

June 2018

Trust in water

# **Final determination of a complaint against Northumbrian Water about work in private land**

## Contents

1. Introduction .....	4
2. Background.....	5
3. Legal framework.....	8
4. Jurisdiction to determine the complaint .....	10
5. Draft determination.....	11
6. Final determination.....	12
7. Conclusion .....	28

## Summary of our decision

This is a final determination of a dispute between Northumbrian Water and [REDACTED] Partnership over the work carried out on the [REDACTED] Partnership's land from February to April 2017, and whether this represented a failure to consult, or caused loss, damage or inconvenience.

In summary, we have determined that there were three failures by Northumbrian Water. The failures relate to Northumbrian Water not providing the [REDACTED] Partnership with information, which they had a right to expect under Northumbrian Water's Code of Practice for Pipelaying, and failure to consult adequately with the Complainant, which has caused it a loss.

As a result of this, we have made an award of £700 from Northumbrian Water to the [REDACTED] Partnership.

## 1. Introduction

### A. The complaint

- 1.1 This is the final determination of a dispute referred by [REDACTED] on behalf of [REDACTED] (collectively, the [REDACTED] Partnership, and henceforth, **the Complainant**) to the Water Services Regulation Authority (**Ofwat**), on 20 June 2017, for determination under section 181 of the Water Industry Act 1991 (**the Act**).
- 1.2 The dispute is between the Complainant and Northumbrian Water Limited (**Northumbrian Water**) and is about the exercise by Northumbrian Water of its power to carry out works on private land under section 159 of the Act. In particular:
- a. Whether Northumbrian Water failed to adequately consult with the Complainant; and
  - b. Whether the Complainant experienced any loss, damage or inconvenience when Northumbrian Water worked on the Site.

### B. Overview of our determination

- 1.3 Our determination and our reasoning for it are set out in full in [Chapter 6](#) of this document, but an overview of our determination is set out below.
- 1.4 In light of the legal framework of the Act, and the evidence we have gathered from the parties to the dispute, we have determined that by failing to provide the Schedule of Condition in a timely manner, and not providing an out of hours contact, Northumbrian Water breached its “[Code of Practice on Pipelaying](#)” (**the Code**). In both cases, this represents a failure to consult with the Complainant in a manner promised in Northumbrian Water’s own terms.
- 1.5 Further, as a result of poor communication with the Complainant, a substantive amount of rock, which the Complainant wished to use for its planned properties, was recycled against the Complainant’s wishes. This is a further failure to consult which had adverse consequences for the Complainant.
- 1.6 Accordingly, Northumbrian Water should make a payment of £700 to the Complainant in respect of this failure.

## 2. Background

### A. The Site

- 2.1 The Site is described in a notice issued under section 159 of the Act as “certain land situated and being an area of open space, land to the back of [REDACTED] (the Site).
- 2.2 The only information provided by the Complainant in relation to the Site is that the [REDACTED] Estate consisted of [REDACTED] acres in [REDACTED] and has been sold off in various transactions. It is unclear how much of the original estate is left, and what it is currently being used for. However, the ownership of the Site is not disputed.

### B. The parties

#### Complainant

- 2.3 The Complainant is the owner of the Site which is the subject of the complaint.

#### Company

- 2.4 Northumbrian Water is appointed under the Act to provide water and sewerage services to customers in the North East of England, where the Site is located.

### C. The work on private land

- 2.5 The complaint relates to works done on the Site, from February to April 2017, in order to repair damaged sewers which were causing properties downhill from the Site to flood. The complaint is that both in the time leading up to entry onto the Site, and during works on the Site, Northumbrian Water failed to adequately communicate with the Complainant and that this caused it multiple problems. This included, but is not exclusive to, the removal and recycling of valuable stone which the Complainant wished to use to develop new properties.
- 2.6 On 24 October 2016, prior to the works being carried out, a site visit took place between the Complainant and Northumbrian Water to discuss the

proposed works. Following this, on 24 November 2016, notice of the works was served on the Complainant.

- 2.7 The substance of the complaint is set out in a letter from the Complainant to the Chief Executive of Northumbrian Water dated 10 April 2017. In this letter, the Complainant lists a number of instances where it alleges Northumbrian Water failed to comply with the Code.
- 2.8 On 17 May 2017, Northumbrian Water replied to the Complainant, making reference to an interim offer of compensation of £3549.05 offered to the Complainant on 31 March 2017, which it considered to be a fair offer under Schedule 12 of the Act, and offering its apologies for inconvenience caused. This offer was refused by the Complainant.

