

**PROTECTIVE PROVISIONS FOR THE PROTECTION OF
NORTHUMBRIAN WATER LIMITED**

1. For the protection of NWL, the following provisions, unless otherwise agreed in writing between the undertaker and NWL, have effect.

2. In this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable NWL to fulfil its statutory functions in no less efficient a manner than previously;

“apparatus” means the following items belonging to or maintained by NWL within the Order limits—

- (a) in the case of NWL’s water undertaking—
 - (i) mains, pipes, wells, boreholes, tanks, service reservoirs, pumping stations or other apparatus, structure, tunnel, shaft or treatment works or “accessories” (as defined in section 219(1) of the Water Industry Act 1991) belonging to or maintained or used by NWL for the purposes of water supply; and
 - (ii) any water mains or service pipes which are the subject of a notice of intention to adopt under section 51A of the Water Industry Act 1991; and
- (b) in the case of NWL’s sewerage undertaking—
 - (i) any sewer, drain or disposal works vested in NWL under the Water Industry Act 1991; and
 - (ii) any sewer, drain or disposal works which is so vested or is the subject of a notice of intention to adopt given under section 102(4) of that Act or an agreement to adopt made under section 104 of that Act, and includes a sludge main, “disposal main” (within the meaning of section 219 of that Act) or sewer outfall and any manholes, ventilating shafts, pumps or other accessories (as defined in section 219(1) of the Water Industry Act 1991) forming part of any such sewer, drain or works, and any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

“functions” includes powers and duties;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over or upon land;

“NWL” means Northumbrian Water Limited (company number 02366703), whose registered office is at Northumbria House, Abbey Road, Pity Me, Durham, DH1 5FJ; “plan” includes sections, drawings, specifications and method statements; and

“the standard protection strips” means strips of land falling within the following distances to either side of the medial line of any relevant pipe or apparatus—

- (a) 2.25 metres where the diameter of the pipe is less than 150 millimetres;
- (b) 3 metres where the diameter of the pipe is between 150 and 450 millimetres;
- (c) 4.5 metres where the diameter of the pipe is between 450 and 750 millimetres;
- (d) 6 metres where the diameter of the pipe exceeds 750 millimetres; and
- (e) 6.5 metres where it is a sewer.

Commented [PM1]: Issue 1 - restriction on DCO powers

Protection Strips

3. The undertaker must not within the standard protection strips interfere with or build over any apparatus within the Order limits or execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within the standard protection strips unless otherwise agreed in writing with NWL, such agreement not to be unreasonably withheld or delayed, and this provision must be brought to the attention of any contractor responsible for carrying out any part of the authorised development on behalf of the undertaker.

Protection of NWL Apparatus

Commented [PM2]: Issue 2

4. Without prejudice to the generality of the foregoing, the alteration, extension, removal or re-location of any apparatus shall not be implemented until—

- (a) any requirement for any permits under the Environmental Permitting Regulations 2016 or other replacement legislation and any other associated consents are obtained; and
- (b) if applicable, the undertaker has made the appropriate application under sections 106 (right to communicate with public sewers), 112 (requirement that proposed drain or sewer be constructed so as to form part of the general system) or 185 (duty to move pipes, etc. in certain cases) of the Water Industry Act 1991 as may be required by those provisions and has provided a plan of the works proposed to NWL and NWL has given the necessary consent or approval under the relevant provision, such agreement not to be unreasonably withheld or delayed and must be given within 28 days from the date the plan of works proposed has been submitted; and
- (c) and in the event that such works are to be executed by the undertaker, they are to be executed only in accordance with the plan, section and description submitted and in accordance with such reasonable requirements as may be made by NWL for—
 - (i) the continuing safety and operational viability of the apparatus (for the avoidance of doubt where the reasonable requirements relate to such matters, a reasoned explanation will be provided by NWL to substantiate the need for these requirements); and
 - (ii) the requirement for NWL to secure reasonable access to the apparatus.

