

Code for Adoption Agreements

Water sector documents: Change proposal (Ref 007)

Modification proposal	Model Water Adoption Agreement: Clause 9 Street Works Licence
Independent Water Adoption Panel Recommendation	The Panel recommended approving the change proposal, but proposed using alternative wording
Decision	Ofwat has approved this change proposal using the alternative wording proposed by the Panel
Publication date	04/04/2022
Implementation date	11/04/2022

Background

Fair Water Connections (**FWC**) submitted this change proposal on 5 July 2021 to the Independent Water Adoption Panel (**the Panel**), with the Panel publishing the proposal on its website on the same day. The function of the Panel is to consider change proposals to the [water sector guidance and model water adoption agreement](#) which apply to companies operating wholly or mainly in England. These documents were developed by companies as required by the [Code for Adoption Agreements](#) (**the Code**) and came into effect in January 2021. A change proposal is defined in the Code as a proposed change to the sector guidance or the model adoption agreements.

FWC has requested changes be made to the model water adoption agreement (**the Model Agreement**). The first proposed change concerns the requirement in clause 9 of the Model Agreement that where self-lay works are constructed in a highway maintainable, or declared to be prospectively maintainable, at the public expense, a self-lay provider (**SLP**) shall obtain a street works licence in its own name from the relevant street authority for the street. FWC stated that it is not always possible for an SLP to obtain such a licence in its own name and, as such, this section of the Model Agreement needs to be changed to allow SLPs to comply with the requirement.

FWC has also raised a concern that water companies do not incur the cost of obtaining street work licences necessary to undertake work in public highways, but SLPs do. This is because water companies can rely on their statutory power to lay pipes in streets and carry out related works set out in section 158 of the Water Industry Act 1991 (**the Act**). FWC considers this means that SLPs are not competing on an equal playing field to water companies. Although FWC has not proposed a specific modification to the Code to address this issue, it noted that a possible solution would be to enable SLPs to rely on companies' statutory power referred to above when carrying out street works which are subject to an adoption agreement. Given no specific amendment has been put forward, we will not consider this aspect of FWC's change proposal as part of this decision document. However, we note that the statutory framework relating to street works, including the prohibition on carrying out street works otherwise than in pursuance of a statutory right or a street works licence, is set out in Part III of the New Roads and Street Works Act 1991 (**NRSWA**) and also that section 158 of the Act does not expressly authorise water companies to delegate this statutory power to separate entities. As such, it appears the solution proposed by FWC is likely to require changes to primary legislation, and is consequently outside the scope of the Code.

The change proposal

FWC has requested a change be made to clause 9 of the Model Agreement. Clause 9.1 currently states:

“9.1 Where the Self-Lay Works are constructed in a highway maintainable, or declared to be prospectively maintainable at the public expense, the SLP shall:

- (a) obtain a Street Works Licence under section 50 NRSWA in its own name from the street authority for the street; and
- (b) comply fully with the requirements of the Street Works Legislation regarding the supervision of the Self-Lay Works by a qualified supervisor and the presence on site of a trained operative in accordance with the provisions in force from time to time.”

FWC has requested a change because it considers that it is not always possible for a SLP to obtain a street works licence¹ under its own name. It notes that the wording of section 50 of the NRSWA means that the relevant street authority may grant a licence to parties seeking to carry out certain street works, but is not required to do so. FWC has provided an example where an SLP was unable to get a street works licence under its own name, which prevented the SLP from providing the service. FWC states that the reasoning given by the relevant street authority for not granting such a licence to the SLP was that the street authority considered

¹ A street works licence is a licence that a party is required to obtain from the relevant council in order to place apparatus in the street and carry out incidental works, for example breaking up or tunnelling under the street. [Street works licence \(England, Scotland and Wales\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/street-works-licence)

such contractors to have a risk of being closed down during the street works, leaving incomplete street works or obstructions on the highway. FWC notes that while this is a current issue for this particular street authority, as water companies are increasingly allowing SLPs to construct larger water mains and therefore undertake more street works, this issue may arise for other street authorities as well.

FWC proposes that clause 9.1 (a) is amended to allow an SLP to obtain a street work licence under either its own name or under the name of the developer for which the SLP is providing the developer service. Clause 9.1 (a) would then read as follows, with the additional text shown in red font:

- (a) obtain a Street Works Licence under section 50 NRSWA in its own name or the Developer's name from the street authority for the street; and

Consultation and assessment

In submitting its recommendation, the Panel confirmed that it met the Code requirement² to assess the change in terms of:

- The need for change, for example, is it a service improvement or is it needed to address a particular issue?;
- Consistency with the principles and objectives of the Code, and any relevant statutory requirements; and
- The impact of the change (be it positive and/or negative) on customers and on water and sewerage companies.

In considering the change proposal, the Panel has:

- discussed the Proposal at three Panel meetings;
- sought feedback from members' companies;
- sought feedback from the Water UK lawyer's network; and
- obtained external legal advice on the legal implications of the proposal on the rest of the Code documentation and the wider competition issue.

Ofwat consulted the Drinking Water Inspectorate (**DWI**) about this change proposal and the DWI had no objections to the proposed change.

Panel recommendation

On 5 January 2022, the Panel recommended to Ofwat, by unanimous decision, that we approve the change proposal. The Panel has recommended making the change, but has

² See paragraph 3.8.11 of the Code.

proposed alternative wording to the change that was proposed by FWC. In reaching its decision, the Panel stated that it has taken into account the following issues:

- The proposed change does not appear to the Panel to negatively impact on other parties to the Model Agreement. However, it may not necessarily prevent street authorities from objecting to the status of an applicant for a street works licence;
- The proposal only refers to one street authority objecting to the licence issue and the issue does not appear to be widespread across other authorities. However, acceptance of the change may prevent the issue from becoming more common;
- The Panel considers that the proposal does not appear to cause any legal issues for the rest of the Model Agreement; and
- The proposed change to the wording of the Model Agreement could be further clarified by omitting reference to the SLP or developer, so that it simply refers to a valid licence and is not restricted to a specific party.

With the above in mind, the Panel recommended the following change be made to clause 9.1 (a) of the Model Agreement with the changes to the current wording of the Model Agreement shown in strikethrough font:

“(a) obtain a Street Works Licence under section 50 NRSWA³ ~~in its own name~~ from the street authority for the street; and”

The Panel considers that this proposed change to the Model Agreement improves services, facilitates efficiencies for water companies, SLPs and developers and enables the Design and Construction Guidance to better meet the principles of the Code.

Our decision and reasons

We have considered the above issues, and all the supporting documentation provided to us by the Panel, and have decided to approve the change proposal using the alternative wording proposed by the Panel. We think that this change is an improvement because we consider that there may be circumstances where a street authority may be more willing to grant a street works licence to another party such as a developer than to an SLP. This could remove a potential barrier for SLPs which better fulfils the fair and proportionate and level playing field Code principles.

Decision notice

In accordance with paragraph 3.9.4 of the Code Ofwat approves this Change Proposal using the alternative wording proposed by the Panel.

³ New Roads and Street Works Act 1991

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