#### **D. Request for a determination**

- 2.9 On 2 June 2017, the Complainant contacted Ofwat, asking for a determination. We subsequently carried out an assessment of whether to take the matter forward, which included requesting further information from Northumbrian Water and the Complainant.
- 2.10 On 11 September 2017, we requested information from the Complainant about the works that took place on its land and we also sent a request for information to Northumbrian Water asking for:
- details of the work which took place; and
  - details of the correspondence between Northumbrian Water and the Complainant; and
  - clarification of whether Northumbrian Water would consider settling this particular matter with the Complainant as an alternative to becoming the subject of an investigation.
- 2.11 On 27 September 2017, we received a response from Northumbrian Water. It included records of its negotiations with the Complainant and confirmed that it had attempted to reopen negotiations with the Complainant to resolve the complaint, but had been unsuccessful at the time of writing.
- 2.12 On 13 October 2017, we received a response from the Complainant. It confirmed the dates of the work on its land, and that its claim in relation to the lost stone is ongoing with Northumbrian Water, and would not form a part of this complaint.

- 2.13 On 7 December 2017, having conducted a preliminary assessment and determining we had jurisdiction, we decided to open a case.
- 2.14 On 21 February 2018, we requested further clarification of the timeline of events from Northumbrian Water and, on 28 February 2018, it confirmed the dates of its work and offer of compensation.

### 3. Legal framework

- 3.1 This section outlines the key legislative provisions relevant to this case.
- 3.2 Section 159 of the Act empowers water and sewerage undertakers to lay and maintain pipes in private land. The undertaker is required to give reasonable notice to the owner and to the occupier of the land of its intention to exercise this power.
- 3.3 Ofwat has a qualified duty under section 181 of the Act to investigate any complaint referred to it with respect to the exercise by an undertaker of any powers conferred on it by section 159 and section 161(2) of the Act (i.e. the power to lay pipes in private land, the power of entry for works purposes, and other related powers).
- 3.4 The duty referred to above is qualified in that we are not required to investigate a complaint if any of the following exceptions apply:
- a. The complaint appears to Ofwat to be vexatious or frivolous;
  - b. Ofwat is not satisfied that the complainant has given the undertaker a reasonable opportunity to investigate and deal with the complaint; or
  - c. The complaint was first made to Ofwat or the Consumer Council for Water (**CCWater**) more than 12 months after the matter to which the complaint relates first came to the attention of the complainant.
- 3.5 If, after considering the representations of the parties, Ofwat is satisfied that the undertaker:
- has failed to adequately consult the complainant, before and in the course of exercising those powers, about the manner in which they are exercised; or
  - by acting unreasonably in the manner of its exercise of those powers, has caused the complainant to sustain loss or damage, or to be subjected to inconvenience

it may direct the undertaker to pay to the complainant an amount, not exceeding £5,000, in respect of that failure, loss damage or inconvenience.

- 3.6 In deciding whether to direct a payment in respect of any failure, loss or inconvenience, we will take into account any sums that have already been paid by the undertaker. We will not direct an undertaker to pay any amount to a complainant in respect of any loss, damage or inconvenience for which compensation is recoverable under any other enactment (unless we consider it is appropriate to do so) (section 181(5) of the Act).
- 3.7 Section 182 of the Act obliges an undertaker to have an approved code of practice in place, dealing with work on private land. In compliance with section 182 of the Act, Northumbrian Water has published its Code.
- 3.8 A contravention of the Code does not of itself require that a payment be directed under section 181 of the Act. However, Ofwat will take into account any contravention of an undertaker's code of practice in determining whether to direct any payment.
- 3.9 Under Schedule 12 of the Act a party that considers its land has depreciated as a result of an undertaker's exercise of certain powers, including its powers to carry out work on private land, may seek compensation in the Upper Tribunal. Schedule 14 of the Act provides that where a relevant undertaker carries out any works on private land, it does not become entitled to any mines or minerals lying under the land.

## **4. Jurisdiction to determine the complaint**

4.1 Ofwat is satisfied that the dispute between the Complainant and Northumbrian Water is a dispute about the exercise by Northumbrian Water of powers conferred on it by section 159 of the Act. The Complainant has alleged that Northumbrian Water has failed its Code on twelve separate occasions, and that this amounts to a failure to consult the Complainant adequately before exercising these powers. The Complainant has further alleged that it was inconvenienced in the manner of Northumbrian Water's exercise of these powers, and that this has caused it significant loss.

4.2 We consider that we have a duty to investigate this complaint in that:

- we do not consider the complaint to be vexatious or frivolous;
- we are satisfied that the Complainant has exhausted Northumbrian Water's complaints procedure; and
- the Complainant contacted Ofwat on 20 June 2017 to complain about Northumbrian Water's use of its statutory powers, which is within the time that allows us to consider the complaint.

