

## SCHEDULES

### SCHEDULE 8

#### PROTECTIVE PROVISIONS

#### PART 4

#### FOR THE PROTECTION OF THE ENVIRONMENT AGENCY

**30.** The following provisions apply for the protection of the Agency unless otherwise agreed in writing between the undertaker and the Agency.

**31.** In this Part of this Schedule—

“the Agency” means the Environment Agency;

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

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

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

“main river” means all watercourses shown as such on the statutory main river maps held by the Agency and the Department for Environment Food and Rural Affairs including any structure or appliance for controlling or regulating the flow of water in or out of the channel;

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

“Roman Bank” means the sea defence known as the Roman Bank as shown on the Roman Bank plan;

“Roman Bank plan” means the plan titled “Roman Bank within the Order limits” certified by the Secretary of State as the Roman Bank plan for the purposes of this Order under article 47 (certification of documents, etc.);

“sea defence” means any bank, wall, embankment (and any berm, counterwall or cross-wall connected to any such bank, wall or embankment), barrier, tidal sluice and other defence, whether natural or artificial, against the inundation of land by sea water or tidal water, including natural or artificial high ground which forms part of or makes a contribution to the efficiency of the defences of the Agency’s area against flooding, but excludes any sea defence works which are for the time being maintained by a coast protection authority under the provisions of the Coast Protection Act 1949(1) or by any local authority or any navigation, harbour or conservancy authority;

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“specified work” means so much of any work or operation authorised by this Order or otherwise as is for the purpose of or in connection with, the construction or maintenance of the authorised development—

- (a) in, on, under, over or within 16 metres of a drainage work or is otherwise likely to—
    - (i) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;
    - (ii) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;
    - (iii) cause obstruction to the free passage of fish or damage to any fishery;
    - (iv) affect the conservation, distribution or use of water resources; or
    - (v) affect the conservation value of the main river and habitats in its immediate vicinity;
  - (b) in, on, under, over or within 16 metres of the base of a sea defence which is likely to—
    - (i) endanger the stability of, cause damage to or reduce the effectiveness of that defence; or
    - (ii) interfere with the Agency’s access to or along that defence;
  - (c) an activity that includes any dredging, raising or taking of any sand, silt, ballast, clay, gravel or other materials from or off the bed or banks of a drainage work (or causing such materials to be dredged, raised or taken), including hydrodynamic dredging or desilting;
  - (d) any quarrying or excavation within 16 metres of a drainage work which is likely to cause damage to or endanger the stability of the banks or structure of that drainage work; and
- “watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, basins, sewers and passages through which water flows except a public sewer.

#### *Submission and approval of plans*

**32.**—(1) Before beginning to construct any specified work, the undertaker must submit to the Agency plans of the specified work and such further particulars available to it as the Agency may within 28 days of the receipt of the plans reasonably request.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 42.

(3) Any approval of the Agency required under this paragraph—

- (a) must not be unreasonably withheld or delayed;
- (b) is deemed to have been refused if it is neither given nor refused within 2 months of the submission of the plans or receipt of further particulars if such particulars have been requested by the Agency for approval;
- (c) in the case of a refusal, accompanied by a statement of the grounds of refusal; and
- (d) may be given subject to such reasonable requirements as the Agency may have for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

(4) The Agency must use its reasonable endeavours to respond to the submission of any plans before the expiration of the period mentioned in sub-paragraph (3)(b).

#### *Construction of protective works*

**33.** Without limiting paragraph 32, the requirements which the Agency may have under that paragraph include conditions requiring the undertaker, at its own expense, to construct such

protective works, whether temporary or permanent, before or 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 any specified work.

#### *Timing of works and service of notices*

**34.**—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 33, must be constructed—

- (a) without unreasonable delay in accordance with the plans approved under this Part of this Schedule; and
- (b) to the reasonable satisfaction of the Agency,

and the Agency is entitled by its officer to watch and inspect the construction of such works.

(2) The undertaker must give to the Agency 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 completed.

(3) If the Agency reasonably requires, the undertaker must construct all or part of the protective works so that they are in place prior to the construction of the specified work to which the protective works relate.

