



**THE APPLICANTS MARK UP OF THE BESPOKE
PROTECTIVE PROVISIONS PROVIDED BY
ANGLIAN WATER**

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INTRODUCTION

- 1.1 The Applicant has included standard protective provisions for the benefit of water undertakers in its dDCO [REP4-005], but Anglian Water (AW) have requested bespoke provisions. Drafting was issued to the Applicant for consideration in March 2022.
- 1.2 The Applicant reverted to AW with comments on their bespoke Protective Provisions on 31 May 2022. AW made submissions at ISH3 that they were not content with the protective provisions as drafted, but provided no further details. The Applicant has not yet had a substantive response on the proposed drafting.
- 1.3 The purpose of Table 1 is to set out the Applicant's proposed changes to the bespoke set of Protective Provisions requested by AW and the explanation for each change to assist the ExA.
- 1.4 Unless agreement can be reached with AW before Deadline 7, the Applicant's proposed drafting will be incorporated into the dDCO at Deadline 7.

Table 1: Summary of proposed changes to the Protective Provisions in favor of Anglian Water Services Limited

Paragraph number	Protective Provision wording with proposed changes shown in tracks	Applicant's explanation for change
1. Application	<p>Application</p> <p>For the protection of Anglian Water the following provisions have effect, unless otherwise agreed in writing between the undertaker and Anglian Water.</p>	N/A
2. Interpretation	<p>Interpretation</p> <p>In this Part of this Schedule—</p> <p>“1991 Act” means the New Roads and Street Works Act 1991;</p> <p>“alternative apparatus” means alternative apparatus adequate to enable Anglian Water to fulfil its statutory functions in a manner no less efficient than previously;</p> <p>“Anglian Water” means Anglian Water Services Limited;</p> <p>“apparatus” means:</p> <p>(a) works, mains, pipes or other apparatus belonging to or maintained by Anglian Water for the purposes of water supply and sewerage;</p> <p>(b) any drain or works vested in Anglian Water under the Water Industry Act 1991;</p> <p>(c) any sewer 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,</p> <p>(d) any drainage system constructed for the purpose of reducing the volume of surface water entering any public sewer belonging to Anglian Water,</p> <p>and</p> <p>(e) includes a sludge main, disposal main or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works, and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;</p> <p>and for the purpose of this definition, where words are defined by section 219 of that Act, they shall be taken to have the same meaning</p> <p>“functions” includes powers and duties;</p>	All redundant definitions have been removed

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	<p>“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; “plan” includes all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe the works to be executed;</p>	
<p>3. On Street Apparatus</p>	<p>On-street apparatus</p> <p>This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and Anglian Water are regulated by the provisions of Part 3 of the 1991 Act. [only for use where the undertaker has powers under part 3 of the New Roads and Street Works Act 1991]</p>	<p>The relevant powers are not included in dDCO, so this drafting has been removed.</p>
<p>4. Apparatus in stopped up streets</p>	<p>Apparatus in stopped-up streets</p> <p>(1) Where any street is stopped up under article 18 (permanent stopping up and restriction of use of streets and private means of access), where Anglian Water has apparatus in the street or accessed by virtue of that street, it has the same powers and rights in respect of that apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to Anglian Water legal easements reasonably satisfactory to Anglian Water in respect of such apparatus and access to it, but nothing in this paragraph affects any right of the undertaker or of Anglian Water to require the removal of that apparatus under paragraph 85 or the power of the undertaker to carry out works under paragraph 87.</p> <p>(2) Regardless of the temporary stopping up or diversion of any highway under the powers conferred by article 17 (temporary alteration, diversion, prohibition and restriction of the use of streets), Anglian Water is at liberty at all times to take all necessary access across any such stopped up highway and to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.</p>	<p>No streets are being stopped up as part of the Proposed Development, so the Applicant does not consider this provision to be relevant to the Proposed Development.</p>

