

SCHEDULES

SCHEDULE 11

Article 51

PROTECTIVE PROVISIONS

PART 1

FOR PROTECTION OF DRAINAGE AUTHORITIES

1.—(1) The following provisions of this Part of this Schedule shall apply for the protection of each drainage authority unless otherwise agreed between the undertaker and the drainage authority concerned.

(2) In this Part of this Schedule—

“construction” includes execution, placing, altering, replacing, relaying and removal and “construct” and “constructed” are to be construed accordingly;

“drainage authority” means the Environment Agency or, within the area of the Swavesey Internal Drainage Board or the Old West Internal Drainage Board, that board except in relation to a drainage work forming part of a main river as defined in the Water Resources Act 1991;

“drainage work” means any watercourse and includes any land which is expected to provide flood storage capacity for any watercourse and any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage or flood defence;

“fishery” means any waters containing fish and fish in, or migrating to or from such waters and the spawn, habitat or food of such fish;

“plans” includes sections, drawings, specifications and method statements;

“specified work” means so much of any work or operation authorised by this Order as is in, on, under, over or within 9 metres of a watercourse or is otherwise likely to affect any drainage work or the volumetric flow of water in or flowing to or from any drainage work; and

“watercourse” includes all rivers, streams, ditches, drains, culverts, dykes, sluices, sewers and passages through which water flows (whether or not the flow is intermittent) except a public sewer.

2.—(1) Before beginning to construct any specified work, the undertaker shall submit to the drainage authority plans of the work and such further particulars available to it as the drainage authority may within 28 days of the submission of plans reasonably require.

(2) Any such specified work shall not be constructed except in accordance with such plans as may be approved in writing by the drainage authority, or determined under paragraph 11.

(3) Any approval of the drainage authority under this paragraph—

(a) shall not be unreasonably withheld,

(b) shall be deemed to have been given if it is neither given nor refused in writing within 56 days of the submission of plans for approval and in the case of a refusal, accompanied by a statement of the grounds of refusal, and

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- (c) may be given subject to such reasonable requirements as the drainage authority may make for the protection of any drainage work or fishery and for the prevention of flooding.

3. Without prejudice to the generality of paragraph 2, the requirements which the drainage authority may make under that paragraph include conditions requiring the undertaker at its own expense to construct such protective works, whether temporary or permanent, during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work against damage, or
- (b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased by reason of the specified work.

4.—(1) Any specified work, and all protective works required by a drainage authority under paragraph 3, shall be constructed—

- (a) with all reasonable despatch in accordance with the plans approved or deemed to have been approved or settled under this Part of this Schedule,
- (b) to the reasonable satisfaction of the drainage authority.

(2) The undertaker shall give the drainage authority not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days' after the date on which it is brought into use.

(3) If any part of the works comprising a structure in, over or under a drainage work is constructed otherwise than in accordance with the requirements of this part of this schedule, the drainage board concerned may by notice in writing require the undertaker, at the undertaker's own expense, to comply with the requirements of this Part of this Schedule or (if the undertaker so elects and the drainage board concerned in writing consents (such consent not to be unreasonably withheld), to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent and within such limits as the drainage authority concerned reasonably requires.

(4) Subject to paragraph (5), if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (3) is served upon the undertaker, it has failed to begin to take steps to comply with the requirements of the notice and thereafter to make reasonably expeditious progress towards their implementation, the drainage authority concerned may execute the works specified in the notice and any expenditure incurred by it in so doing shall be recoverable from the undertaker.

(5) In the event of any dispute as to whether sub-paragraph (3) is properly applicable to any work in respect of which a notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the drainage authority concerned shall not except in an emergency exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined.

5.—(1) The undertaker shall from the commencement of the construction of the specified works maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land owned by the undertaker or which it otherwise has control of or on land held by the undertaker for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers of the Order or is already in existence.

(2) If any such work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the drainage authority concerned, that drainage authority may by notice in writing require the undertaker to repair and restore the work, or any part thereof, or (if the undertaker so elects and the drainage authority in writing consents (such consent not to be unreasonably withheld),

to remove the work and restore the site to its former condition, to such extent and within such limits as the drainage authority concerned reasonably required.