(4) If any part of a specified work or any protective work required by the Agency is constructed otherwise than in accordance with the requirements of this Schedule, the Agency 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 Agency in writing consents, such consent not to be unreasonably withheld or delayed) 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 Agency reasonably requires.

(5) Subject to sub-paragraph (6) and paragraph 39, if, within a reasonable period, being not less than 28 days beginning with the date when a notice under sub-paragraph (4) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice and any reasonable expenditure incurred by the Agency in so doing is recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the Agency must not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 41.

#### *Maintenance of drainage works*

**35.**—(1) Subject to sub-paragraph (5) the undertaker must 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 held by the Applicant

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for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the undertaker to repair the drainage work, or any part of such drainage work, or (if the undertaker so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed), to remove the specified work and restore the site to its former condition, to such extent and within such limits as the Agency reasonably requires.

(3) Subject to sub-paragraph (4) and paragraph 39, if, within a reasonable period, being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is reasonably necessary for such compliance and any expenditure reasonably incurred by the Agency in so doing is recoverable from the undertaker.

(4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the Agency will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined in accordance with paragraph 41.

(5) This paragraph does not apply to—

- (a) drainage works which are vested in the Agency, or which the Agency or another person is liable to maintain and is not proscribed by the powers of the Order from doing so; and
- (b) any obstruction of a drainage work expressly authorised in the approval of specified works plans and carried out in accordance with the provisions of this Part provided that any obstruction is removed as soon as reasonably practicable.

#### *Impairment of drainage works*

**36.** Subject to paragraph 39, 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 drainage work is otherwise damaged, such impairment or damage must be made good by the undertaker to the reasonable satisfaction of the Agency and if the undertaker fails to do so, the Agency may make good the impairment or damage and recover any expenditure reasonably incurred by the Agency in so doing from the undertaker.

#### *Agency access*

**37.** If by reason of construction of the specified work the Agency's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the undertaker must provide such alternative means of access that will allow the Agency to maintain the flood defence or use the equipment no less effectively than was possible before the obstruction as soon as reasonably practicable and within 24 hours of the undertaker becoming aware of such obstruction unless a longer period of time has been agreed in writing by the Agency.

#### *Free passage of fish*

**38.—**(1) The undertaker must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in the fishery during the construction of any specified work.

(2) If by reason of—

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- (a) the construction of any specified work; or
- (b) the failure of any such work,

damage to the fishery is caused, or the Agency has reason to expect that such damage may be caused, the Agency may serve notice on the undertaker requiring it to take such steps as may be reasonably practicable to make good the damage, or, as the case may be, to protect the fishery against such damage.

(3) Subject to paragraph 39, if within such time as may be reasonably practicable for that purpose after the receipt of written notice from the Agency of any damage or expected damage to a fishery, the undertaker fails to take such steps as are described in sub-paragraph (2), the Agency may take those steps and any expenditure reasonably incurred by the Agency in so doing is recoverable from the undertaker.

(4) Subject to paragraph 39, in any case where immediate action by the Agency is reasonably required in order to secure that the risk of damage to the fishery is avoided or reduced, the Agency may take such steps as are reasonable for the purpose, and may recover from the undertaker any reasonable expenditure incurred in so doing provided that notice specifying those steps is served on the undertaker as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

**39.** The undertaker must indemnify the Agency in respect of all direct reasonable costs, charges and expenses which the Agency may reasonably incur —

- (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 Agency under this Part of this Schedule; and
- (c) in the carrying out of any surveys or tests by the Agency which are reasonably required in connection with the construction of the specified works.

#### *Indemnity*

**40.—(1)** The undertaker is responsible for and indemnifies the Agency for all costs and direct losses which may be reasonably incurred or suffered by the Agency by reason of—

- (a) the construction, operation or maintenance of any specified works comprised within the authorised works or the failure of such works comprised within them; or
- (b) any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged upon the construction, operation or maintenance of the authorised works or dealing with any failure of the authorised works,

except in so far as such costs or losses in relation to the operation or maintenance of the authorised works are properly covered and payable under separate agreement made between the Agency and the undertaker.

(2) For the avoidance of doubt, in sub-paragraph (1)—

“costs” includes reasonably incurred—

- (a) expenses and charges;
- (b) staff costs and overheads;
- (c) legal costs; and

“losses” includes physical damage.