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5. Protective works to buildings	<p>Protective works to buildings</p> <p>The undertaker, in the case of the powers conferred by article 22 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to any apparatus.</p>	This power is not included in the dDCO, so the Applicant does not consider this provision to be relevant to the Proposed Development.
6. Acquisition of land	<p>Acquisition of land</p> <p>Regardless of any provision in this Order or anything shown on the land plans, the undertaker must not acquire any apparatus otherwise than by agreement.</p>	As there are no compulsory acquisition powers included in the dDCO, the land plan does not link to any powers and is not a certified document, so is solely informative. It is therefore not appropriate to refer to this plan in these PPs.
7. Removal of apparatus	<p>Removal of apparatus</p> <p>(1) If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any apparatus is placed or requires that Anglian Water's apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule, and any right of Anglian Water to maintain that apparatus in that land must not be extinguished, until</p> <p>(a) alternative apparatus has been constructed and is in operation to the reasonable satisfaction of Anglian Water in accordance with sub-paragraphs (2) to (8); and</p> <p>(b) facilities and rights have been secured for that alternative apparatus in accordance with paragraph 86.</p> <p>(2) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Anglian Water 28 days' written notice of that requirement, together with a plan of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order an undertaker reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to Anglian Water the necessary facilities and rights for the construction of alternative apparatus in other land of the undertaker and subsequently for the maintenance of that apparatus.</p> <p>(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker, or the undertaker is unable to afford</p>	As discussed at ISH3, the Applicant has not applied for the powers to relocate the apparatus within the Order limits, so the Applicant does not consider this provision to be relevant to the Proposed Development.

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	<p>such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed Anglian Water must, on receipt of a written notice to that effect from the undertaker, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.</p> <p>(4) Any alternative apparatus to be constructed in land of the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between Anglian Water and the undertaker or in default of agreement settled by arbitration in accordance with article 54 (arbitration).</p> <p>(5) Anglian Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 54, and after the grant to Anglian Water of any such facilities and rights as are referred to in sub-paragraphs (2) or (3), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.</p> <p>(6) Regardless of anything in sub-paragraph (5), if Anglian Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Anglian Water fails to proceed with that work in accordance with sub-paragraph (5) or the undertaker and Anglian Water otherwise agree, that work, instead of being executed by Anglian Water, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of Anglian Water.</p> <p>(7) If Anglian Water fails either reasonably to approve, or to provide reasons for its failure to approve along with an indication of what would be required to make acceptable, any proposed details relating to required removal works under sub-paragraph (2) within 28 days of receiving a notice of the required works from the undertaker, then such details are deemed to have been approved. For the avoidance of doubt, any such “deemed consent” does not extend to the actual undertaking of the removal works, which shall remain the sole responsibility of Anglian Water or its contractors.</p> <p>(8) Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker shall, before taking or requiring any further step in such</p>	

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	<p>substitution works, use best endeavours to comply with Anglian Water's reasonable requests for a reasonable period of time to enable Anglian Water to: (a) make network contingency arrangements; or (b) bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question.</p>	
8. Facilities and rights for alternative apparatus	<p>Facilities and rights for alternative apparatus</p> <p>(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to a utility undertaker facilities and rights for the construction and maintenance in land of the undertaker of alternative apparatus in substitution for apparatus to be removed, those facilities and rights are to be granted upon such terms and conditions as may be agreed between the undertaker and Anglian Water or in default of agreement settled by arbitration in accordance with article 54 (arbitration).</p> <p>(2) If the facilities and rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the arbitrator less favourable on the whole to Anglian Water than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the arbitrator must make such provision for the payment of compensation by the undertaker to Anglian Water as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.</p> <p>(3) Such facilities and rights as are set out in this paragraph are deemed to include any statutory permits granted to the undertaker in respect of the apparatus in question, whether under the Environmental Permitting Regulations 2010 or other legislation.</p>	As above, the dDCO includes no powers to remove apparatus, so the Applicant does not consider this provision to be relevant to the Proposed Development.
9. Retained apparatus	<p>Retained apparatus</p> <p>(1) Not less than 28 days before starting the execution of any works in, on or under any land purchased, held, appropriated or used under this Order that are near to, or will or may affect, any apparatus (or any means of access to it) the removal of which has not been required by the undertaker under paragraph 85</p>	The paragraph referred to has been removed, so the cross reference has also been removed.