## 5. Draft determination

5.1 On 28 March 2018, we issued a draft determination to which both parties provided comments.

### A. Response from the Complainant

5.2 On 30 April 2018, the Complainant responded to the draft determination. It disputed the findings of ten of its twelve complaints and, where relevant, these objections have been addressed in [Chapter 6](#). The Complainant also raised further objections in its response to the draft determination, as follows:

- Ofwat has accepted false or misleading information without offering the Complainant the opportunity to respond or provide an alternative account;
- Ofwat has not recognised a duty to ensure that private property rights are not infringed, and disregarded the law relating to trespass on land;
- Ofwat has unfairly attempted to put the burden of proof on the Complainant;
- Ofwat has indicated that matters should have been raised orally by the Complainant with Northumbrian Water; and
- The draft determination did not take into account the inability to effect service on one member of [REDACTED], who lacks the capacity to address this.

5.3 We address these further objections at the end of [Chapter 6](#).

### B. Response from Northumbrian Water

5.4 On 23 April 2018, Northumbrian Water responded to the draft determination providing no challenge to the contents.

## 6. Final determination

- 6.1 We set out our final determination in this chapter. It has been informed by the legal framework, as set out in [Chapter 3](#), and the evidence provided to us by both parties.
- 6.2 Our final determination assesses whether Northumbrian Water:
- a. Failed to adequately consult the Complainant; and
  - b. Caused any loss, damage or inconvenience to the Complainant in carrying out the works at the Site.
- 6.3 The Complainant has set out 12 complaints. Each complaint is directly linked to an alleged breach of the Code.
- 6.4 This chapter will address each of these complaints in turn, and outline our findings in relation to each of these.

### Complaint 1

- 6.5 The Complainant considers that Northumbrian Water failed to communicate with it about its planned works, in breach of paragraph 12 of the Code, which states:

“We will always use our best endeavours to consult you before the notice is served, but if for any reason we have not been able to, we will consult you about what we propose to do during the notice period. During any consultation we may ask for information about;

- Ownership (and occupancy if different) of the land. It would be helpful if you would tell us if there is a change of occupier or owner;
- Any proposals you have for developing the land, such as proposals for building any permanent structures or subsisting planning consents;
- Known pipes, cables, equipment or structures below the ground;
- Anything which you believe might affect the timing of our works;
- The location of springs, wells, cesspools or septic tanks or land drains and in particular any deep land drainage system;
- Any harmful materials liquids, or vegetation in the area where we will be working or any contaminated land or if the land has been subject to any notifiable plant or animal diseases;

- any areas with special needs such as SSSIs, protected flora and fauna, archaeological considerations, public rights of way, trees subject to preservation orders or conservation areas; or
- planned cropping and stocking and any other factor you believe is relevant or will affect our works and for which we may have to compensate you.”

6.6 The Complainant refers to a letter it sent to Northumbrian Water on 30 November 2016 where paragraph 4 states:

“we had a site meeting a few weeks ago when I suggested you make enquiries of [REDACTED] MBC about our proposed development.”

6.7 The Complainant considers that Northumbrian Water failed to communicate, as it failed to make enquiries of [REDACTED] MBC as requested. [REDACTED] MBC was processing a planning application submitted by the Complainant, and the Complainant was concerned that Northumbrian Water’s assets on the land might give [REDACTED] MBC grounds to refuse.

6.8 On 27 January 2017, Northumbrian Water responded to the Complainant’s letter of 30 November 2016 indicating that it would not seek to intervene in the planning process other than as a statutory consultee with regards to drainage and flood risk prevention.

6.9 Northumbrian Water states that it was asked by the Complainant on a couple of occasions to speak to [REDACTED] MBC in order to provide support for the planned development and on each occasion Northumbrian Water advised the Complainant that it did not consider it appropriate for it to contact [REDACTED] MBC on this matter.

### **Our response**

6.10 We set out in the draft determination that we did not consider the Complainant had made a case as to why it was necessary or appropriate for Northumbrian Water to consult [REDACTED] MBC and that we accepted Northumbrian Water’s reasoning for not contacting [REDACTED] MBC. Based on this, we did not uphold the complaint.

6.11 In its response to the draft determination, the Complainant outlined that it was not asking Northumbrian Water to support its application, rather it wanted Northumbrian Water to speak to [REDACTED] MBC to ensure that its assets were not a factor in any potential decision to reject its application.

- 6.12 We do not consider the above clarification materially affects the outcome of this individual complaint, as paragraph 12 of the Code does not oblige Northumbrian Water to become involved in planning applications. We also accept that it was not appropriate for Northumbrian Water to offer any further input to the planning application.
- 6.13 Based on the above, we maintain the position set out in the draft determination. That is, we are not upholding this complaint.

## **Complaint 2**

- 6.14 The Complainant considers that Northumbrian Water did not seek information from it in relation to its proposed development and that this is in breach of paragraph 12 of the Code (see paragraph 6.5) and is a dereliction of duty.
- 6.15 Northumbrian Water stated that, on 24 October 2016, a site meeting (**Site Meeting**) took place to discuss the proposed works ahead of it serving formal notice on 24 November 2016. Northumbrian Water considers this would have provided the Complainant with the opportunity to raise any issues associated with its proposed development.