Commented [PM3]: Issue 3

5. In the situation, where in exercise of the powers conferred by the Order, the undertaker acquires any interest in any land in which any apparatus is placed and such apparatus is to be relocated, extended, removed or altered in any way, no alteration or extension shall take place until NWL has established to its reasonable satisfaction, without unnecessary delay, contingency arrangements in order to conduct its functions for the duration of the works to relocate, extend, remove or alter apparatus.

6. If in consequence of the exercise of the powers conferred by the Order the access to any apparatus is materially obstructed the undertaker shall provide such alternative means of access to such apparatus as will enable NWL to maintain or use the apparatus no less effectively than was possible before such obstruction.

Commented [PM4]: Issue 4

7. The undertaker, in the case of powers conferred by the Order for the protective work to buildings, must exercise those powers so as not to obstruct or render less convenient the access to any apparatus belonging to NWL without the written consent of NWL.

Commented [PM5]: Issue 5

Commented [PM6]: Issue 2

Commented [PM7]: Issue 6 - Stopping Up

Unmapped sewers / other apparatus

8. (1) Where the undertaker identifies any apparatus which may belong to or be maintainable by NWL but which does not appear on any statutory map kept for the purpose by NWL, it shall inform NWL of the existence and location of the apparatus as soon as reasonably practicable.

(2) If in consequence of the exercise of the powers conferred by the Order, previously unmapped sewers, lateral drains or other apparatus are identified by the undertaker, notification of the location of such assets will immediately be given to NWL and afforded the same protection as other NWL assets.

Indemnity

9.—(1) Subject to sub-paragraphs (2) and (3), if for any direct reason or in direct consequence of the construction of any of the works by or at the direction of the undertaker referred to in paragraphs 3 to 7 any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of NWL, or there is any interruption in any service provided, or in the supply of any goods, by NWL, the undertaker must—

- (a) bear and pay the cost reasonably incurred by NWL in making good any damage or restoring the supply; and
- (b) make reasonable compensation to NWL for any other expenses, loss, damages, penalty or costs reasonably incurred by NWL, by direct reason or in direct consequence of any such damage or interruption.

Commented [PM8]: Issue 7

(2) NWL must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 9 applies. If requested to do so by the undertaker, NWL must provide an explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1). The undertaker shall only be liable under this paragraph 9 for claims reasonably incurred by NWL.

(3) Any dispute arising between the undertaker and NWL under this Schedule must be referred to and settled by arbitration under article 46 (arbitration).

(4) The fact that any act or thing may have been done by NWL on behalf of the undertaker or in accordance with a plan approved by NWL or in accordance with any requirement of NWL or under its supervision does not, subject to sub-paragraph (5) excuse the undertaker from liability under the provisions of sub-paragraph (1) unless NWL fails to carry out and execute the works properly with due care and attention and in a skilful and professional manner or in a manner that does not accord with the approved plan.

(5) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the unlawful or unreasonable act, neglect or default of NWL, its officers, employees, servants, contractors or agents.

Commented [PM9]: Issue 7

(6) NWL must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which, if it withholds such consent,

has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Commented [PM10]: Issue 7

Duty to cooperate

10.—(1) Where in consequence of the proposed construction of any of the authorised development, the undertaker or NWL requires the removal of apparatus or NWL makes requirements for the protection or alteration of apparatus, the undertaker must use all reasonable endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised development and taking into account the need to ensure the safe and efficient operation of NWL's undertaking and NWL must use all reasonable endeavours to co-operate with the undertaker for that purpose.

11. Nothing in this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and NWL in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

12. Prior to carrying out any works within the Order limits (as defined in the Order) NWL must give written notice of the proposed works to the undertaker, such notice to include full details of the location of the proposed works, their anticipated duration, access arrangements, depths of the works, and any other information that may impact upon the works consented by the Order.