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	(2) , the undertaker must submit to Anglian Water a plan of the works to be executed.	
	(2) Those works must be executed only in accordance with the plan submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by Anglian Water for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and Anglian Water is entitled to watch and inspect the execution of those works.	The Applicant is of the view that this provision would apply to any crossing points and would allow AW to impose reasonable conditions in relation to those crossing points.
	(4) If Anglian Water in accordance with sub-paragraph (3) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 8.5(2).	As above, the dDCO includes no powers to remove apparatus, so the Applicant does not consider this provision to be relevant to the Proposed Development.
	(7) For the purposes of sub-paragraph (1) and without prejudice to the generality of the principles set out in that sub-paragraph, works are deemed to be in land near Anglian Water's apparatus (where it is a pipe) if those works fall within the <u>water pipeline standoff distance approved pursuant to Schedule 2 Requirement 19. following distances measured from the medial line of such apparatus:</u> (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 451 and 750 millimetres; and (d) 6 metres where the diameter of the pipe exceeds 750 millimetres.	The definition of "near" has been updated to align with the water pipeline standoff which is to be approved pursuant to requirement 19. This will be a greater distance than the distances set out in AW's template PPs and therefore is felt to provide adequate protection for AW.
10. Expenses and costs	Expenses and costs (1) Subject to the following provisions of this paragraph, the undertaker must repay to Anglian Water all expenses reasonably incurred by Anglian Water in, or in connection with, the inspection, removal, alteration or protection of any	N/A

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	<p>apparatus or the construction of any new apparatus which may be required in consequence of the execution of any such works as are referred to in this Part of this Schedule.</p> <p>(2) There must be deducted from any sum payable under subparagraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule that value being calculated after removal.</p> <p>(3) If in accordance with the provisions of this Part of this Schedule—</p> <p style="padding-left: 20px;">(a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or</p> <p style="padding-left: 20px;">(b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated, and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 20 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to Anglian Water by virtue of subparagraph (1) must be reduced by the amount of that excess.</p> <p>(4) For the purposes of sub-paragraph (3)—</p> <p style="padding-left: 20px;">(a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and</p> <p style="padding-left: 20px;">(b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole is to be treated as if it also had been agreed or had been so determined.</p>	

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11. Indemnity	<p>Indemnity</p> <p>(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works referred to in paragraphs 83 or 85(2), or by reason of any subsidence resulting from such development or works, any damage is caused to any apparatus or alternative 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 Anglian Water, or there is any interruption in any service provided, or in the supply of any goods, by Anglian Water, the undertaker must—</p> <ul style="list-style-type: none"> (a) bear and pay the cost reasonably incurred by Anglian Water in making good such damage or restoring the supply; and (b) make reasonable compensation to Anglian Water for any other expenses, loss, damages, penalty or costs incurred by the undertaker, by reason or in consequence of any such damage or interruption. 	The paragraph referred to has been removed, so the cross reference has also been removed.
	(2) The fact that any act or thing may have been done by Anglian Water on behalf of the undertaker or in accordance with a plan approved by Anglian Water or in accordance with any requirement of Anglian Water or under its supervision does not, subject to sub-paragraph (3), excuse the undertaker from liability under the provisions of sub-paragraph (1) unless Anglian Water fails to carry out and execute the works properly with due care and attention and in a skilful and professional like manner or in a manner that does not accord with the approved plan.	N/A
	<p>(3) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to:</p> <ul style="list-style-type: none"> (a) any damage or interruption to the extent that it is attributable to the unlawful or unreasonable act, neglect or default of Anglian Water, its officers, servants, contractors or agents. <u>(b) any part of the authorised development carried out by Anglian Water in the exercise of any functions conferred by this Order pursuant to a transfer of benefit under article 7; or</u> <u>(c) any indirect or consequential loss of any third party (including but not limited to loss of use, revenue, profit, contract, production, increased cost of working) arising from any such damage or interruption, which is not reasonably foreseeable.</u> 	The Applicant has sought to impose reasonable limitations on its liability.

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	(4) Anglian Water 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 (such consent not to be unreasonably withheld or delayed) who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.	N/A
	<u>(5) Anglian Water must act reasonably in relation to any claim or demand served under subparagraph (1) and use its reasonable endeavours to mitigate and to minimise any costs, expenses, loss, demands and penalties to which a claim or demand under subparagraph (1) applies.</u>	On the basis an indemnity is being provided, the Applicant has included a reasonable requirement for AW to mitigate its losses.
12. Cooperation	<p>(1) Where in consequence of the proposed construction of any of the authorised development, the undertaker or Anglian Water requires the removal of apparatus under paragraph 85(2) or Anglian Water makes requirements for the protection or alteration of apparatus under paragraph 9, 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 Anglian Water's undertaking, using existing processes where requested by Anglian Water, provided it is appropriate to do so, and Anglian Water must use all reasonable endeavours to co-operate with the undertaker for that purpose.</p> <p>(2) Where the undertaker identifies any apparatus which may belong to or be maintainable by Anglian Water but which does not appear on any statutory map kept for the purpose by Anglian Water, it shall inform Anglian Water of the existence and location of the apparatus as soon as reasonably practicable.</p> <p>(3) Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and Anglian Water in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.</p> <p>(4) The undertaker and Anglian Water may by written agreement substitute any period of time for those periods set out in this Part of this Schedule.</p>	The paragraph referred to has been removed, so the cross reference has also been removed.