## **Our response**

- 6.16 We set out in the draft determination that we considered the Complainant had not explained why it did not raise any issues in relation to the proposed development with Northumbrian Water at the Site Meeting or otherwise. We also noted that the wording of paragraph 12 of the Code states, “we may ask for information...” which suggests that Northumbrian Water will ask for information where it thinks it may be relevant. Based on this, we did not uphold the complaint.
- 6.17 In its response to the draft determination, the Complainant suggested it was unreasonable to shift the full burden of information provision onto the Complainant.
- 6.18 We consider that the Site Meeting with Northumbrian Water, on 24 October 2016, provided an adequate forum for any unique issues regarding the works to be raised, such as the proposed development, and it would be unreasonable to expect Northumbrian Water to question a landowner on every individual aspect of the Code ahead of carrying out any work on private land. We also consider that such meetings would be a reasonable way to address any unique aspects of a particular item of work.

- 6.19 Based on the above, we maintain the position set out in the draft determination. That is, we are not upholding this complaint.

### **Complaint 3**

- 6.20 The Complainant considers that no Schedule of Condition was served by Northumbrian Water, breaching paragraph 20 of the Code, which states:

“We will make a full schedule of condition of the working area before the works begin, including any buildings in close proximity, any accesses and any compound in respect of the proposed scheme. This may consist of (any or all of) written notes, photographs, or a video recording with verbal commentary. A copy will be kept at our office and will be available upon request to you or your agent. The purpose of the record is to help both you and us check that we have restored the land to a condition as near as reasonably possible to that which existed before we started work (unless you have asked us to consider alternative proposals) and that any buildings remain in the same condition.”

- 6.21 Northumbrian Water has confirmed that it did not provide the Complainant with a Schedule of Condition prior to entry. It has apologised to the Complainant for not doing so, and, on 17 May 2017, provided a copy of the Schedule of Condition to the Complainant.

### **Our response**

- 6.22 We set out in the draft determination that we consider that where a water company fails to provide a full Schedule of Condition prior to entry onto land, it has failed to communicate, with the potential to cause inconvenience and loss. Based on this, we upheld this complaint.
- 6.23 Neither party provided any representation on this complaint.
- 6.24 Further to what we set out in the draft determination, we also consider that where a company makes a commitment to provide specified information to customers, it must comply with that obligation and that, in this case, Northumbrian Water failed to provide the Schedule of Condition, causing inconvenience to the Complainant.
- 6.25 Based on the above, we maintain the position set out in the draft determination. That is, we are upholding this complaint.

## Complaint 4

6.26 The Complainant has stated that no contact details for the works supervisor were provided by Northumbrian Water, which prevented issues from being dealt with when they arose and breaches paragraph 21 of the Code, which states:

“Before the works begin, we will give you the name, workplace address and telephone number of the person responsible for supervising the works. Normally, they will be available during working hours. We will also give you an emergency telephone number for use outside normal working hours or if your normal contact is unavailable.”

6.27 Northumbrian Water has stated that, when serving notice on 24 November 2016, the accompanying covering letter provided details of the Project Manager and Estates Surveyor.

### Our response

6.28 We set out in the draft determination that while Northumbrian Water provided contact details for the Project Manager and Estates Surveyor, the Code states that the Complainant should have been given an emergency telephone number to use outside normal hours, and there is no indication that this was provided.

6.29 We also set out that whilst this may have caused some inconvenience we had not received any evidence that the Complainant had attempted to contact Northumbrian Water regarding the Site out of hours, so cannot prove any inconvenience had a material effect.

6.30 Based on the above, we set out in the draft determination that we did not uphold this complaint.

6.31 Neither party provided any representation on this complaint.

6.32 Further to what we set out in the draft determination, we consider that the failure to provide an out of hours' number is a failure by Northumbrian Water to adhere to its Code. We consider, however, that whilst this may have caused the Complainant some inconvenience, there is no evidence that the Complainant attempted to contact Northumbrian Water regarding the Site out of hours, or was inconvenienced by this failure.

- 6.33 Based on the above, we have decided to uphold this complaint but, as there is no evidence that the Complainant attempted to contact Northumbrian Water regarding the Site out of hours, or was inconvenienced by this failure, we do not make any award to the Complainant in respect of this complaint.

## **Complaint 5**

- 6.34 The Complainant considers there were “problems with rock”, which it became aware of through a report received from its engineer after the works had started, and that this breaches paragraph 22 of the Code, which states:

“Normally all our pipes are laid below ground. We prefer to lay them with 900mm minimum cover to the crown of the pipe as this protects them from frost and also from interfering with any agricultural operations. Sometimes there are engineering problems or obstacles such as rock outcrops, which prevent this. If this happens we will advise you of the final position and depth. We may, unless otherwise agreed with you, place permanent marker posts at field boundaries to show the location of the pipe and chambers. There are occasional instances where other locations may be unavoidable. If you have deep land drainage you should alert us to this before we start work.”