Commented [PM11]: Issue 8

1. **Issue 1 – restriction on DCO powers**

- 1.1 Northumbrian Water Limited (NWL) has sought in its preferred protective provisions to restrict the Applicant exercising its compulsory acquisition powers.
- 1.2 The Applicant strongly refutes such restrictions as they would jeopardise the delivery of the authorised development. These powers are required to ensure the authorised development can be constructed, operated and maintained and also to ensure that the authorised development's nationally significant public benefits can be realised, including supporting the Government's policies in relation to the timely delivery of new generating capacity and achieving ambitious net zero targets.
- 1.3 With the controls in place in the protective provisions in respect of controlling impacts of the works on NWL's apparatus (including controls over works in the standard protection strips and alteration to apparatus), the impacts to the apparatus are able to be controlled. With these measures in place, the Applicant ensures that there is no realistic prospect that the exercise of compulsory acquisition powers would have a detrimental impact on the ability of NWL's apparatus to be protected and no serious detriment would be caused to its statutory undertaking.
- 1.4 However, the Applicant needs the ability to then deliver those approved works, utilising land shown on the Order limits. In this context, the Applicant considers that the balance lies clearly in favour of the grant of compulsory acquisition powers, taking into account the measures to avoid, minimise or mitigate the effects of such powers, and noting the substantial public benefits that it considers exist for the authorised development.
- 1.5 The Applicant also refers to the justification for compulsory acquisition powers that is outlined in the Statement of Reasons [CR1-013].

2. **Issue 2 – Alteration, extension, removal or re-location of apparatus (paragraphs 4 to 7)**

- 2.1 Paragraphs 4 to 7 outline the protections afforded to NWL in respect of the alteration, extension, removal or re-location of any apparatus belonging to or maintained by NWL within the Order limits in respect of NWL's water and sewerage undertakings.
- 2.2 The Applicant is required to obtain necessary permits, make necessary applications and obtain NWL's consent or approval as required under the Water Industry Act 1991 prior to altering, extending, removing or re-locating NWL's apparatus. NWL is also able to impose reasonable requirements related to the performance of the works for the continuing safety and operational viability of the apparatus and the ability for NWL to secure reasonable access to that apparatus.
- 2.3 The Applicant understands that NWL seeks to include a series of additional clauses relating to the diversion of apparatus and in respect of 'alternative apparatus'. The Applicant considers that these provisions currently included in the protective provisions constitute appropriate and proportionate protections for NWL and its apparatus in this respect and that additional provisions are unnecessary. These provisions are broadly consistent with the protections afforded to NWL under the Net Zero Teesside Order 2024 (paragraphs 343, 344 and 346) and have been expanded to include additional protections relating to protective works following negotiations with NWL.

3. **Issue 3 – Consent timeframes for alteration, extension, removal or re-location of apparatus (paragraph 4(b))**