(3) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin to take steps to comply with the reasonable requirements of the notice and has not thereafter made reasonably expeditious progress towards their implementation, the drainage authority concerned may do anything necessary for such compliance and may recover the expenditure reasonably incurred by it in doing so from that person.

(4) In the event of any dispute as to the reasonableness of a notice served under sub-paragraph (2), the drainage authority concerned shall not, except in a case of emergency, exercise the powers of sub-paragraph (3) until the dispute has been finally determined.

6. If by reason of the construction of any specified work or of the failure of any such work the efficiency of any drainage work for flood defence purposes is impaired, or that work is otherwise damaged, such impairment or damage shall be made good by the undertaker to the reasonable satisfaction of the drainage authority concerned and if the undertaker fails to do so, that drainage authority may make good the same and recover from the undertaker the expense reasonably incurred in doing so.

7. The undertaker shall indemnify the drainage authority concerned in respect of all costs, charges and expenses which it may reasonably incur or have to pay or which it may sustain—

- (a) in the examination or approval of plans under this part of this schedule,
- (b) in the inspection of the construction of the specified works or any protective works required by the drainage authority under this Part of this Schedule.

8.—(1) Without prejudice to the other provisions of this Part of this Schedule, the undertaker shall indemnify each drainage authority from all claims, demands, proceedings, costs, damages or expenses or loss, which may be made or taken against, or recovered from or incurred by the drainage authority by reason of—

- (a) any damage to any drainage work so as to impair its efficiency for the purposes of flood defence,
- (b) any raising or lowering of the water table in land adjoining the works authorised by the Order or any sewers, drains or watercourses,
- (c) any flooding or increased flooding of any such lands,

which is caused by, or results from, the construction of any of the works or any act or omission of the undertaker, its contractors, agents or employees whilst engaged upon the work.

(2) The drainage authority concerned shall give the undertaker reasonable notice of any such claim or demand and no settlement or compromise thereof shall be made without the agreement of the undertaker which agreement shall not be unreasonably withheld.

9. The fact that any work or thing has been constructed or done in accordance with a plan approved or deemed to be approved by a drainage authority, or to its satisfaction, or in accordance with any directions or award of an arbitrator shall not relieve the undertaker of any liability under the provisions of this part of this Schedule.

10. For the purposes of section 109 of the Water Resources Act 1991 (as to structures in, over or under a main river) as applying to the construction of any specified work, any consent or approval given or deemed to be given by the Environment Agency under this Part of this Schedule with respect to such construction shall be deemed also to constitute an approval under that section.

11. Any dispute arising under this Part of this Schedule between the undertaker and a drainage authority (other than a difference as to its meaning or construction) shall, if the parties agree,

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be determined by arbitration, but shall otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs on a reference to him by the undertaker or the drainage authority concerned after notice in writing by one to the other.

PART 2

FOR FURTHER PROTECTION OF ENVIRONMENT AGENCY

12. The following provisions of this Part of this Schedule shall apply for the protection of the Environment Agency unless otherwise agreed between the undertaker and the Environment Agency.

13. Before beginning to construct any work or operation authorised by the Order involving the abstraction of water contained in underground strata, the undertaker will notify the Environment Agency of its proposals.

14. Any such work shall not be constructed except in accordance with such reasonable measures for conserving water (including monitoring and mitigation measures) as may be specified by the Agency by notice in writing to the undertaker within 56 days of the submission of the proposal.

15. The undertaker shall not be obliged to serve any notice which would otherwise be required by section 30 of the Water Resources Act 1991 (which relates to boreholes and similar works in respect of which a licence is not required).

16. Paragraph 11 of this Schedule shall apply to any dispute between the undertaker and the Environment Agency under this Part of this Schedule.

PART 3

FOR PROTECTION OF NETWORK RAIL INFRASTRUCTURE LIMITED

17. The following provisions of this Part of this Schedule shall have effect unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 30, any other person on whom rights or obligations are conferred by that paragraph.

18. In this Part of this Schedule—

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“the engineer” means an engineer appointed by Network Rail for the purposes of this Order;

“plans” includes sections, designs, drawings, specification, soil reports, calculations, descriptions (including description of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

“Network Rail” means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 736 of the Companies Act 1985⁽¹⁾) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or other subsidiary of the holding company of Network Rail Infrastructure Limited;

“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993⁽²⁾) or station lease;

(1) 1985 c. 6.
(2) 1993 c. 43.