- 6.35 The Complainant has been unable to obtain details of the “problem with rock”, as it considers that Northumbrian Water failed to produce the information requested.
- 6.36 Northumbrian Water has stated that no engineering problems or obstacles arose and it was able to construct the apparatus as intended, in line with the engineer’s report it provided to the Complainant on 27 January 2017.

## **Our response**

- 6.37 We set out in the draft determination that as no such problems appear to have arisen which affected the works being undertaken, no further report was required. Based on this, we did not uphold the complaint.
- 6.38 In its response to the draft determination, the Complainant raised the severity of the issue of the removal of stone from its property. However, we consider this is not relevant to paragraph 22 of the Code but rather, is addressed in detail as part of Complaint 11.
- 6.39 Based on the above, we maintain the position we set out in the draft determination. That is, we do not uphold this complaint.

## Complaint 6

- 6.40 The Complainant alleges that Northumbrian Water breached paragraph 26 of the Code, which states:

“We realise the importance to you of maintaining access to your property. Within reason, we will let you have access with stock or vehicles across the working area. If the location of the working area is such that it cuts off access to part of your property we will discuss this with you before we begin work. If appropriate, we will provide temporary foot crossings, gates, steps or stiles and discuss their location with you.”

- 6.41 When [REDACTED], part of the Complainant, attempted to enter the Site he was prevented from doing so by one of the contractors for health and safety reasons. The Complainant suggests that it was attempting to maintain access to its property.
- 6.42 Northumbrian Water refers to paragraph 30 of the Code, which confirms that, “for safety reasons, you will not have access to the working area”. Northumbrian Water indicated that, when requested by appointment, it allowed access to the Site under supervision and at a safe distance from the working area.

### Our response

- 6.43 We set out in the draft determination that the purpose of the above paragraph is to enable those people who were residing on the Site to have access to their living area. Other than being the owners of the land, the Complainant has not provided persuasive information in respect of it needing to maintain access to the area. Based on this, we did not uphold this complaint.
- 6.44 The Complainant said that it wished to gain access to inspect the Site, and that there are no residents on the Site.
- 6.45 While access to the land was restricted, there is no evidence that the Complainant required access on the Site, and therefore no requirement under the Code to allow access. Under supervision, the Complainant was permitted to access the works, and we consider access with supervision to be adequate for the purposes of the Code in this instance.
- 6.46 Based on the above, we maintain the position set out in the draft determination. That is, we do not uphold this complaint.

## Complaint 7

- 6.47 The Complainant alleges that no discussions took place on security, in breach of paragraph 30 of the Code, which states:

“Before we start work we will talk to you about whether the working area needs to be fenced. If the working area is next to land on which livestock will remain, we will erect a suitable stockproof fence. In these circumstances we will ensure the stockproof fence is maintained during the course of the works (and reinstatement) and will erect straining posts at junctions of our fencing with existing fencing, and ensure both fences are secured and strained to the posts. Where livestock stray via the working area through our proven acts or omissions, we will give consideration to claims for loss or damage. For safety reasons you will not have access to the working area. However, we will make sure that, if necessary, you have access across the working area and that during the works (and reinstatement) the existing level of security of your property is not reduced.”

- 6.48 Northumbrian Water considers the above paragraph refers mainly to agricultural stocked land which is not applicable to the Site. Northumbrian Water further states that any issues related to security could have been raised at the Site Meeting, if any concerns had existed.

### Our response

- 6.49 In the draft determination we set out that paragraph 30 of the Code deals primarily with ensuring the safety of livestock and, as there was no livestock on the Site, it was unnecessary to discuss stockproof fencing with the Complainant. We also set out that we agreed with Northumbrian Water that if there were issues relating to security these could have been raised by the Complainant at the Site visit. Based on this, we did not uphold this complaint.
- 6.50 In its response to the draft determination, the Complainant raised that there is land to the East used for grazing horses<sup>1</sup>. However, this land is separated from the Site by a road and two fences, and, therefore, we do not consider could be considered a part of the Site.
- 6.51 Based on the above, we maintain the position we set out in the draft determination. That is, we do not uphold this complaint.

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<sup>1</sup> Desktop survey of land shows the grazing area at 

## Complaint 8

- 6.52 The Complainant considers that 240 tonnes of stone were removed from the Site without authorisation or agreement. The Complainant refers to paragraph 31 of the Code, which refers to the removal and preservation of topsoil, and states:

“We will seek to preserve the structure of the soil. When topsoil is stripped from the land we will store it separately from other excavated materials. We will not compress it with machinery. When the works are finished adequate subsoil preparation will be carried out before we replace the topsoil. The excavated material will be replaced, so far as possible, to the condition it was prior to the works. In particular, topsoil will be replaced to the same depth as it was originally and there will be no large stones excavated during the works left on the surface. If, for any reason, we are unable to return the same topsoil that was removed from your land it will, unless otherwise agreed with you, be replaced by soil of a similar nature, structure and quality”

