity, and according to paragraphs 35-36 of SP1, Affinity, for its part completed the work required by the modifications set out in the SoS's Decision Letter, and also published its WRMP on 18 October 2024.

Further Procedures

94. As a result of one particular argument raised by SW, namely the Compulsory Acquisition Point, it is necessary for me to explain the process which will follow the publication of Thames Water's WRMP, if it is not quashed.

95. Section 31 of the Planning Act 2008 ("the 2008 Act") states that a Development Consent Order ("DCO") is required to the extent that a development is or forms part of a "nationally significant infrastructure project" ("NSIP"). Where a DCO is required, there is no separate need for planning permission or various other forms of consent. They are all dealt with "under one roof", as it were, within the DCO process. This is a national, rather than local process, in that it is for the Secretary of State either to grant or refuse the application for a DCO. There are detailed descriptions and thresholds for when a development is or forms part of an NSIP, in Part 3 of the 2008 Act.

96. In addition, however, pursuant to section 35 of the 2008 Act, the Secretary of State can direct that a particular development be treated as a development for which a DCO is required ("s35 Direction").

97. On 19 May 2025, Thames Water requested that the SoS make a s35 Direction in respect of the SESRO. By a letter dated 11 June 2025 from Mr Woolhead on behalf of the SoS, the latter acceded to this request and issued the s35 Direction attached to that letter. In the s35 Direction, the SoS noted that the SESRO did not as such qualify as an NSIP. Had it done so, there would have been no need for the s35 Direction. In setting out the reasons for giving the s35 Direction (and Annex A thereto) the SoS noted that:

> "1…the Project would
>
> •be for a complex and substantial scheme, involving extensive infrastructure works and requiring multiple powers and consents (including multiple planning permissions, compulsory acquisition powers and highway orders), and is therefore seen as a nationally significant development in its own right; and
>
> • benefit from an application being determined in a timely and consistent manner by the Secretary of State, and by removing the need for, and planning uncertainty of applying for, a large number of separate powers and consents.

2. Furthermore the Principal Development would

• play an important role in contributing to a secure water supply for people in the South East of England, mitigate local flooding, and add flexibility and greater resilience capability across the water resources network.

• be recognised as a needed and important piece of infrastructure in the WRSE regional plan and TWUL's published WRMP24. Additionally, the Project is identified as a key piece of infrastructure in Affinity Water's published WRMP24 and Southern Water's draft WRMP24."

98. There is only one aspect of the DCO application process which is relevant here. This concerns the position where the application for the DCO includes a request for consent to authorise compulsory acquisition of land or of an interest in or right over land (a "Compulsory Acquisition"). Section 92 of the 2008 Act deals with Compulsory Acquisition hearings which must be ordered by the "Examining authority" which is the body that oversees the DCO application, if at least one person affected by the request requests there to be such a hearing. At such a hearing, the applicant and each affected person will have the right to make oral representations subject to the Examining authority's powers of control over the conduct of the hearing.

99. Section 122 (1) of the 2008 Act stipulates that the DCO may include provision authorising a Compulsory Acquisition only if the SoS is satisfied that the conditions set out in sub-paragraphs (2) and (3) are met. The condition in sub-paragraph (3) is that "there is a compelling case in the public interest for the land to be acquired compulsorily".

100. There are further provisions and materials relevant to the Compulsory Acquisition Point but they are best introduced in context, below.

THE EVIDENCE OF DR STORK

101. Part of Dr Stork's WS concerns the history of the relevant WRMP process. This has been dealt with in sufficient detail, above.

102. At paragraph 32-36, he says that new material issues have arisen. In fact, the only particular one to which he points was a change is the increase in reservoir size in Thames Water's WRMP from 100Mm3 to 150Mm3. However, as noted above, GARD actually addressed the question of the size of the reservoir in its original representations from March 2023. Moreover, it was an increase in size which the EA positively asked Thames Water to consider.

103. The other matters referred to by Dr Stork do not arise as the result of any change to Thames Water's WRMP. They were all there at the outset.

104. At paragraphs 43-100, Dr Stork refers to "significant unresolved issues". These are then set out in detail and effectively track the lists of unresolved issues referred to in the First and Second CMS Letters. However, in essence, all of these were points which GARD originally made.

105. As it seems to me, GARD's real point is that, to the extent that such issues were taken up by the EA, it does not accept that they have been resolved. Alternatively, to the extent that such issues were not taken up by the EA, it disagrees with the EA's stance. The most important example of the latter consists of the various elements of GARD's case on the need for the SESRO as a matter of principle (save in respect of the question of leakage).

106. In truth, as I see it and as Thames Water put it in submissions, there were no unresolved issues as such by the end of the process; rather there were the unresolved objections from GARD (and other third parties) which were not acceded to.

107. Further, to the extent that SW now says, through Dr Stork, that it wishes to put in WSs or expert reports not adduced as part of its March 2023 representations it could have done so then, had it wished.

GROUND 1 - ANALYSIS

Introduction

108. It is important to note what this claim is (and is not) about. It is concerned solely with the non-exercise of the SoS's discretion conferred upon him by Regulation 5 to order a public inquiry. It is not said that there should have been a re-consultation of GARD at any point in the process. Nor is there any public law challenge to the exercise of the EA's power (and duty) to advise the SoS, or the actions of the SoS in seeking the advice of the EA following the original SORs submitted by Thames Water and Affinity on 31 August 2023, and again, following the revised SOR from Thames Water on 29 April 2024 (and in any event see *AG v Great Eastern Railway* (1880) HL 474 at 478 on acts taken which are incidental to the power being exercised not being *ultra vires*). Nor, finally, is there any actual challenge to the DEFRA RFI.

109. I should also note that, while originally intimated, there is no claim based upon legitimate expectation on the part of SW in relation to there being a public inquiry or any other action on the part of the SoS, save in relation to one aspect of the Ground 2 claim, addressed below.

110. As to the non-exercise of the discretion to order a public inquiry, it is common ground that the question here is whether this was procedurally unfair which is a matter for the Court to determine. This is why the relief sought here is, among other things, an order for such a public inquiry.

The Law

111. It is not in dispute that the decision-making by the SoS here is subject to the public law concept of fairness. Rather the issue is what, if anything, fairness requires in this case. As the authorities referred to in the paragraphs below make clear, that question is highly fact and context specific.

General Principles and Oral Hearings

112. The starting point in my judgment is the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531. In this case, a mandatory life-sentence prisoner challenged the procedure by which the Home Secretary determined his "tariff" (the minimum period he must serve before being considered for parole). The Home Secretary would receive recommendations from the trial judge and the Lord Chief Justice, but would make the final decision in private, without disclosing the judicial advice to the prisoner or allowing him to make representations on it.

113. The House of Lords unanimously held this process to be procedurally unfair. Lord Mustill explained that while the standards of fairness are not rigid, certain minimum requirements exist. He reasoned that for prisoners to have any chance of a fair outcome, they must be able to participate in the decision. This was impossible if they did not know what factors were being weighed against them.