- 3.1 Paragraph 4(b) requires the Applicant to obtain necessary permits, make necessary applications and obtain NWL's consent or approval as required under relevant legislation prior to altering, extending, removing or re-locating NWL's apparatus.
- 3.2 The Applicant has inserted additional drafting requiring that NWL's agreement (or approval) must be given within 28 days from the date the plan of works proposed has been submitted.
- 3.3 The Applicant acknowledges the protective provisions require that NWL's agreement under paragraph 4(b) must not be unreasonably withheld or delayed and understands that NWL considers that any additional drafting is unnecessary. However, the obligations in paragraph 4(b) could delay the delivery of the authorised development and the Applicant must be certain that it is protected against this risk. The proposed 28-day approval timeframe in conjunction with the existing drafting provides this certainty.
4. **Issue 4 – Reasonable requirements on alteration, extension, removal or re-location of apparatus (paragraph 4(c))**
- 4.1 Paragraph 4(c) empowers NWL to impose reasonable requirements related to the performance of the works for the continuing safety and operational viability of the apparatus and the ability for NWL to secure reasonable access to that apparatus. Similar forms of this drafting has also been included in paragraphs relating to the imposition of conditions on consents in the protective provisions for the benefit of other counterparties in the draft DCO (see, for example, paragraph 5 in Schedule 25, paragraph 34 in Schedule 30, paragraph 5 in Schedule 35, paragraph 3 in Schedule 41).
- 4.2 The Applicant understands that NWL's preferred drafting allows it to make reasonable requirements for 'the alteration or otherwise for the protection of the apparatus, or for securing access to it'. The scope of the terms 'protection' and 'alteration' in that drafting is unclear, particularly in the context that such requirements are being made in the scenario where the Applicant is seeking to make changes to the apparatus in question.
- 4.3 The Applicant considers its drafting strikes a reasonable and appropriate balance between affording protection to NWL and limiting risk that conditions or requirements are imposed upon the works that effectively results in the authorised development not being able to be constructed.
5. **Issue 5 – protective works to buildings (paragraph 7)**
- 5.1 Paragraph 7, included by NWL in its preferred form of protective provisions, governs the exercise of powers relating to protective works to buildings under article 19.
- 5.2 The Applicant has agreed to include this protection subject to additional drafting which clarifies that the Applicant must not exercise the powers under article 19 in a manner which obstructs or renders less convenient access to any apparatus belonging to NWL without the written consent of NWL. This provides the Applicant with an element of flexibility in the exercise of its powers under article 19 whilst still providing NWL with a strong protection against any potential impacts of the works on access to NWL's apparatus.
6. **Issue 6 – Stopping Up**
- 6.1 NWL have sought in its preferred protective provisions to include drafting preserving its powers and rights in respect of apparatus which may be affected by the 'stopping up' or

diversion of streets and highways as a result of the Applicant exercising relevant powers conferred by the Order.

- 6.2 The Applicant is currently investigating whether any NWL apparatus or access to any NWL apparatus will be affected in this manner. At this stage, it is not clear whether protections like those proposed by NWL are necessary or required as a result of the delivery of the authorised development. It is not appropriate to include protections or provisions which may not be relevant to the interactions between the authorised development and NWL's apparatus.
- 6.3 Accordingly, the Applicant has not included this drafting in the protective provisions but remains willing to work with NWL to arrive at a solution to this issue, if required.

7. **Issue 7 – indemnity (paragraph 9)**

- 7.1 The Applicant has amended paragraph 9(1) to refer to specific paragraphs containing descriptions of works (being paragraphs 3 to 7) relevant to the indemnity in place of the phrase 'construction of any of the works... that is consequential to the terms hereof' as suggested by NWL. The Applicant considers that this provides a clearer link between the indemnity clause and relevant works.
- 7.2 The indemnity clause at paragraph 9 provides sufficient protection to NWL as it covers the scope of the damage and interruption to service provided or supply of goods that NWL may suffer as a result of the works referred to in paragraphs 3 to 7 of the protective provisions.
- 7.3 NWL has suggested amendments to the indemnity clause in its preferred protective provisions which require the Applicant to 'indemnify and keep indemnified NWL against' (a) any cost reasonably incurred by NWL in making good any damage or restoring the supply and (b) any other expenses, loss, damages, penalty or costs incurred by NWL by reason or in consequence of any such damage or interruption.
- 7.4 The Applicant considers that the scope of coverage and compensation included in its preferred drafting of paragraph 9(1)(a) and (b) is broad enough to cover the types of expenses, losses etc. that NWL may suffer as a result of the damage and interruption to service provided or supply of goods contemplated by paragraph 9(1). This is broadly consistent with protective provisions for the benefit of NWL in the Net Zero Teesside Order 2024 subject to the slight amendment discussed below (see paragraph 348, Part 25 of Schedule 12 as well as paragraphs 56, 68, 86, 94 of Parts 5-9 of Schedule 12 among others).
- 7.5 The Applicant has included drafting which limiting the application of the indemnity to:
- 7.5.1 damage and interruption of service provided and a supply of goods caused for any direct reason or in direct consequence of the relevant works in paragraphs 3 to 7; and
- 7.5.2 expenses, loss, damages, penalty or costs reasonably incurred by NWL, by direct reason or in direct consequence of any such damage or interruption.
- 7.6 These amendments clarify that the Applicant will not be liable for indirect loss. This is appropriate as indirect losses are as those losses are far too remote from, and lack a causal link to, the damage or interruption to any service or supply of goods contemplated by paragraph 9(1). The exclusion of indirect loss is precedent in bespoke protective provisions for counterparties in the Net Zero Teesside Order 2024 (see for example, paragraphs 109(2)(b), 125(3), 255(2)(b), 295(2)(b) and 361(4)(b) of Parts 10-11, 19, 21 and 26 respectively of Schedule 12).