- 6.53 The Complainant argues that the term topsoil should include excavated stone in these circumstances, and as the topsoil should be replaced by soil of a similar nature, structure and quality, so should the stone.
- 6.54 Northumbrian Water states that paragraph 31 of the Code refers only to topsoil and paragraph 49 of the Code refers to excavated material stating that “we will take away any surplus excavated material unless you ask us not to”.
- 6.55 Northumbrian Water has stated that it received no notification that the Complainant wished to keep the stone until a proportion of the excavated material had been removed from the Site to a recycling centre. Once Northumbrian Water became aware that this was what the Complainant wanted, it entered into negotiations with the Complainant, with regard to the remaining stone on the Site.

### Our response

- 6.56 In the draft determination we set out that the appropriate forum for resolving disputes about compensation for the removal of minerals is the Upper Tribunal, Lands Chamber (formerly the Lands Tribunal).
- 6.57 We also set out that on 13 October 2017, in an email from the Complainant it confirmed that the dispute in connection with the removal of stone is being resolved via negotiations between the parties and is not part of this complaint.

- 6.58 We then set out that we agreed with Northumbrian Water that paragraph 49 of the Code is the relevant paragraph, rather than paragraph 31 of the Code. This paragraph of the Code deals with the preservation and replacement of topsoil and the Complainant has not specifically complained about the preservation and replacement of topsoil.
- 6.59 Based on the above, we did not uphold this complaint.
- 6.60 Neither party provided any representation on this complaint.
- 6.61 For the reasons above, we are maintaining the position we set out in the draft determination. That is, we do not uphold this complaint. In relation to paragraph 49 of the Code, we outline our findings in Complaint 11.

## **Complaint 9**

- 6.62 The Complainant considers that no discussions on land drainage have taken place, and that no record of land drains disturbed has been offered, and that this breaches paragraphs 33-35 of the Code, which state:

“If you have any records of existing land drains, these should be made available to us at the earliest opportunity. We will then discuss with you the reinstatement work to any land drainage system affected by the works as in some circumstances this may need to include preliminary work before pipelaying operations start. If we are made aware of an extensive land drainage system then prior to the works we may engage a land drainage consultant to draw up a remedial scheme.

If during the works we discover a land drainage system, which you did not tell us about, we will tell you. If we disturb it, or any land drainage system that you have told us about, we will do our best to reinstate or replace it to the same standard as existed before the works began. We will, where practicable, lay our pipe under the land drainage system. We will tell you when we are going to carry out remedial work and will give you the opportunity to inspect the site.

We will make a record (which may include photographs) of any land drains disturbed and the replacement/reconnection work carried out. If you wish, we will give you a copy. If we construct any land drains in locations where they did not previously exist we will discuss this with you, give you an opportunity to inspect the site and provide you with a record of the works on completion. You may like to consider filing a copy with your property deeds.”

6.63 Northumbrian Water has stated that the relevant sections of the Code refer mainly to arable land. If drainage installations are discovered as part of the scheduled works, then they are protected, but no drainage installations were discovered on the Site.

### **Our response**

6.64 We set out in our draft determination that the Complainant had not evidenced that there were drainage installations on the Site that were not discussed. The terms of the paragraphs regarding communications related to land drainage systems are conditional on there being land drainage on the land. Based on this, we did not uphold this complaint.

6.65 In its response to the draft determination, the Complainant felt that the burden of proof was unfairly placed upon it.

6.66 We consider it is clear that neither party was aware of any drainage installations on the Site, and, as such, neither the Complainant nor Northumbrian Water needed to take any action under paragraphs 33-35 of the Code as a result. We also consider that neither party has suggested, nor evidenced, that there are drainage installations on the Site.

6.67 Based on the above, we maintain the position we set out in the draft determination. That is, we do not uphold this complaint.

### **Complaint 10**

6.68 The Complainant states that there is a Roman Road to the [REDACTED] of the Site, and requests information on whether any excavations were made to ascertain whether there was any connection between this road and the Site, and that this may relate to a breach of paragraph 47 of the Code which states:

“If we discover any coins, fossils or other articles during our work we will inform you and the appropriate archaeological body. We will not retain them or lay any claim to them. We have a legal obligation to have regard to the protection and conserving of objects of archaeological interest. Accordingly, we may employ or involve an archaeologist to examine the works as they progress. This will, however, be discussed with you first.”

6.69 Northumbrian Water states that an environmental desktop screening was undertaken by the conservation team and no elements of concern were raised about the working area.

## **Our response**

- 6.70 In the draft determination, we set out that the Code refers to a conditional requirement to inform and discuss – i.e. there will be engagement with the landowner if Northumbrian Water encounters circumstances such as finding fossils, coins or similar articles. We set out that there was no evidence that Northumbrian Water should have done more in the circumstances. Based on this, we did not uphold this complaint.
- 6.71 Neither party provided any representation on this complaint.
- 6.72 Based on the above, we maintain the position we set out in the draft determination. That is, we do not uphold this complaint.