114. He said this at paragraph 560D-E:

> "…What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that:-
>
> 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
> 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
> 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
> 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
> 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer…"

115. This makes clear the context-specific nature of the fairness requirement.

116. Lord Mustill's observations at page 560H-561A are also important. Here, he stated that:

> "…the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

117. In *Howard League for Penal Reform v Lord Chancellor* [2017] 4 WLR 92, Beatson LJ, in giving the judgment of the Court of Appeal, noted at paragraph 35 "the commonplace and long-standing orthodoxy that what is required is acutely sensitive to context." He then said this at paragraph 39:

> "***(d) What is required in a given context***
> 39 Although the courts cannot and have not purported to lay down rules of general application, there is a broad consensus in the decisions of appellate courts as to the factors that affect what is required in a given context. That consensus runs from Lord Upjohn's important statement in Durayappah v Fernando [1967] 2 AC 337, 349 to the refinements in more recent cases such as Lloyd v McMahon [1987] AC 625, 702, and Doody's and Osborn's cases. The factors include the nature of the function under consideration, the statutory or other framework in which the decision-maker operates, the circumstances in which he or she is entitled to act and the range of decisions open to him or her, the interest of the person affected, the effect of the decision on that person's rights or interests, that is, the seriousness of the consequences for that person. The nature of the function may involve fact-finding, assessments of matters such as character and present mental state, predictions as to future mental state and risk, or policy-making. The decision-maker may have a broad discretion as to what to do, or may be required to take into account certain matters, or to give them particular or even dispositive weight. The decision may affect the individual's rights and interests, and its effect can vary from a minor inconvenience to a significant detriment."

118. The importance of context was similarly noted by Lewis LJ in *Dawes v Transport Secretary* [2024] PTSR 2033, at paragraph 42 of his judgment:

> "42 The requirements of procedural fairness depend upon a number of factors including the facts, the nature of the decision-making process and the statutory framework:.. In another context, the Court of Appeal has observed that a process of consultation may require that those who have a potential interest in the subject matter are told enough about the proposal to enable them to make an intelligent response but "consultation is not litigation" and the consulting authority is not obliged to reveal every submission it receives: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 at para 112."

119. I next refer to *R (Osborn) v Parole Board* [2014] AC 1115. This case concerned three prisoners, one recalled to prison and two serving life sentences who were refused transfer to open conditions. All decisions were made by the Parole Board on the papers, without an oral hearing. The Supreme Court held that fairness required an oral hearing in these cases.

120. As explained by Lord Reed, at paragraphs 67, 68 and 71 of his judgment, procedural fairness serves a number of purposes. One is that procedurally fair decision-making is liable to result in better decisions by ensuring that the decision-maker receives all relevant information and that it is properly tested. A second is that justice requires a procedure which pays due respect to persons whose rights are significantly affected by the decisions taken in the exercise of administrative or judicial functions so that they can participate in the procedure by which the decision is made provided they have something to say which is relevant to the decision to be taken. Finally, procedural fairness has a value to the rule of law because it promotes congruence between the actions of the decision-makers and the law.

121. Then, in the context of when fairness would require an oral hearing in relation to decisions taken by the parole board in relation to prisoners, he said this:

> "80 What fairness requires of the board depends on the circumstances. As these can vary greatly from one case to another, it is impossible to lay down rules of universal application. The court can however give some general guidance.
>
> 81 Generally, the board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and, as was said in West [2005] 1 WLR 350, the importance of what is at stake. The board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide. It is presumably because of the possibility of such assistance that the board must hold an oral hearing under rule 11(2)(a) in any case where an indeterminate sentence prisoner appears to the single member panel to be potentially suitable for release or for a transfer to open conditions. The assumption must be that an oral hearing has the potential to make a difference. But that potential may also exist in other cases. The board's annual report for 2005-2006 contains a statement by a psychiatrist member of the board which demonstrates how valuable oral hearings can be:
>
> > "I find the oral hearings particularly rewarding in that the evidence on the day can sometimes illuminate a situation sufficiently to turn around my preliminary view of the case. There is no substitute for being able to hear from, and ask questions of the prisoner."
>
> 82 The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to respect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute. An oral hearing should therefore be allowed where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him…
>
> 96 Thirdly, since the effect of the refusal of an oral hearing is that the provisional decision becomes final, it follows that an oral hearing should be granted in any case where it would be unfair to the prisoner for that to happen. For example, if the representations made in support of the prisoner's request for an oral hearing raise issues which place in question anything in the provisional decision which may in practice have a significant impact on the prisoner's future management in prison or on his future reviews, such as reports of poor behaviour or recommendations that particular courses should be undertaken to reduce risk, it will usually follow that an oral hearing should be allowed for that reason alone, even if there is no doubt that the prisoner should remain in custody or in closed conditions:…"

122. I have quoted these passages in full because SW contend that they have a particular resonance for the claim that there should be a public inquiry in this case.

123. Of course, not every decision pertaining to the potential release or transfer of a prisoner will require an oral hearing. Thus, where the issue was whether there should be an oral hearing in relation to the potential discretionary release of a prisoner who had been recalled for breach of his tagging order, the Court of Appeal in *Foster v Secretary of State for Justice* [2015] EWCA Civ 281, held that it was not necessary. In his judgment with which Jackson LJ and Black LJ agreed, Sir Brian Leveson noted that context was critical and stated at paragraph 35 that:

> "…The question, however, is not whether principles of procedural fairness are in play, but rather their application not just generally (it being the effect of the concessions made by both sides that there is no bright line that an oral hearing is always or never required), but specifically having regard to the circumstances of the case."

124. Although this was a case where there was a question as to whether the prisoner's account of what had happened with the tagging officer was correct, Sir Brian Leveson said at paragraph 38 that it was not in truth a case which required the flexibility of oral presentation or oral evidence to determine the truth of the appellant's account or to investigate potential mitigation.

Giving reasons and the planning context

125. In *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108, the Supreme Court had to decide if there was an obligation on the local planning authority's planning committee to give reasons when it granted planning permission for a large, controversial housing development against the planning officer's recommendation.

126. In fact, the Court held that a duty to give reasons was imposed by the Environmental Impact Assessment Regulations, but it went on to consider whether there was a duty at common law to give reasons for the grant of planning permission, as this had been fully argued. At paragraph 55, Lord Carnwath stated:

> "55 *Doody* concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the legality of which may be of legitimate interest to a much wider range of parties, private and public: see *Walton v Scottish Ministers* [2013] PTSR 51, paras 152—153per Lord Hope of Craighead DPSC. Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done" (see para 25 above). That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts:…"

127. *CPRE* is relied upon by SW to support the notion that there is a straight "read across" of the requirements of fairness from cases involving decisions about particular individuals to policy-driven

decisions like those of local planning authorities whose impact, while real, may be more diffuse. This was to counter the submission made by the SoS, that there is a more demanding standard of fairness in the former case than in the latter.

128. In truth, as it seems to me, all Lord Carnwath was doing here was to say that fairness principles apply in the planning sphere, and in particular the duty to give reasons. This was in the context of some earlier cases which suggested that there was no such duty. On the other hand, I do not think it useful or appropriate to attempt to create a rigid set of distinctions between one type of fairness case and another as the SoS suggested. Of course, as the cases referred to above demonstrate, the nature of the person or persons affected by the decision in question along with the particular consequences for them is one of the factors that goes into the fairness calculation, as it were. Beyond that, it is not helpful to go, since what fairness demands is so fact and context sensitive.

Reconsultation Cases

129. Although SW is not claiming that the SoS here should have undertaken a further round of consultations at some point after Thames Water's and Affinity's SORs, cases where a reconsultation was claimed, are said by the SoS to have some relevance.