(3) The undertaker must indemnify the Agency against all liabilities, claims and demands arising out of or in connection with the authorised works or otherwise out of the matters referred to in sub-paragraph (1)(a) and (b).

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- (4) For the avoidance of doubt, in sub-paragraph (3)—
- “claims” and “demands” include as applicable—
- (a) costs (within the meaning of sub-paragraph (2)) incurred in connection with any claim or demand;
  - (b) any interest element of sums claims or demanded;
- “liabilities” includes—
- (a) contractual liabilities;
  - (b) tortious liabilities (including liabilities for negligence or nuisance);
  - (c) liabilities to pay statutory compensation or for breach of statutory duty;
  - (d) liabilities to pay statutory penalties imposed on the basis of strict liability (but does not include liabilities to pay other statutory penalties).
- (5) The Agency must give to the undertaker reasonable notice of any such claim or demand without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.
- (6) The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved by the Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, will not relieve the undertaker from any liability under the provisions of this Part of this Schedule.

#### *Disputes*

**41.** Any dispute arising between the undertaker and the Agency under this part of this Schedule must, if the parties agree, be determined by arbitration under article 49 (arbitration), but will otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs or its successor and the Secretary of State for Energy Security and Net Zero or its successor acting jointly on a reference to them by the undertaker or the Agency, after notice in writing by one to the other.

#### *Roman Bank*

**42.—(1)** The undertaker must at its own cost engage the services of a suitably experienced chartered civil engineer to carry out an initial condition survey of the Roman Bank prior to carrying out the authorised development in, on, under, over or within 16 metres of the base of the Roman Bank.

(2) The inspection must be undertaken on foot with information recorded on both sides of the bank as well as the crest.

**43.** The undertaker must at its own cost engage the services of a suitably qualified surveyor to carry out a topographical survey of the parts of the Roman Bank within the Order limits to establish the continuous height of the Roman Bank prior to carrying out any authorised development in, on, under, over or within 16 metres of the base of the Roman Bank.

- 44.** The initial condition survey in accordance with paragraph 42 must report on—
- (a) the height of the Roman Bank (based on the topographical survey undertaken under paragraph 43);
  - (b) the structural condition of the Roman Bank including taking measurements and recording the location of any existing defects, such as cracks, holes, slumping burrows, scour; and
  - (c) a photographic record of the inspection of the Roman Bank identifying the above elements using geo-referenced photographs or marked on maps with grid references.

**45.** The undertaker must provide to the Agency a copy of—

- (a) the initial condition survey; and
- (b) the topographical survey,

as soon as reasonably practicable following the undertaker's receipt of those documents.

**46.** The undertaker at its own costs will inspect, maintain and repair Roman Bank subject to the provisions in paragraph 47.

**47.** In respect of the Roman Bank only, this Part of Schedule 8 applies subject to the following variations—

- (a) the definition of “specified work” in paragraph 31(b) is to be read as—

“Prior to carrying out any works in, on, under, over or within 16 metres of the base of the Roman Bank which is likely to—

- (i) endanger the stability of, cause damage to or reduce the effectiveness of the Roman Bank (in light of the condition assessed in the initial condition survey subject to any changes of condition or impacts on the effectiveness of the Roman Bank approved by the Agency); or
- (ii) interfere with the Agency's access to or along that defence.”;

- (b) paragraph 33 is subject to the following—

“Provided that the undertaker is not required to take any step which results in the Roman Bank exceeding the standards, efficiency for flood defence purposes, or otherwise reducing the risk of flooding based on the condition of the Roman Bank as assessed in the initial condition survey subject to any changes to condition as a result of specified works approved by the Agency.”;

- (c) paragraph 35(1) is subject to the following—

“Provided that the undertaker is not required to maintain or repair the Roman Bank or to keep it free from obstruction, to a standard greater than its condition as assessed in the initial condition survey subject to any changes to condition as a result of specified works approved by the Agency.”; and

- (d) paragraph 36 is subject to the following—

“Provided that the undertaker is not required to restore efficiency, damage or other impairments at the Roman Bank to a standard greater than its condition as assessed in the initial condition survey subject to any changes to condition as a result of specified works approved by the Agency.”.