## **Complaint 11**

- 6.73 The Complainant considers that despite a request being made to retain excavated stone, as it was needed for construction operations, such stone was taken away and crushed, and this breaches paragraph 49 of the Code which states:

“We will remove all tools and equipment and any contaminants brought to the site, and take away any surplus excavated material unless you ask us not to and we are legally able to comply with such a request. The site will be left clean and tidy. Before we hand the working area back to you we will arrange a joint inspection to make sure you are satisfied.”

- 6.74 Northumbrian Water says that it did not receive notification from the Complainant until a proportion of the excavated material had already been taken offsite to a recycling area.
- 6.75 Northumbrian Water also set out that once it had been made aware the Complainant wished to keep the stone (which was on 7 March 2017) the excavated material was kept on the Site until the works were finished. However, Northumbrian Water considered that it was not possible to keep the stone on the Site any longer than the point at which the work was finished and, as such, the stone was removed and recycled.

## **Our response**

- 6.76 In the draft determination we set out that we considered that Northumbrian Water could have checked, before it started removing stone from the Site,

whether it was appropriate to do so rather than relying on the landowner to raise the issue. We did not, however, consider this to be a breach of the Code, as Northumbrian Water stopped removing the stone as soon as the Complainant made such a request, in keeping with its Code. Based on this, we did not uphold this complaint.

6.77 In its response to the draft determination, the Complainant said the second batch of stone was removed when the work was complete. This is addressed in the Code, which states that Northumbrian Water will keep the materials on site where, “we are legally able to comply with such a request”. Negotiations are underway between the parties in this regard.

6.78 However, we have seen no substantive evidence that Northumbrian Water kept the Complainant informed that there was a deadline by which they had to remove the second batch of stone, or that Northumbrian Water made any further enquiries to ascertain when or whether the Complainant would be able to take the stone for future use. We consider this a failure to consult, and an unreasonable exercise of its powers, causing loss to the Complainant.

6.79 Based on the above, we uphold this complaint.

## **Complaint 12**

6.80 The Complainant considers that Northumbrian Water has breached paragraph 57 of the Code, which states:

“If in the future you wish to develop the land the Act makes provision for you to ask us to alter or remove the pipe at your expense. If the request is not unreasonable, we have a duty to comply.”

6.81 The Complainant considers that Northumbrian Water has been aware of the Complainant’s wish to develop the land at all material times. As a consequence, the Complainant considers that the cost of altering or removing the pipe should fall to Northumbrian Water in view of what the Complainant considers to be the failure of Northumbrian Water to comply with its statutory requirements.

6.82 The original complaint of 20 April 2017 does not make it clear which pipe is being referred to, and this has not been clarified in further correspondence.

6.83 However, in trying to address this complaint, Northumbrian Water has stated that the installation of apparatus is along the statutory easement strip of three

metres either side of an existing sewer and it has not sought to sterilize any additional land than that which was currently restricted.

### **Our response**

- 6.84 In the draft determination we set out that we did not consider this to be a complaint under section 181 of the Act and that, in any event, it is apparent that paragraph 57 of the Code has been provided as information as it merely serves to make property owners aware of their right under section 160 of the Act.
- 6.85 We also set out that this section only makes reference to carrying out work at the owner or occupier's expense and that there is no provision in the Act for Northumbrian Water to carry out this request at its own expense. If it were the case that the Complainant wished to develop the land and needed to move the pipe, the Complainant would need to make the request and pay the cost to Northumbrian Water.
- 6.86 In its response to the draft determination, the Complainant states that it disagrees with the fact that any statutory easement exists over the land.
- 6.87 As we set out in the draft determination, it is clear that paragraph 57 of the Code has been provided as information as it merely serves to make property owners aware of their rights under sections 160 and 185 of the Act. Under both these sections, the work will be at the owner or occupier's expense with there being no provision in the Act for Northumbrian Water to carry out a request of this nature at its own expense.
- 6.88 The reference to a statutory easement is a reference to Regulation H4 in Schedule 1 of the [Building Regulations 2010](#). The Ministry of Housing, Communities and Local Government published guidance called 'Approved Documents' on ways to meet building regulations. [Approved Document H](#) specifies that no buildings should be constructed over or within 3m of a public sewer without the consent of the sewerage undertaker.<sup>2</sup>
- 6.89 Notwithstanding this, we do not consider the issue of a statutory easement to be relevant as we do not consider this to be a complaint under section 181 of the Act.

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<sup>2</sup> Para 1.6, page 49 of [Approved Document H](#).