130. In *Keep Wythenshawe Special Ltd v NHS Central Manchester CCG* [2016] EWHC 17 (Admin), the Claimant argued that the process by which particular hospitals had been selected or not selected to be designated as specialist hospitals, was procedurally flawed, including the public consultation which had taken place. One of the arguments was that there should have been a further consultation. This required Dove J (as he then was) to consider when fairness would require a decision-maker to re-consult. He held as follows:

> "[75] The requirements of fairness in considering whether or not to re-consult must start from an understanding of any differences between the proposal and material consulted upon and the decision that the public body in fact intends to proceed to make. This is because there will have already been consultation. The issue is, then, whether it is fair to proceed to make the decision without consultation on the differences, which will therefore be heavily influenced in this particular context by the nature and extent of the differences. Whilst it is not possible to produce any exhaustive list of the kind of matters that would need to be considered (alongside all the other legal principles set out above) to determine whether re-consultation is required, some illustrations may assist. Examples would include where it has been determined that it is necessary to re-open key decisions in a staged decision-making process which had already been settled prior to consultation occurring; or where the key criteria set out for determining the decision and against which the consultation occurred have been changed; or where a central or vital evidential premise of the proposed decision on which the consultation was based has been completely falsified. These examples serve to illustrate the very high order of the significance of any difference which would warrant re-consultation.
>
> [76] It is also important to point out that the question of a change's significance is not to be determined with the benefit of hindsight: it is significance at the point in time when the question of re-consultation is to be determined that counts. Finally, the fact that a change arises so as to reflect

> views produced by the consultation process does not itself require re-consultation. Once again, it is the extent of the change or difference which is the starting point. If the change arose from the original consultation that is simply evidence of the fourth Sedley criterion in operation and not in and of itself a reason for re-consultation. It is the extent of the change which requires examination.
>
> [77] Having observed all of the above in relation to the legal principles governing consultation it is important to recognise, as the courts have on several occasions, that a decision-maker will have a broad discretion as to how a consultation exercise may be structured and carried out. As Sullivan J (as he then was) observed in R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin), [2007] All ER (D) 192 (Feb) (paras [62] and [63]):
>
> > 'A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out … In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went "clearly and radically" wrong.' Subsequently, in the case of R (on the application of Baird) v Environment Agency [2011] EWHC 939 (Admin), [2011] All ER (D) 225 (Mar) Sullivan LJ confirmed that the 'test is whether the process was so unfair as to be unlawful'."

131. Of course, one has to recognise that the question of whether or not there should be a reconsultation is not the same as an issue over whether there should have been a discretionary decision to order a public inquiry. This is not least because in the former case it is necessary, effectively, to show that the first (and usually only) consultation is itself flawed or is rendered ineffective because of what has happened subsequently. However, I think that there is some relevance in what Dove J said in paragraph 76, in that if the change which is relied upon to entail a reconsultation is simply that which emerged from the original consultation then that is actually showing that the consultation process worked. It does not justify a further consultation.

132. *R (Save Stonehenge World Heritage Site Ltd) v SoS for Transport* [2024] EWHC 339 (Admin) was concerned with a redetermination of the application for a DCO in respect of the proposed road tunnel under Stonehenge. The original DCO granted by the SoS for Transport had been quashed and there was now to be a redetermination. That redetermination was carried out on the basis of further written consultations, including representations from the Claimant, which said that the examination conducted by a panel of inspectors which was carried out originally should be re-opened in the light of new information which had been submitted. It was a discretionary matter for the SoS for Transport whether to re-open the examination and if so, whether there should be an oral hearing which is what the Claimant said should have been done. It said there should have been an inquisitorial process in which the relevant material was tested as opposed to there being an entirely paper exercise.

133. Holgate J (as he then was) dismissed the unfairness claim here as unarguable. In this case, there had already been the original examination which had produced a detailed report with the assessment of the information provided and conclusions. The question now was only whether the more limited range of issues which arose in the redetermination entailed the need for the examination to be reopened. At paragraph 117 of his judgment, Holgate J noted that the court had not been shown anything to suggest that the officials handling the redetermination were any less qualified than the inspectors to interrogate the issues and the information provided.

134. At paragraph 119, he noted that a key issue was whether the reopening of the examination could have made a material difference procedurally, for example if one or more issue-specific hearings had taken place with oral questioning. A hearing could only take place if it was considered necessary to ensure adequate examination of an issue or that an interested party had a fair opportunity to put their case.

135. Notwithstanding the number of issues which the Claimant said needed to be addressed by way of a re-opened examination Holgate J said that none of them led to the conclusion that as a matter of fairness they had to be dealt with in this way as opposed to being dealt with by written representations to the Department of Transport and questions from officials.

136. Effectively, given what Holgate J had said at paragraph 119 he must have concluded that there was no material prejudice to the Claimant by not having a re-opened examination because the SoS for Transports officials were able to and did assess the new information and issues adequately.

137. The Court of Appeal ([2025]PTSR 726) upheld Holgate J's decision. As it said in paragraph 69:

> "The critical question is whether, given the facts, the nature of the issues raised and the statutory requirements of the decision-making process, further procedural steps need to be taken to ensure procedural fairness in the particular case. It is important to consider the issues said to require the appointment of an independent expert to test or "interrogate" those issues and to report to the Secretary of State. As Holgate J. said (at [119]), "[an] important consideration is whether the claimants can show that there was a significant issue in the redetermination which ought, as a matter of fairness, to have been the subject a hearing under section 91" or, we would add, which necessitated the appointment of an independent expert to conduct an inquisitorial process to assess the issue."

138. It is also worth noting what the Court said at paragraph 70:

> "70. As for the question of "alternatives", the interested parties, including Save Stonehenge, were well able to make written representations to the minister. And the minister, and his department, were well able to, and did, consider those representations and seek further information where necessary. That is what the judge found (at [117]), and we agree. Although the examining authority had not itself considered alternatives when it prepared its report, this does not mean that the minister is required to create an equivalent inquisitorial process when he comes to determine, or redetermine,

> an application. Procedural fairness does not require that, either generally or on the facts of this particular case."

139. This is of some relevance because it shows that even where the matter had not been considered originally in an examination it did not follow that the examination should be re-opened to deal with it, as opposed to having written representations.

The Public Inquiry Cases

140. The first three of the four cases referred to below did not involve challenges on the basis of procedural unfairness in the sense of Ground 1. Rather they all involved claims that a decision not to hold a public inquiry had been made irrationally. They are therefore strictly relevant to Ground 2, not Ground 1. However, it is convenient to note them here.

141. Only one case has been cited to me where the Court held that the Minister erred in not ordering a public inquiry. This was the decision of Webster J in *Binney v Secretary of State for the Environment* [1984] J.P.L. 871. In that case, paragraph 7 of Schedule 1 to the Highways Act 1980 imposed a statutory duty to hold an inquiry unless the Secretary of State was satisfied that it was unnecessary to do so. On any view, that provision is quite different from the open discretion conferred on the SoS here by Regulation 5.

142. In *Binney* itself, the Secretary of State was determining a road improvement scheme which would pass through an historic landscape and park and there were a number of objections. The Minister decided not to hold an inquiry but did invite further representations. Subsequently the road scheme was approved. It had received the support of a number of authorities and private bodies and individuals mainly on the grounds that the existing road was dangerous and needed to be improved. These were counterbalanced by the environmental objections. In the decision letter the Ministers gave, as the reason for not holding a public inquiry, the fact that they were sufficiently informed by the representations so as to obviate the need for it.

143. In his judgment quashing the Ministers' decision, Webster J noted first that there was a presumption in favour of holding a public inquiry. Second, he said that the test to be applied by the Minister was:

> "not one of expediency, nor was it one of general discretion. He had a discretion to dispense with the holding the public inquiry only if he was satisfied that it was unnecessary to hold one."