“railway property” means any railway belonging to Network Rail and any station, land, works, apparatus and equipment belonging to Network Rail or connected therewith and includes any easement or other property interest held or used by Network Rail for the purposes of such railway or works, apparatus or equipment;

“specified work” means so much of any of the authorised works as is situated upon, across, under, over or within 15 metres of, or may in any way affect, railway property.

19.—(1) Where under this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures.

(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail shall—

- (a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised works pursuant to this Order.

20.—(1) The undertaker shall not exercise the powers conferred by section 11(3) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

(2) The undertaker shall not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The undertaker shall not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

(4) The undertaker shall not exercise the powers conferred by sections 271 or 272 of the 1990 Act, as applied by Schedule 10 to this Order, in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(5) Where Network Rail is asked to give its consent pursuant to sub-paragraphs (1), (2), (3) or (4), such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

21.—(1) The undertaker shall before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work shall not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) shall not be unreasonably withheld or delayed, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated his disapproval of those plans and the grounds of his disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further period of 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

(3) If by the expiry of 28 days beginning with the date on which written notice was served upon the engineer under paragraph (2), Network Rail gives notices to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network

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Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail shall construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph and under the supervision (where appropriate and if given) of the undertaker.

(4) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before the commencement of construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation, decommissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works) and such protective works as may be reasonably necessary for those purposes shall be constructed by Network Rail or by the undertaker, if Network Rail so desires such protective works shall be carried out by the undertaker at its own expense with all reasonable dispatch and the undertaker shall not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

22.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 21(4) shall, when commenced be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 21;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property and as little interference as may be with the conduct of traffic on the railways of Network Rail.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker shall, notwithstanding any such approval, make good such damage and shall pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(3) Without prejudice to any other operational railway requirement, the undertaker shall give to the engineer not less than 180 days' notice of its intention to commence the construction of a specified work and also, except in emergency (when it shall give such notice as may be reasonably practicable), of its intention to carry out any works for the maintenance or repair of a specified work in so far as such work of repair or maintenance may affect railway property.

23. The undertaker shall—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.

24. Network Rail shall at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Schedule during their construction and shall supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them.

25.—(1) If any alterations or additions, either permanent or temporary, to railway property are reasonably necessary during the construction of a specified work or any protective works under paragraph 21(4), or during a period of 12 months after the commencement of regular revenue-earning bus operations using the guided busways comprised in any specified work, in consequence of the

construction of a specified work, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker reasonable notice of its intention to carry out such alterations and additions, the undertaker shall pay to Network Rail the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If during the construction of a specified work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires that part of the specified work to be constructed, Network Rail shall assume the construction of that specified work and the undertaker shall, notwithstanding any such approval of specified work under paragraph 21(3), shall pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

26. The undertaker shall repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

- (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 21(3) or in constructing any protective works under the provisions of paragraph 21(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction of a specified work and otherwise in connection with the implementation of the provisions of this Part of this Schedule;
- (c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;
- (d) in respect of any special traffic working resulting from any speed restrictions which may, in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and
- (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

27. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work not vested in Network Rail appears to be such as adversely affects the operation of railway property, the undertaker shall, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.

28. The undertaker shall not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it shall have first consulted Network Rail and it shall comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

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29. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work shall, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

30.—(1) The undertaker shall pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Schedule which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason of the construction or maintenance of a specified work or the failure thereof; or
- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work; and the undertaker shall indemnify Network Rail 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 his 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 Schedule.

(2) Network Rail shall give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

(3) The sums payable by the undertaker under sub-paragraph (1) shall include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail shall promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

(6) In this paragraph—

“the relevant costs” means the costs, direct losses and expenses (including loss of revenue) incurred by each train operator as a consequence of any restriction of the use of Network Rail’s railway network as a result of the construction, maintenance or failure of a specified work, or any such act or omission as mentioned in sub-paragraph (1); and

“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.

31. Network Rail shall, on receipt of a request from the undertaker, from time to time provide to the undertaker at the cost of the undertaker, written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph 30) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).

32. In the assessment of any sums payable to Network Rail under this Part of this Schedule there shall not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Schedule or increasing the sums so payable.

33. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—

- (a) any railway property shown on the deposited plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such railway property; and
- (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property.