

The Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Your Ref: H2TS-AFP107
Our Ref: EXA.NOR081.68
Doc No: 47556083v1
Date: 24 February 2025

For electronic submission through PINS webpage

Dear Sirs

H2 Teesside Project - Application for Development Consent - Planning Act 2008
Reference: EN07009
Our Client: Northumbrian Water Limited (Interested Party Number H2TS - AFP107)
Applicant: H2 Teesside Limited
Subject: Update to Examining Authority - Comments on submissions received by the Examining Authority at Deadline 7A

As you are aware, we are instructed by Northumbrian Water Limited ("NWL") in relation to the application for a Development Consent Order ("DCO") in respect of the H2 Teesside Project (the "Project").

We write to provide comments on submissions received by the Examining Authority at Deadline 7A and more specifically the document referred to as 8.44.13 PP Position Statement with Northumbrian Water Limited – Rev 0 (Position Statement) with Northumbrian Water Limited that was filed by the Applicant on the 18th February 2025.

Please find attached our client's preferred Protective Provisions which were issued to those acting on behalf of the Applicant on the 28th November 2024. In the intervening months little to no attempt has been made by the Applicant to actively engage with NWL to negotiate those provisions despite our chasing, and it is concerning that the substantive comments relating to NWL's Protective Provisions now included as part of the Applicant's Position Statement were not made known to us or our client until after it was filed for examination.

This has left NWL very little time to review those detailed comments and it is regrettable that despite regular chasing very little progress has been made with the Applicant to engage with our client so that proper consideration could be given of the nature and extent of those rights sought as part of the proposed Order as they will affect our client's assets and statutory responsibilities. We are writing therefore to re-assert our client's position that the Protective Provisions in favour of NWL (Revision 8) currently included as part of the draft Order at Deadline 7A are not acceptable to our client and to make clear that at this time NWL must therefore maintain its objection to the scheme.

At various points throughout their Position Statement, the Applicant makes various references to the Protective Provisions in relation to land and other interests included as part of another scheme ("Net Zero"). However, it is difficult to understand why the provisions included as part of an entirely separate and unrelated scheme should apply in an entirely identical manner to those presently under

consideration as part of this scheme. No justification is given for the "porting" of provisions in this way and if it was in order for the Applicant to clumsily impose measures by these means such an approach would make a farce of their duty to consult and the examination process.

Taking each of the Applicant's numbered issues in their Position Statement in turn we would respond as follows:

Issue 1: Restriction on DCO powers

The applicant comments in very general terms at paragraph 1.2 of their Position Statement on the need for compulsory acquisition powers however fails to explain with specific reference to those plots in relation to which NWL holds a proprietary interest why there is a necessity for compulsory acquisition powers to be available to them in order for the scheme to proceed. No reasoned justification is given as to why the omission of those powers in the case of NWL's interests would jeopardise the delivery of the scheme and it is noted by virtue of communications the Applicant has had direct with our client that in fact the Applicant may not intend to compulsorily acquire any proprietary interest of NWL. Rather in conversations that have taken place between the Applicant and NWL the focus instead has been on the temporary acquisition of rights rather than the compulsory acquisition of any freehold or leasehold interest and the latest submission included as part of the Applicant's position statement are notably silent as to the site-specific justifications for powers for compulsory acquisition in respect of NWL's interests at Land Plan sheet 11 for 11/128 and 11/129. Therefore, it is clear the powers sought are unnecessary and consequently that the reasons for which they are sought are unclear.

Parcel numbers 11/128 and 11/129 relate to operational interests that are material to NWL's statutory responsibilities. They concern a number of significant utilities comprising sewer mains, potable water mains, gas mains, and a sludge transfer main and in the absence of any further explanation from the Applicant as to the justification for their compulsory acquisition it is difficult to understand how the public interest is better served through extinguishing those interests in order to allow the scheme to proceed or indeed even if there is such a necessity for those powers to be included in order to delivery.

Therefore, it is difficult to understand why the Applicant should so "strongly refute" a restriction on the exercise of compulsory acquisition powers which are very usual in circumstances such as these as demonstrated for example by the protective provisions the Applicant itself has negotiated and included for the benefit of National Gas Transmission PLC as part of the terms of this draft Order and as further demonstrated by paragraph 2.3 of the National Gas Transmission PLC's written submission at deadline 7A which makes clear that the Applicant is now content for compulsory acquisition to be reinstated within those protective provisions included for the benefit of NGT

No explanation is given as to why a consistent approach is not taken by the Applicant in respect of NWL's assets and for that reason the ExA is respectfully urged to ensure the protective provisions in the form attached with regard to acquisition of land are included as part of the Order.

Issue 2: Alteration extension removal or relocation of apparatus

The Applicant contends these additional provisions are unnecessary and inconsistent with the approach taken in respect of another scheme ("Net Zero"). The relevance of the Order in respect of Net Zero is not explained or justified however, the ExA is referred to those protective provisions more recently accepted at examination in respect of NWL's interest in respect of Byers Gill – (<https://national-infrastructure-consenting.planninginspectorate.gov.uk/projects/EN010139/documents?searchTerm=DCO&itemsPerPage=25>) where it will be observed that the provisions for alteration removal or relocation of NWL's apparatus was readily accepted by the undertaker and examining authority.