144. He went on to say that the objects of the relevant Act and the holding of public inquiries thereunder were first to ensure that the Minister was able to weigh any conflicting public interests. Second it was to ensure that those with the right to make representations had had those representations properly taken into account. It was not sufficient that the relevant information was before the

Minister and the issues raised were sufficiently clear. This was because this omitted the "much more difficult judgmental function of assessing the information and weighing conflicting views".

145. He then said as follows (quoting from the summary in the report):

> "A Minister, properly directing himself and acting reasonably could not be satisfied that a public inquiry was unnecessary unless it was satisfied of at least two things, namely that without a public inquiry he could properly weigh any two or more conflicting issues and secondly, that those with the right to make representations could have their representations taken into account".

146. On the facts of this case, Webster J decided as follows:

> "where issues which were raised by proposals and objections were confined to issues between one individual and another, where they only affected a few individuals without to any material extent any group of the public having any genuine public interest, it seemed very likely that the Minister concerned could be satisfied, properly directing himself that a public inquiry was not necessary. But in this case, there were two groups each with general public interests; the local residents interested in safety and protection from noise, and those members of the public interested in Highclere, both because of their interest in its historical features and because of their right to access to part of it. He did not see how any reasonable Minister could have been satisfied that he could weigh those conflicting interests without the benefit of a public inquiry at which the two groups in conflict would, in a sense, be confronted with each other and at which witnesses, including expert witnesses, would be heard and cross-examined so that an inspector who heard all the evidence and representations could marshal and weigh it all and report on it to the Minister. Nor did he see how in this case, where 70 objections had been received, 21 of which had asked for a public inquiry, and where petitions containing 210 signatures to the proposals had also been received, and where matters of expertise such as the effects of noise and the possibilities and effects of landscape were relevant, it would be possible reasonably to have decided that those with the right to make objections could have those objections properly taken into account without the holding of a public inquiry."

147. Accordingly, the Ministers had misdirected themselves here.

148. *Binney* was considered by Potts J in the later case of *Greenpeace v Lancashire County Council* [1994] 3 CMLR 737. One of the challenges raised here, in connection with planning applications made by BNFL relating to its Sellafield site, concerned the Minister's refusal to "call in" the applications or cause a local inquiry to be held. The Claimant argued that the decision not to hold an inquiry was flawed or irrational. As found by Potts J the provision that the Secretary of State "may cause a local inquiry to held" conferred a wide discretion to be exercised in accordance with ordinary principles of public law.

149. Potts J noted the decision in *Binney* and that the statutory provision there was different but considered that the observations made by Webster J as set out in paragraph 144 above were of general application. However, he concluded that the relevant part of the decision letter dealing with not holding a public inquiry:

> "…adequately and properly addressed all those matters relevant to his decision not to hold a local inquiry. He was satisfied that he was in a position to take account of the representations made

(paragraph 156) and to weigh the information received (paragraph 158). Thus the criteria identified by Webster J. in BINNEY were addressed, I accept that the argument that scientific and economic issues ought to be considered and tested in public is a strong one: but the Secretary of State applied himself to these matters and decided not to order an inquiry. In my judgment he was entitled to take this course given the consultations that had taken place and the information that was available to him. The ministers' assertion that that information and argument "provides an adequate basis for them to inform themselves of the weight and substance of the concerns of all interested parties, and to assess and weigh that information and argument" cannot be faulted."

150. Further, he said this at paragraph 103:

> "…But Parliament entrusted the ministers with responsibility for making the relevant decisions and gave the Secretary of State a discretion as to whether or not to direct a local inquiry. Provided the Secretary of State applied his mind genuinely and rationally to the issue of whether or not to hold a public inquiry. his decision cannot be impugned. In this case, there is no evidence that the Secretary of State failed so to apply his mind."

151. In *Decra Plastics Limited v London Borough Of Waltham Forest* [2002] EWHC 2718 (Admin), a challenge was made to a traffic disclosure order made by the local borough as the final part of a major road redevelopment programme. The effect of the order on the Claimant's business was that the majority of its employees would have their journey time to and from work increased by around 70 minutes a day which was unacceptable to them, and a number of them had resigned. The local authority had a discretion to cause an inquiry to be held before making the order, the relevant words being "may cause".

152. The Claimant argued that given the highly controversial nature of the proposal and the matters relied on, including bias and unfairness on the part of the local council, the matter cried out for independent and objective assessment, so that it would have the opportunity to put its case and to challenge and test the council's case and it had requested such an inquiry in clear terms. It alleged that the council had failed to consider whether in all the circumstances it would be appropriate to exercise its discretion, if it did consider that question the decision was perverse and it fails to give reasons for its decision.

153. Richards J (as he then was) held as follows:

> "50. I can deal more quickly with the argument on irrationality. I reject the submission that the decision not to hold a public inquiry was Wednesbury unreasonable. In the light of the very lengthy history, the exhaustive consultation exercise and the analysis that had been made of representations received, councillors were very well informed of the advantages and disadvantages of the proposed order as well as of the alternative options put forward by Decra. They were in a position to evaluate the competing arguments, as ultimately they would have had to do in any event since the eventual decision would be theirs whether or not there was a public inquiry. It was entirely reasonable in all the circumstances to decide not to hold a public inquiry.
>
> 51. The decision in Binney, upon which Mr Moys placed heavy reliance, does not lead me to any different conclusion. The statutory context in Binney was a duty to hold a public inquiry subject to a power to dispense with one if the minister was satisfied that in the circumstances of the case the holding of an inquiry was unnecessary (Highways Act 1980, schedule 1, para 7). The factual context

> was the proposed construction of a dual carriageway through an historic park, Highclere. Webster J held that ministers had misdirected themselves as to the factors which they should have taken into account in deciding whether they could be satisfied that a public inquiry was unnecessary and that no ministers properly directing themselves as to that question on the material before them could have been satisfied that no public inquiry was necessary. Mr Moys referred in particular to a passage at 873-4, where it was stated inter alia:….
>
> [see the passages cited at paragraphs 145146 above]
>
> 52. Strongly expressed though the judgment was, it was a judgment on a particular set of facts and in the context of what was in effect a statutory presumption in favour of an inquiry. The conclusion reached cannot be carried across automatically to the circumstances of the present case where there was no presumption in favour of an inquiry and, although the proposed traffic order had given rise to substantial controversy and there were at least two groups with conflicting interests (the residents of the Markhouse Avenue area and the businesses of Forest Business Park), the councillors could reasonably take the view that they were in a position to weigh the arguments and that objectors had been given ample opportunity to voice their objections and their objections could be taken properly taken into account without a public inquiry."

154. Finally, in *Persimmon v Secretary of State for Transport* [2005] P&CR 24, the claimant alleged that the Secretary of State should have implemented a procedure for a continual and pro-active review of the policy which had been enunciated in a White Paper produced in 2013. This had recommended that a space be set aside near Gatwick Airport in order to accommodate a possible second wide-spaced runway. Nothing had been done about that, but over the ensuing years the fact of this reservation was said to have effectively blighted the claimant's business. It was further alleged that such a review should be by way of a public inquiry as opposed to further written representations which the Secretary of State was prepared to accept. The reason for the public inquiry was said to be so that the evidence could be tested by cross-examination and/or by questioning from the person conducting the inquiry. This itself was necessary because there were conflicts of expert opinion between the experts appointed on either side. Sullivan J held that notwithstanding this difference of opinion, which was of considerable significance, fairness did not require the Secretary of State to arrange for some form of extra statutory hearing or inquiry. He accepted that in some circumstances fairness might require a hearing or inquiry and in that context referred to *Binney*. However, he said that the circumstances in that case were wholly different because there was a statutory framework where the holding of an inquiry was the norm. In the present case there was no statutory framework for reviewing the policy of the White Paper at all, but if there was such a review process it would be most unusual for it to include a hearing or inquiry.