## **Additional concerns from draft determination**

- 6.90 As noted at paragraph 5.2, the Complainant raised additional concerns, outside of the twelve complaints above, in its response to the draft determination and these are addressed below.
- 6.91 The Complainant is concerned that Ofwat has accepted false or misleading information without offering the Complainant the opportunity to respond or provide an alternative account.
- 6.92 The purpose of the draft determination is that both parties can challenge the findings and evidence therein, and provide further evidence if they feel this would strengthen their case. Without further evidence, we must make our determination based on what we have received, both in response to our requests for information and in response to the draft determination.
- 6.93 The Complainant also outlined concerns that Ofwat has not recognised a duty to ensure that private property rights are not infringed, and that Ofwat has disregarded the law relating to trespass on land.
- 6.94 Section 159 of the Act gives water companies the right to lay and maintain pipes in private land, and sets out the restrictions on them when doing so. Further, section 181 of the Act gives us the power to investigate complaints when this is not carried out correctly, which is the purpose of this determination. Taking this into account, we consider that there is no substance to this concern.
- 6.95 The Complainant felt that Ofwat has unfairly attempted to put the burden of proof on the Complainant alone, and that Ofwat has indicated that matters should have been raised orally by the Complainant with Northumbrian Water.
- 6.96 At paragraph 6.18, we outlined that it would not be reasonable to expect Northumbrian Water to question a land owner on every individual aspect of the Code ahead of carrying out any work on private land and that, as such, holding a Site Meeting with the Complainant was a reasonable way to address any unique aspects of a particular item of work.
- 6.97 We also consider that there is an onus on both parties to act reasonably and to evidence their respective views. We consider, therefore, that the Site Meeting held on 24 October 2016 provided the Complainant with an opportunity to raise any concerns ahead of work starting on the Site and that

no evidence has been provided as to why the Complainant did not use this opportunity.

6.98 The Complainant also commented that the draft determination did not take into account the inability to effect service of notice by Northumbrian Water on one member of [REDACTED] Partnership, who lacks the capacity to address this.

6.99 As the complaint was received from the [REDACTED] Partnership, Northumbrian Water was justified in dealing with the Complainant as a single entity. Notwithstanding this, we understand that the notice was served on more than one member. It is assumed that the Complainant has processes in place to continue its operations, taking into account an individual member's lack of capacity.

## 7. Conclusion

7.1 We have considered, under section 181 of the Act, the manner in which Northumbrian Water exercised its powers under section 159 of the Act:

### A. Failure to adequately consult the Complainant

7.2 In Complaint 3, by failing to provide the Schedule of Condition, Northumbrian Water has failed to fulfil its obligations under paragraph 20 of the Code and we conclude that this failure amounted to a failure to adequately consult the Complainant.

7.3 In Complaint 4, by failing to provide an out of hours contact for the Site, Northumbrian Water failed to fulfil its obligations under paragraph 21 of the Code. As noted above, however, there is no evidence that this had any effect for the Complainant.

7.4 In Complaint 11, by failing to adequately communicate with the Complainant about collection of the stone after the Complainant informed Northumbrian Water of its desire to keep the stone, there was a clear failure.

### B. Loss, inconvenience or damage caused by the exercise of powers

7.5 We conclude that by failing to provide the Schedule of Condition in Complaint 3, Northumbrian Water caused inconvenience to the Complainant and that the apology given to the Complainant for this failure was not adequate recompense.

7.6 Further, we recognise that in failing to communicate adequately with the Complainant in Complaint 11 about the second batch of stone, Northumbrian Water caused inconvenience and loss to the Complainant.

### C. Conclusion

7.7 We have considered whether Northumbrian Water should pay the Complainant an amount for not adequately consulting it and for causing a loss to the Complainant in the manner in which it carried out works at the Site.

7.8 In light of the legal framework of the Act, and the evidence we have gathered from the parties to the dispute, we determine that Northumbrian Water breached its Code by:

- not communicating with the Complainant about the second batch of stone;
- failing to provide the Schedule of Condition; and
- not providing an out of hours contact,

and that these represent multiple failures to properly consult the Complainant, and in the case of the stone, caused the Complainant loss and inconvenience.

- 7.9 In the nine other complaints, there has either been no breach of the Code, or the complaint does not fall within our remit.
- 7.10 We determine that Northumbrian Water should make a payment of £200 to the Complainant in respect of the inconvenience caused to the Complainant by Northumbrian Water's failure to present the correct documents prior to the works taking place.
- 7.11 We further determine that Northumbrian Water should make a payment of £500 for its failure to adequately consult with the Complainant in regard to the removal of the stone, after the Complainant raised this issue on 7 March 2017.
- 7.12 Accordingly, taking into account the above, Northumbrian Water should make a total payment of £700 to the Complainant.

Ofwat (The Water Services Regulation Authority) is a non-ministerial government department. We regulate the water sector in England and Wales. Our vision is to be a trusted and respected regulator, working at the leading edge, challenging ourselves and others to build trust and confidence in water.

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June 2018

ISBN 978-1-911588-61-0

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