Issue 3: Consent time frames for alteration, extension, removal, or relocation of operators

The 28 day time scale referred to at paragraph 3.2 of the Applicant's Position Statement is unnecessary and unjustified given that the Protective Provisions prepared by NWL do require NWL to not unreasonably delay such approvals. The reference to added certainty at paragraph 3.3 of the applicant's Position Statement is incorrect. There is no clear sanction in respect of any failure to meet the 28 day approval timeframe and as such its inclusion is puzzling and notably inconsistent with provisions included elsewhere in the draft Order. Further, it is our instruction that the timeframe imposed is wholly and unsuitably arbitrary given that in some cases the timeframe will be entirely unfeasible. Indeed, in other cases (perhaps concerning a more minor alteration) a much sooner timescale than 28 days would be suitable and therefore imposing an arbitrary timeframe of 28 days in those cases would in fact lead to unnecessary delay and increased costs for the Applicant. That is why it is more usual in such circumstances for NWL to only remain under an obligation to not unreasonably delay such approval; that is as much legally certainty as can be achieved in the circumstances. Indeed, the approval regime pertaining to other protective provisions included as part of the draft Order do not appear to contain any such arbitrary 28 day timeframe and therefore we would urge the ExA to ensure a consistent approach is taken in this regard between all statutory undertakers or if there is to be a difference of treatment some detailed justification is given for those differences.

Issue 4: Reasonable requirements and alteration extension removal or relocation of operators

No comment.

Issue 5: Protective works to buildings

No comment.

Issue 6: Stopping Up

It is not acceptable for the statutory functions and responsibilities of NWL to be put at risk in the event that its assets become stranded due to a power exercised under the terms of the Order to stop up areas of highways and roads. The justification given by the Applicant for not including this protective provision is that notwithstanding the requirement to properly investigate and duly consult NWL in good time for when the application was accepted for examination it appears from paragraph 6.2 of the Applicant's Position Statement that they are still in the questionable position of investigating whether any of NWL's apparatus or access to any NWL apparatus will be affected. It is more usual than not for infrastructure relating to critical sewerage and watermains in addition to other crucial apparatus of NWL to be laid under highways that are likely to be stopped up and on that basis it is entirely necessary and appropriate for protective provisions dealing with the arrangements for the access, retention and maintenance of such infrastructure in the event of a stopping up to be included within the protective provisions. Therefore, contrary to the statements at paragraphs 6.2 and 6.3 of the Applicants Position Statement it is precisely because of the uncertainty relating to the existence of NWL apparatus under the roads that those protective provisions are absolutely critical to NWL's interests and we would urge the ExA to ensure those appropriate protections are included as part of the Order.

Issue 7: Indemnity

The amendments proposed by the applicant to the indemnity (particularly through the removal of the words "indemnify" and "keep indemnified" throughout the drafting included as part of NWL's protective provisions are entirely unreasonable and provide little or no protection to NWL by way of an indemnity.

It is noted that elsewhere within the Order's Protective Provisions indemnities have been accepted and agreed with other undertakers on terms that are not dissimilar to those put forward by NWL. In this regard it is noted the Applicant will be indemnifying as follows –

- National Grid for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from National Grid, by reason or in consequence of any such damage or interruption or National Grid becoming liable to any third party and including STC Claims or an Incentive Deduction other than arising from any default of National Grid.
- National Gas for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from National Gas, by reason or in consequence of any such damage or interruption or National Gas becoming liable to any third party and including Network Code Claims other than arising from any default of National Gas.
- Network Rail (to "indemnify and keep indemnified" in much the same way that NWL has requested in respect of its interests) from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.
- PD Teesport for any other expenses, loss (including loss of profits), damages, penalty, claims, investigations, demands, charges, actions, notices, proceedings, orders, awards, judgments, damages, other liabilities and expenses (including legal fees, expenses and fines) or costs incurred of any kind or nature whatsoever by them, by reason or in consequence of any such damage or interruption.

We would urge the ExA to ensure a consistent approach is taken in the case of NWL's interests as we do not see any justification for a difference in treatment.

Again reference to the Net Zero scheme is not explained or justified and furthermore, the limitations proposed by the applicant at paragraph 7.5 of their Position Statement comprise too far an erosion of the protections secured in the drafting and are unreasonable.

Issue 8

No comment.