155. Obviously the facts in *Persimmon* were different from the facts here, in the sense that there was no relevant statutory framework for even the possibility of a public inquiry, but once again, *Binney* was in any event distinguished because of the presumption in favour of a public inquiry there.

156. I shall deal with the facts here in relation to this group of cases, below, but as *Decra* and *Persimmon* make plain, and as is obvious in any event, the position is different where there is no statutory presumption in favour of a public inquiry.

The Statutory Context

157. By their very nature, WRMPs are likely to involve significant projects and planning issues since they are designed to explain how water companies discharge the fundamental duty imposed by s37 of the 1991 Act - see paragraphs 11 and 12 above. Indeed, at least some of them will entail the requirement of a DCO, either because they involve an NSIP or because of a s35 Direction. According to the note prepared on behalf of Southern Water (from publicly available information), there are 6 projects arising out of WRMPs published in 2024 by 7 different water companies in England where a s35 Direction has been given and a further project where such a direction is expected. Those projects are The Hampshire Water Transfer and Water Recycling Project, Teddington Direct River Abstraction Project, the SESRO, Lincolnshire Reservoir Project, Fens Reservoir Project, the GUC Transfer and the Thames to Southern Transfer Project. In all but one case, these projects involve more than one water company. This list does not include any other projects which are themselves NSIPs.

158. There are overall, 15 water and wastewater companies in England excluding small local water companies.

159. Of course, it cannot be said from this snapshot from 2024 that every WRMP is likely to involve the need for a DCO because of an NSIP or s35 Direction. However, it would be wrong to suggest that where a proposed WRMP did have that consequence it was somehow unusual. On the face of it, it was at least a real possibility. This is important in the light of SW's Compulsory Acquisition Point. I have taken into account SW's point that because of "double counting" the figure may be 11 out of 30 projects. Nonetheless, that is a significant number.

160. In addition, it is in the nature of such projects that they are likely to attract public interest (and opposition).

161. Notwithstanding this, the statutory scheme does not provide for a public inquiry in any event or even as a presumption (as in *Binney*). Rather, there is an open discretion conferred upon the SoS in a context where there is a mandatory process for the taking in consideration of written representations.

162. Further, the SoS and DEFRA are not acting alone, as it were. They have the benefit of an independent specialist technical adviser, namely the EA whose views take into account those of Ofwat and other bodies such as Natural England as well as the relevant representations.

163. The only other material making reference to a public inquiry is paragraph 3.8 of the EA's WRPG to water companies although again, it is not in mandatory terms. See paragraph 21 above.

164. Absent a public inquiry, the scheme presupposes that there will be one round of written representations which will thereafter be considered, both by the SoS and the EA. There is nothing within the statute that prevents the SoS from communicating with the EA as its adviser and the water company proposing the WRMP, in terms of asking for advice or seeking further information. As already noted, there is no public law challenge in this respect.

165. This point needs to be emphasised because SW at various points refers to "private communications" between the SoS and those of the parties as if they were in some way untoward or inappropriate. They were indeed private in the sense that were not published but there was no obligation to do so. There is therefore nothing in SW's point that the SoS's approach here was at odds with the statutory framework. Rather, it was in my view in keeping with it. Indeed, Mr Woolhead explains at paragraph 61 of MW1 that seeking further information in support of the draft WRMP is a common step in the process.

166. SW was in fact provided with the original SORs and rdWRMPs, along with EA's First Advice, albeit the latter was obtained pursuant to a freedom of information request. It is not clear to me whether Thames Water published its 29 April response to the SoS (see paragraph 72 above) on its website. For present purposes, this does not matter because it is not suggested that the parties were given the opportunity to comment on it – just as they were not in relation to Thames Water's original SOR which they did have.

167. Contrary to what is submitted at paragraph 42 of SW's Skeleton Argument, there was nothing "deficient" in the "private process" because it proceeded as contemplated by the statutory scheme. It is correct that the EA and Ofwat had the opportunity to test the dWRMPs after the consultation and representations stage, and they did so. It is correct that SW had no opportunity (without a public inquiry) to make further representations but that is how the scheme is structured. If SW was correct in its complaint here, it would mean that in every case, there should be a public inquiry, but that is plainly not the position. There is no relevant "inescapable sense of injustice" that makes the process

here unfair, as distinct from SW's undoubted wish to say more on the various issues on which it had already made extensive submissions.

168. It is also worth noting that the SoS of course has the power (and effectively exercised it here) to require changes in the draft WRMP. See section 37B(7) of the 1991 Act, referred to at paragraph 13(5) above. There is nothing to suggest that if this occurs, or if further information is sought to see if there should be such changes, a public inquiry must also be ordered to assess the position, as opposed to the EA and the SoS considering the position at that point.

Significant Public Interest

169. I have already noted that this is likely to occur in relation to a WRMP, or at least some of them. It is also correct that there is the reference in the WRPG to the possibility of a public inquiry, where there is significant public interest, but no more than that. The use of the word "may" here reflects the fact of the SoS's discretion, and it must be remembered that this is guidance to the water companies themselves as to what might happen. It is not guidance prepared for the SoS, nor does it fetter his broad discretion. In the event, of course, the Submission clearly addressed whether there were outstanding issues in paragraph 11. Moreover, as the Submission shows at paragraph 1 the issue of local interest was specifically considered, but balanced against the need to improve water resilience and an anticipated delay of one year if there was to be a public inquiry. See paragraph 84 above. Further, prior to that, the EA had considered such issues in its First and Second Advices.

170. Therefore, I do not consider that the significant public interest in the SESRO here indicates that there should have been public inquiry.

Delay

171. I deal with this point here because it was raised by SW under Ground 1, although it is relevant for Ground 2 as well.

172. SW made two points about how the perception of delay engendered by any public inquiry, on the part of the SoS, should somehow not count as a matter going to the exercise of his discretion. First, it was suggested that if one considered the new procedure for fast-tracked public inquiries into ordinary planning applications, this would suggest that the holding of a public inquiry here would take much less than one year – see paragraphs 59 and 60 of SW's Skeleton Argument. However, in my view, the SoS was entitled to have regard to his own experience thus far. The process for the public inquiry in 2010 had, after all, taken over a year in total - see paragraph 22 above, and in fact

some 18 months, on the basis that the relevant decision letter was not published until 1 March 2011 (see paragraph 24 above).

173. Further, this was all in circumstances where there had already been a delay as a result of the calling of the general election for July 2024.

174. Second, SW submits that the putative public inquiry here could and should have been called much earlier than 21 August 2024, being the date of the Thames Water and Affinity Decision Letters. This is because the SoS had delayed by 8 months from the point when SW made its first call for a public inquiry by the First CMS Letter. However, that assumes that the SoS should have called a public inquiry then, which is the issue in question. In addition, the SoS was hardly doing nothing over this period. This is when work was being carried out on the part of EA, the water companies and his own department in considering the merits of the rdWRMP.

175. For those reasons, I do not think there is anything in the delay points taken by SW.

Existence of Unresolved Issues

176. SW places much emphasis on the notion that there were "unresolved issues"; this of course is the expression found in paragraph 3.8 of the WRPG as indicating that there may be a public inquiry.