- 7.7 The Applicant should not be responsible for paying any unreasonable costs incurred by NWL which is why the Applicant has included 'reasonable' and 'reasonably' in paragraph 9(1)(b) in addition to 9(1)(a).
- 7.8 Paragraph 9(5) states that nothing in paragraph 9(1) imposes any liability on the Applicant in respect of any damage or interruption to the extent that it is attributable to the unlawful or unreasonable act, neglect or default of NWL, its officers, employees, servants, contractors or agents. The Applicant has inserted 'employees' into this clause. This is an appropriate amendment which is preceded by the equivalent paragraph in the protective provisions for the benefit of NWL in the Net Zero Teesside Order (see paragraph 348(2), Part 25 of Schedule 12) as well as in other bespoke protective provisions for other counterparties (see, for example, paragraphs 268(2) 295(2), 304(2), 338(2) of Parts 20-22 and 24 respectively of Schedule 12).
- 7.9 NWL has not previously included paragraph 9(6) in its preferred form of protective provisions. Paragraph 9(6) balances the need between the Applicant approving claims or demands it is going to pay for, and any burden imposed on NWL for seeking such approvals from the Applicant. It is appropriate for NWL to seek the Applicant's consent before it settles or makes any compromise of any claim or demand, given the Applicant is the party that is ultimately going to pay for such claim or demand. The Applicant requires oversight of and a level of control over claims to be able to manage its liability. Paragraph 9(6) avoids any additional burden placed on NWL by having to continually seek the Applicant's consent before settling or making any compromise, as in the event the Applicant withholds its consent, the Applicant is from then on, responsible for resolving the claim or demand. This also enables the Applicant to have the possibility of minimising its liability, whereas NWL would have no incentive to do so. This is consistent with various bespoke protective provisions (see, for example, paragraphs 26(4), 41(4) of Parts 3 and 4 respectively of Schedule 12 to the Net Zero Teesside Order 2024.)
8. **Issue 8 – notice of works proposed by NWL in Order limits**
- 8.1 NWL has not previously included paragraph 12 in its preferred form of protective provisions. Paragraph 12 which requires NWL to give written notice to the Applicant prior to carrying out any works within the Order limits with that notice to include full details of the location of the proposed works, their anticipated duration, access arrangements, depths of the works, and any other information that may impact upon the works consented by the Order.
- 8.2 The Applicant considers that this protective measure is proportionate and appropriate and strikes a balance between allowing NWL to conduct required works within the Order limits and enabling the Applicant to have oversight over how those works may impact the authorised development. The catch-all of 'any other information' is appropriately limited to information that may impact upon the works consented by the Order and needs to be included to ensure that the Applicant is fully informed of any potential risks to the authorised development potentially arising from NWL's proposed works.
- 8.3 This drafting reflects the corresponding provision in the protective provisions for the benefit of NWL in the Net Zero Teesside Order 2024 (see paragraph 351 of Part 25 of Schedule 12) and is also included in the protective provisions for another counterparty at paragraph 150 of Part 12 of Schedule 12).