Yours faithfully

[Redacted Signature]

Ward Hadaway LLP

[Redacted Email Address]@wardhadaway.com

NWL Protective Provisions

FOR THE PROTECTION OF NORTHUMBRIAN WATER LIMITED

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

1. In this Part of 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"	<p>means the following items belonging to or maintained by NWL within the Order limits:</p> <p>a. in the case of NWL's water undertaking:</p> <p>(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</p> <p>(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</p> <p>b. in the case of NWL's sewerage undertaking:</p> <p>(i) any sewer, drain or disposal works vested in NWL under the Water Industry Act 1991; and</p> <p>(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;</p>

"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;
"Order"	mean the H2Teesside Order as it is made by the Secretary of State pursuant to section 37 of the 2008 Act and any references to "Draft Order" are references to the draft of the Order most recently submitted to the Planning Inspectorate and published on [XXX];
"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: <ul style="list-style-type: none"> 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.
"undertaker"	means H2T, being the applicant for the Application

2. Compulsory acquisition

- 2.1. The undertaker must not without express written agreement of NWL exercise any power conferred by article [] (compulsory acquisition of land) or article [] (compulsory acquisition of rights) in respect of NWL's interests.
- 2.2. 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 the apparatus.
- 2.3. Regardless of any provision in this Order or anything shown on any plan, the undertaker must not acquire any apparatus otherwise than by agreement, and before extinguishing any existing rights for NWL to use, keep, inspect, renew and maintain its apparatus in the Order land, the undertaker must, with the agreement of NWL, create

a new right to use, keep, inspect, renew and maintain the apparatus that is reasonably convenient for NWL, such agreement not to be unreasonably withheld or delayed.

3. Protection Strips

- 3.1. 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.

4. Alteration of NWL Apparatus

- 4.1. Without prejudice to the generality of the foregoing, the alteration, extension, removal, re-location or diversion of any apparatus shall not be implemented until:
- 4.1.1. any requirement for any permits under the Environmental Permitting Regulations 2016 or other replacement legislation and any other associated consents are obtained;
 - 4.1.2. 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
 - 4.1.3. 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:
 - 4.1.3.1. 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
 - 4.1.3.2. the requirement for NWL to secure reasonable access to the apparatus.
- 4.2. 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.
- 4.3. The undertaker, in the case of the 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.

5. Alternative apparatus

- 5.1. Without prejudice to the generality of the foregoing and subject always to the provisions of paragraph 1.9 hereof, if, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under the Order, the undertaker requires the removal of any of NWL's apparatus placed in that land, the undertaker must give to NWL 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, afford to NWL 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 such works for construction all to be carried out at the undertaker's cost.
- 5.2. The relevant apparatus must not be removed, and any right of NWL to maintain that apparatus in that land must not be extinguished, until:
 - 5.2.1. alternative apparatus has been constructed and is in operation to the reasonable satisfaction of NWL and at the undertaker's cost; and
 - 5.2.2. facilities and rights have been secured for that alternative apparatus in accordance with paragraph 4.1
- 5.3. Any alternative apparatus to be constructed in land of the undertaker pursuant to the terms hereof must be constructed in such manner and in such line or situation as may be agreed between NWL and the undertaker
- 5.4. If NWL notifies 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 that work must be executed by the undertaker without unnecessary delay under the superintendence and to the reasonable satisfaction of NWL.
- 5.5. 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 substitution works, use best endeavours to comply with NWL's reasonable requests for a reasonable period of time to enable NWL to:
 - 5.5.1. make network contingency arrangements; or
 - 5.5.2. bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question.
- 5.6. Where, in accordance with the terms of the Order, the undertaker affords to NWL 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 on terms reasonable to the parties which for the avoidance of doubt shall specify that the costs thereof are to be borne by the undertaker.
- 5.7. 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 NWL less favourable on the whole to NWL 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 undertaker

must make provision for the payment of compensation by the undertaker to NWL as is reasonable having regard to all the circumstances

- 5.8. Such facilities and rights as are set out in the preceding 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.

6. Unmapped sewers/other apparatus

- 6.1. 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.
- 6.2. 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.

7. Stopping up

- 7.1. Where in pursuance of the powers conferred by the Order any street is stopped up (permanent stopping up and restriction of use of streets and private means of access), where NWL 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 NWL legal easements reasonably satisfactory to NWL in respect of such apparatus and access to it.
- 7.2. Regardless of the temporary stopping up or diversion of any highway under the powers conferred by the Order (temporary alteration, diversion, prohibition and restriction of the use of streets), NWL 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 subject to provision of reasonable prior notice to the undertaker (except in the case of emergency) and compliance at all times with the undertaker's reasonable site safety rules and health and safety law.

8. Indemnity

- 8.1. Subject to sub-paragraphs 8.4 and 8.5, if for any reason or in consequence of the construction of any of the works by or at the direction of the undertaker referred to in paragraphs [3] to [6] 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 indemnify and keep indemnified NWL against :
 - 8.1.1. any cost reasonably incurred by NWL in making good any damage or restoring the supply; and
 - 8.1.2. any other expenses, loss, damages, penalty or costs incurred by NWL, by reason or in consequence of any such damage or interruption.

- 8.2. 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 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 paragraph 4.1. The undertaker shall only be liable under this paragraph for claims reasonably incurred by NWL.
- 8.3. Any dispute arising between the undertaker and NWL under this Part of this Schedule must be referred to and settled by arbitration under article [] (arbitration).
- 8.4. 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 paragraph 8.5, excuse the undertaker from liability under the provisions of sub-paragraph 8.1 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.
- 8.5. Nothing in paragraph 8.1 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, servants, contractors or agents.

9. Duty to cooperate

- 9.1. 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.
- 9.2. Nothing in this [Part of 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.
- 9.3. 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,.