177. In fact, and as explained at paragraphs 73 - 76 and 102 - 106 above, there were no or no significant unresolved issues by the time EA had produced its Second Advice on 23 July 2024. What SW is really complaining about here is that its objections were unresolved because they were not accepted. This is in stark contrast to the position prior to the ordering of the public inquiry in 2010.

178. While there were some matters to be attended to by Thames Water and Affinity prior to publication of their WRMPs, these could hardly be described as unresolved issues of any significance, otherwise the EA would not have approved the WRMPs as it did. As contemplated, and as directed by the SoS, in the Thames Water and Affinity Decision Letters, all of the remaining matters were dealt with in short order prior to publication of the WRMPs on 18 October 2024 i.e. less than 2 months later.

179. In this context, it is worth bearing in mind that the only significant change which SW contended had occurred since publication of the original WRMP by Thames Water was the increased size of the reservoir. I have dealt with that particular point at paragraphs 45(6) and 102 above.

180. No other significant changes which affected what SW had said or would want to say were pointed out in SW's oral submissions to me. Indeed, and as Lord Banner KC put it, the issue was not the existence of fundamental changes. Rather it was that the "holes in [TW's] evidence were filled, but SW did not get the chance to interrogate it" or that "the plan was stitched up in private behind closed doors". However, if this is the true complaint, there is nothing in it. This is because the statutory scheme contemplated one set of representations at the outset and then consideration by the EA and the SoS and possible modifications, without another round of representations. There is nothing unfair in that. Nor does it follow that not calling a public inquiry was unfair. Indeed, in this case, to some extent, the particular matters which EA and the SoS wanted Thames Water to address arose because of the points originally made by SW - in which case, the scheme was working properly. See, albeit in the reconsultation context, *Keep Wythenshawe Special*, referred to in paragraphs 130-131 above. SW's point here is looking at the matter from the perspective of litigation, not consultation. See paragraph 42 of *Dawes* cited at paragraph 118 above.

181. Overall, the "unresolved issues" point is really no more than SW seeking a "second bite at the cherry", as it were. The essence of the points it makes as to what it would say or give evidence of at a public inquiry was what it had already made representations on, even if it would be supplemented by further evidence. The fact that it was not given another chance did not render the process unfair. Again, "consultation, not litigation" - see paragraph 42 of *Dawes* at cited paragraph 118 above.

Technical Nature of the Issues

182. A related point made by SW is that a public inquiry should have been ordered here because of the technical nature of the matters in issue. I agree that there were technical matters but that is where EA as the SoS's technical adviser came in. It addressed such matters and ultimately pronounced TW's WRMP as fit for publication. I do not accept that just because other parties (like SW) might have views which are not in agreement with EA's considered views after an extensive process, it follows that there must be a public inquiry. Otherwise, there would always need to be one where EA's views did not reflect those of even a very significant body of objectors.

183. In fact, many WRMPs will raise, by definition, technical matters concerned with water resources and their management, water deficiencies and proposals for further water supplies. That is the nature of the exercise. Again, if such features required public inquiries, they would have to be ordered in many or most cases.

184. So there is nothing in this point.

185. I return to the question of technical features in the specific context of the need for the SSRO, in paragraphs 192 - 196 below.

Other Points on the need for an oral hearing (via a public inquiry)

186. Although strongly relied upon by SW I do not consider that the decision of the Supreme Court in *Osborn* assists it. First, and most obviously, the context there was very different. It involved the question of transferring to open prison three particular prisoners where such a transfer would have a dramatic effect on their day-to-day lives and the extent of their personal liberty, and where two of them were life prisoners. Second, the issue of transfer raised particular questions of risk and how it could be managed if there was to be a transfer, where an oral hearing was said to be especially revealing. This was in a context where, if the prisoners had been serving indeterminate sentences they would have had a right to an oral hearing in any event. Finally, and as noted by Lord Reed at paragraphs 80 and 81 of his judgment, this case was all about fairness in the context of the powers of parole boards in respect of prisoners. See generally paragraphs 119 - 121 above.

187. Also, the case of *Foster* (see paragraph 123 above) shows that not every case involving prisoners will require an oral hearing.

188. Further, in my judgment, however desirable SW maintains that a public inquiry would be, this is not a case where the SoS would need an oral hearing to understand or appreciate the full implications of the arguments ranged against the SESRO. By the time it came for him to make a decision, this was all well-travelled territory and the SoS had the benefit of two SORs from Thames Water and the EA's First and Second Advices.

189. Next, SW invokes the position pertaining to the holding of public inquiries or hearings in respect of planning appeals and it refers at paragraph 51 of its Skeleton Argument to issued guidance in that respect. However, I fail to see why that should govern the position here, which involved a very different process including the presence of a specialist independent technical adviser like the EA, on which the SoS was entitled to rely (just as competent authorities are entitled to rely on the expert opinion of Natural England – see paragraph 85 of the judgment of Sales LJ (as he then was) in *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417. In addition, that guidance sets out criteria which the Secretary of State is required to publish as a matter of statutory obligation pursuant to section 319A(6) of the Town and Country Planning Act 1990 in the very different context of individual planning decisions, not strategic plans, and I also agree with the SoS that it does not represent the common law on fairness.

190. Further to the extent that SW relies on *Binney* under Ground 1, it does not assist. First, there was a statutory presumption of a public inquiry and second, because it very much turned on its own facts, as noted by *Decra* and *Persimmon*, referred to at paragraphs 153 and 154 above.

The Question of Need

191. SW makes two overarching points here, in my view. The first is that the question of need (for the SESRO) is fundamental and important and has technical features, such that it would be unfair not to order a public inquiry to debate the matter further ("the General Point"). The second is the Compulsory Acquisition Point. I deal with each in turn.

The General Point

192. GARD has for many years consistently argued that there is no need for the SESRO including in relation to earlier WRMPs. It continued to do so in its extensive written representations here made in respect of Thames Water's and Affinity's dWRMPs, on 20 March and 30 April, and 20 February 2023, respectively. See paragraphs 38 and 45 above, respectively.

193. Those representations on need were essentially rejected by the EA - see paragraphs 58, 59, 63 and 64 above. This is also made clear by analysis of the points made in the Second CMS Letter - see paragraphs 78 and 79.

194. Especially in the context where, on analysis, there were no "unresolved issues" of any significance, I do not accept that it is unfair that GARD was not given an opportunity effectively to make those representations again, albeit in the changed context of a public inquiry.

195. Nor do I consider that the technical nature of some of the matters raised by GARD required a public inquiry. Thames Water dealt with such points in its SOR and rdWRMP and then in its further response of 29 April 2024. The EA did not advise the SoS that there was any technical dispute remaining to be resolved. The SoS and his department were well able to understand all the points made both by GARD, as well as by Thames Water, Affinity and the EA.

196. Moreover, as already noted, consideration of a draft WRMP will frequently involve technical considerations - it is hard to conceive of one where such considerations did not arise at least to some extent. If that was then to give rise to a duty to hold a public inquiry, it would have to be ordered in most or at least a large proportion of cases. It is noteworthy that the re-examination sought in *Stonehenge* was not ordered even though there were new information and issues. Holgate J and the

Court of Appeal held that these were matters which were well able to be considered on the papers. See paragraphs 132 - 139 above.

The Compulsory Acquisition Point

197. Part of SW's overall case on the need for the SESRO is that if it does not have the opportunity to deal with this issue further at the putative public inquiry, it will not have the opportunity later on to deal with it, in the context of the DCO consideration.