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13. Monitoring	<p><u>Monitoring</u></p> <p><u>Where in relation to the proposed construction of any of the authorised development, Anglian Water reasonably require leak detection monitoring and/or monitoring of the water level in the pipe bedding material to be installed ("pipe bedding monitoring"), and give written notice to the undertaker of that requirement, the following provisions apply:</u></p> <p><u>(a) Any leak detection monitoring and pipe bedding monitoring to be installed in land of the undertaker under this Part of this Schedule must be constructed in such manner and in such situation as may be agreed between Anglian Water and the undertaker or in default of agreement settled by arbitration in accordance with article 20 (arbitration).</u></p> <p><u>(b) Anglian Water must, after the leak detection monitoring and pipe bedding monitoring to be installed has been agreed or settled by arbitration in accordance with article 20, and after the grant to Anglian Water of any such necessary facilities and rights over the land, proceed without unnecessary delay to construct and bring into operation the agreed leak detection monitoring and pipe bedding monitoring.</u></p> <p><u>(c) The undertaker must repay to Anglian Water all expenses reasonably incurred by Anglian Water in, or in connection with, the installation of any leak detection and pipe bedding monitoring apparatus.</u></p> <p><u>(d) If Anglian Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the installation of leak detection or pipe bedding monitoring apparatus or the undertaker and Anglian Water otherwise agree, that work, instead of being executed by Anglian Water, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of Anglian Water at the cost of the undertaker.</u></p> <p><u>(e) Anglian Water must share all monitoring data arising from the installation of the leak detection monitoring and pipe bedding monitoring with the undertaker on a quarterly basis.</u></p>	<p>The Applicant has included a provision to deal with the installation of additional monitoring apparatus if deemed necessary by AW.</p> <p>This apparatus is not considered to be mitigation necessary to make the development acceptable in planning terms, but it has been identified as an additional measure which could be installed to further reduce any risks.</p> <p>The Applicant is willing to install the necessary apparatus at its own cost if Anglian Water makes such a request, provided the monitoring data is shared with Augean.</p>
14. Arbitration	<p><u>Expert determination</u></p>	<p>The Applicant has inserted a provision to clarify how any disputes arising under the protective provisions should be dealt with. This is required to ensure any</p>

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	<p><u>(1) Article 20 (arbitration) shall apply to any difference as to the legal interpretation of this Schedule and as provided for in sub-paragraph (6).</u></p> <p><u>(2) Save as provided for in sub-paragraph (1) or sub-paragraph (6) any difference under this Part of this Schedule must be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers or the President of the Institution of RICS or the President of the Institution of Engineering and Technology (as relevant and agreed between Anglian Water and the undertaker, both acting reasonably and without delay).</u></p> <p><u>(3) All parties involved in settling any difference must use best endeavours to do so within 14 days from the date of a dispute first being notified in writing by one party to the other and in the absence of the difference being settled within that period the expert must be appointed within 21 days of the notification of the dispute.</u></p> <p><u>(4) The costs and fees of the expert and the costs of Anglian Water and the undertaker are payable by the parties in such proportions as the expert may determine. In the absence of such determination the costs and fees of the expert are payable equally by the parties who shall each bear their own costs.</u></p> <p><u>(5) The expert must—</u></p> <ul style="list-style-type: none"> <u>(a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 14 days of the expert's appointment;</u> <u>(b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;</u> <u>(c) issue a decision within 14 days of receipt of the submissions under sub-paragraph (b); and</u> <u>(d) give reasons for the decision.</u> <p><u>(5) The expert must consider where relevant—</u></p> <ul style="list-style-type: none"> <u>(a) the development outcome sought by the undertaker;</u> <u>(b) the ability of the undertaker to achieve its outcome in a timely and cost-effective manner;</u> <u>(c) the nature of the power sought to be exercised by the undertaker;</u> 	<p>disputes do not cause undue delay to the delivery of a nationally significant infrastructure project.</p>

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	<p><u>(d) the effectiveness, cost and reasonableness of proposals for mitigation arising from any party;</u> <u>(e) Anglian Water's service obligations and licence conditions; and</u> <u>(f) any other important and relevant consideration.</u></p> <p><u>(6) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 20.</u></p>	