198. The reason for that is because of the operation of section 104 of the 2008 Act which, so far as material, provides as follows:

> "(1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.
> (2) In deciding the application the Secretary of State must have regard to—
> (a) any national policy statement which has effect in relation to development of the description to which the application relates …(a "relevant national policy statement")…
> (3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies.
> (4) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations.
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of
> State] by or under any enactment.
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment…
> (7) This subsection applies if the Secretary of State] is satisfied that the adverse impact of the proposed development would outweigh its benefits.
> (8) This subsection applies if the Secretary of State is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met."

199. Following the prescription in s104(3), one then turns to the relevant national policy statement ("NPS") which is the National Policy Statement for Water Resources Infrastructure ("the WRI NPS"), published on 17 April 2023. At the relevant time, paragraph 1.4.5 thereof provided as follows:

> "If a nationally significant infrastructure project is included in a published final water resources management plan, the 'need' for that scheme will have been demonstrated in line with government policy. The applicable statutory requirements, and 'need' would not be expected to be revisited as part of the application for development consent. The Examining Authority and the Secretary of State would then start their assessment of applications for infrastructure covered by the National Policy Statement on that basis."

200. Therefore, it is argued by SW, in the context of any Compulsory Acquisition which is sought (and there may be a number of them), while there will be a hearing at which objections can be taken, it

will not be open to a homeowner or landowner who has to deal with an application for Compulsory Acquisition (if not agreed) to say that there is no need for the SESRO itself (which in turn requires the Compulsory Acquisitions). This is because the question of need has already been demonstrated and cannot be re-opened, as it were. This fact therefore heightens the need for there to have been a public inquiry.

201. The SoS makes a number of points against this argument, but one of them led to the post-hearing submissions. Here, the SoS reasons as follows: the concern expressed by SW is unwarranted and unrealistic because the requirement imposed by s104(3) to follow the WRI NPS is disapplied (by s104(6)) where that would result in unlawfulness. If objectors were prevented from arguing the question of need so that, for example, this rendered more likely the making of a Compulsory Acquisition, and if this constituted a disproportionate interference with the peaceful enjoyment of possessions by natural persons which is protected by A1P1 of the ECHR, that would then entail a breach of section 6(1) of the Human Rights Act 1998. But if so, s104(3) will be dis-applied because of this unlawfulness, and there would therefore be no presumption in favour of need. That would allow the question of need to be debated after all.

202. As against that, SW argues that this does not work. It begins by citing the full text of A1P1:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

203. SW points out, correctly, that the right conferred by A1P1 is not unqualified. In common with well-known jurisprudence, any interference will be justified if it was prescribed by law, was done to secure a legitimate aim under the relevant provision and was necessary in a democratic society, going no further than was strictly necessary to secure that need. Here, by virtue of s122(3), the SoS will have to show that there was a compelling need in the public interest for the relevant land to be acquired compulsorily. In doing that, the SoS will rely upon the fact that the need for the SESRO has been established by Thames Water's WRMP. If the compelling need is established, together with any other factors that need to be shown, this will itself demonstrate that the interference was lawful. Being lawful, there would be no contravention of the ECHR and therefore no unlawfulness for the purposes of s104(6). That being so there would be no basis for dis-applying the presumption of need set out in the WRI NPS.

204. The SoS then responds to say that matters would not be so straightforward and there could still be cases where there was an infringement of A1P1. It is not necessary to delve into the detail of this responsive argument, or indeed SW's reply submissions on the point. For present purposes, I cannot be satisfied that there is no risk that the argument about need will be foreclosed at the DCO stage, including in relation to any requests for Compulsory Acquisitions. Indeed, I think that there is a real risk that this is the position, and I certainly should not assume that SW will have a further opportunity to debate the question of need at the DCO stage.

205. The SoS adds in relation to this that there might be other exceptions to s104(3) which may apply, namely those set out at s104(4), (5), (7) and (8). It also says that it may not just be a question of interference with A1P1 rights, there could be breaches of Article 6 of the ECHR as well. However, all of this seemed speculative to me and does not assist the SoS on the Compulsory Acquisition Point.

206. As it seems to me, the real question is whether the Compulsory Acquisition Point, which I would accept to the extent stated above, makes any difference.

207. In my judgment, it does not. This is because the underlying framework presupposes that this consequence may well be the case for any WRMP proposal. See paragraphs 157 to 159 above. It therefore does not, or should not follow, that a public inquiry is warranted in every potential NSIP or section 35 case involving a WRMP proposal. Indeed, of course, this presumption of need only arises where there is an NSIP or section 35 equivalent. See paragraph 199 above. The Compulsory Acquisition Point assumes that because the question of need would otherwise come up in the context of a Compulsory Acquisition application (or a CPO application) there is something wrong or defective in a process whereby need is debated at a logically prior stage instead. I do not accept this.

The 1998 Aarhus Convention on Access to Information and Public Participation in Environmental Matters ("Aarhus Convention")

208. At paragraph 38 of SW's Skeleton Argument it submits that involving the public by means of holding a public inquiry is consistent with "the wider legal framework". For example, Article 6(2) and (3) of the Aarhus Convention requires the public to be both informed and given the opportunity to participate in environmental decision-making. As to that, first it is unincorporated but second, it adds nothing in any event. Members of the public were informed and did have a right to participate (through making representations) in this particular process. The issue is a far more granular one, namely what particular element of this process was required as a matter of fairness.

Prejudice to SW

209. If all the above points are correct, then there was no material prejudice suffered by SW here. All it can say is that from its perspective, it has suffered prejudice because it would liked to have the opportunity to put its points again in a public inquiry. However, that is simply a circular argument. The real point is that it had the opportunity to make very full representations on a subject that had already been rehearsed previously which were carefully considered and in some respects caused there to be further work done by Thames Water before the EA and the SoS could be satisfied.

Ground 1 overall and conclusion

210. I have dealt with the points raised by SW as separate items, as it were. However, I also take the view that even if they are viewed cumulatively, they do not advance SW's case on unfairness, which remains wanting.

211. In addition, if one approaches the matter by reference to the individual factors going to unfairness (see *Howard League* at paragraph 113 above) they do not combine to say that this is a case where fairness should intervene to say there should have been a public inquiry.

212. Accordingly Ground 1 must be dismissed.

GROUND 2 - ANALYSIS

213. Ground 2 proceeds on the basis that Ground 1 has failed. It alleges 5 different respects in which it is said that in deciding not to exercise his discretion to order a public inquiry, the SoS failed to have regard to mandatory or obviously material considerations so that he acted irrationally or otherwise unlawfully.

The Law

214. A useful reference to the general principles applicable in this sort of irrationality challenge can be found in the decision of Holgate J (as the then was) in *R (WildFish) v Secretary of State for Environment, Food and Rural Affairs* [2024] Env LR 15. In it, he stated as follows, among other things:

> "146 …it is also common ground that the court should start from the position that the Secretary of State, (and indeed Ofwat and the EA), are familiar with the statutory framework and relevant provisions. They are to be taken as having understood them correctly unless there is a sufficient, positive contra-indication within the Plan itself or other relevant documents…
> Furthermore, the internal records of the decision-making process and the formal decision documents should be read fairly and with an appropriate degree of benevolence when seeking to understand how a decision was reached, or policies formulated. The documents

> must be read as a whole and in the context of the material and the issues with which the defendant and officials may be presumed to be familiar. They must not be read in an overly forensic or legalistic way…
>
> 148 … it is said that the Secretary of State failed to take into account various relevant considerations which were "obviously material"… It is insufficient for a claimant simply to say that the decision-maker failed to take into account a material consideration. Such a consideration is only something which is not irrelevant and which a decision-maker is empowered to take into account. A decision-maker does not fail to take into account a material consideration into account unless he was under an obligation to do so.
>
> 149 Accordingly, a claimant must show that the decision-maker was expressly or impliedly required by the legislation to take the particular consideration into account, or that, in the circumstances of the case, the matter was so obviously material that it was irrational for the decision-maker not to have taken it into account. A factor is obviously material if a failure to give direct consideration to it would not accord with the intention of the legislation. The test is not to be applied at large but in the context of the nature, scope and purpose of the legislation in question.."

215. The exercise conducted by the Secretary of State in that case, albeit under the 1991 Act, in formulating a particular plan which would then be laid before Parliament, was different from the non-exercise of his direction to order a public inquiry here. However, the principles set out above appear to be equally applicable here and indeed SW's submissions appeared to me to be consistent with them.

216. I now turn to consider each of the 5 points made by SW.

Point 1 - Binney

217. Here, SW says that the SoS should have considered, as Webster J said that the Secretary of State in *Binney* should have done, whether the object of a public hearing or inquiry could be achieved without holding a hearing or inquiry or whether the competing matters of public interest could be weighed and interrogated with a public hearing or inquiry. It is said that these were obviously material considerations and it was an error of law to leave them out. However, *Binney* was a very different case both because of the statutory presumption of a public inquiry (to be refused only if unnecessary) and the statutory context. See paragraphs 141-155 and 161 above, where the post-*Binney* cases are also considered, none of which found that there was any error in not ordering a public inquiry. I do not agree, therefore, that there was an obligation on the SoS here to direct his consideration of his discretion specifically to the matters relied upon by SW.

218. In any event, the SoS clearly did have in mind the advice of the EA in stating that there were effectively no unresolved issues, in which case there were no further competing matters which

required to be tested at a public inquiry, notwithstanding the continued public interest which he also noted.

Point 2 – testing of evidence and its complexity

219. Here it is said that the SoS failed to have regard to the need for the evidence to be tested because of contested expert judgments and the complexities of the issues. Again, reliance is placed on the holding of public inquiries in planning appeals.

220. I do not accept this point. Technical evidence can be tested without cross-examination, and here, as with Ground 1, I do not accept that one can simply "read across" the position in relation to statutory enquiries on planning appeals. I have covered these matters at paragraphs 182-183, 188, 189, and 192-196 above.

221. Yet again, this is in a context where the EA as the SoS's expert technical adviser had reached the position whereby it saw no significant unresolved issues remaining having considered, among other things, the EA's own representations. The SoS was entitled to reply on that view.

Point 3 - unresolved issues

222. By way of preliminary, I deal with the point made at paragraph 68 of SW's Skeleton Argument that in fact there <u>were</u> unresolved issues between the EA and the water company, and that this was the same position that pertained in 2009/2010. However, that is not correct. While there were the 14 issues requiring attention by reason of the EA's First Advice, they had been dealt with by the time of its Second Advice. Moreover, even with the First Advice there was not the fundamental question as to whether need had been shown on the basis of long-term risk which is ultimately what drove the calling of and the conclusion of the 2010 public inquiry. See paragraphs 177 and 193 above which cross refers to the earlier passages dealing with what can be drawn from the EA's First Advice in relation to Thames Water and also the position it took initially with Affinity. There is no basis, in my judgment, for taking a snapshot of the position halfway through and before the process of the EA advising and Thames Water providing further information had come to an end.

223. Quite apart from that, SW's overarching point is that it had a legitimate expectation that the SoS would expressly consider whether there were unresolved issues because of the wording of paragraph 3.8 of the WRPG. However, to reiterate, paragraph 3.8 was not mandating a public inquiry had there been unresolved issues, and moreover, the WRPG was not published by the SoS. In oral submissions, it was made clear on behalf of SW that the legitimate expectation was not that a public inquiry would be held but that the SoS should consider the question of unresolved issues.

224. I would not agree that the factor of unresolved issues was a mandatory consideration, but in any event that point is academic. This is because the SoS, on a fair reading of his decision and the Submission obviously took into account the EA Second Advice whose whole tenor was that there were no longer any or any real unresolved issues. The Submission itself draws the distinction with the 2010 inquiry and stated expressly that the EA and Ofwat were content that the WRMP be published subject only to some minor changes. It is absurd to suggest that the SoS did not take this fact into account by considering that there were no unresolved issues.

Point 4 – focus on position of the EA

225. SW contends here that it was irrational for the SoS to focus exclusively on the position of the EA as opposed to the nature and extent of the unresolved issues. In this context the decision is or should be based on more than a simple headcount of who supports what.

226. This, again, is a point about the reliance on the EA. However, as enumerated in various places above, the SoS was well entitled to take into account the advice of its independent technical adviser in circumstances where he expressly stated that he had also taken into account the various representations made and the SORs of the water companies, and the question of public interest was expressly referred to in the Submission. So this was not a simple matter of "headcount" in any event.

227. Yet further, and as already stated, the SoS was entitled to take into account the fact that the EA did not consider that they were now any further real unresolved issues, in comparison to the position in 2010 where a public inquiry was ordered.

Point 5 - paragraph 12 of the Submission

228. To recapitulate, paragraph 12 stated as follows:

> "12. There is local interest, but we feel this should be balanced with the urgent need to improve the resilience of water supplies in the South East and the water environment. An inquiry will probably delay development by approximately a year."

229. SW claims here this reasoning was infected by various public law errors.

230. First it is said that the reliance on urgent need was circular because this is exactly what the public inquiry would have considered. There is nothing in this point, because the SoS was entitled by this stage to take into account the urgent need to improve resilience of water supplies in the South East (with which GARD did not disagree as a matter of principle) and the further fact that there were no unresolved issues over the now preferred option of the SESRO in achieving this aim. Rather, what

the SoS did was to consider the fact of local interest as a possible driver for a public inquiry but balanced against this, the urgent need. There was nothing irrational about that.

231. It is then said that there was no rational basis for saying that holding a public inquiry would probably delay development by approximately a year. I have already explained in the context of Ground 1 at paragraphs 171-175 above why there is nothing in the point about delay. Those observations apply equally here.

232. I note that Thames Water at paragraph 91(b) of its Skeleton Argument states that even with called-in planning appeals, the public inquiry can take 18 months. SW objects that there is no evidence to that effect. I see that, but it does not matter because the SoS was entitled to concentrate on the context with which he was dealing and his department's prior experience - see paragraph 172 above.

233. The next point is that there would not have been that delay if the SoS had agreed to a public inquiry eight months earlier. However, that assumes that this was the appropriate point from which to assess delay, with which I disagree, given the ongoing process and all the other work being undertaken during this period - see paragraph 174 above.

234. SW's final point here is that the SoS did not take into account whether the delay caused by a public inquiry would be greater or lesser than the already-threatened judicial review of the decision not to hold a public inquiry. I do not follow this. The SoS at this point was simply looking at how long the public inquiry would take and not considering any judicial review proceedings, which in my judgment would have been speculative.

Ground 2 as a whole

235. For all the reasons stated above, and whether the individual points made under Ground 2, are considered separately or cumulatively, there is plainly no basis for saying that the SoS's decision not to order a public inquiry, in his discretion, was irrational or otherwise unlawful in a public law sense.

OVERALL CONCLUSION

236. In the light of the above, SW's claims against the SoS must be dismissed on the merits.

237. In those circumstances, it is not necessary for me to deal with the application or otherwise of Section 31 (3C) of the Senior Courts Act 1981, or points on promptness or the form of any relief.

238. I am very grateful to all Counsel for their most helpful written and oral submissions.