

SCHEDULES

SCHEDULE 8

Article 54

PROTECTIVE PROVISIONS

PART 1

FOR PROTECTION OF NETWORK RAIL

1. 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 14, any other person on whom rights or obligations are conferred by that paragraph.

2. 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;

“network licence” means the network licence, as the same is amended from time to time, granted to Network Rail by the Secretary of State in exercise of his powers under section 8 of the 1993 Act;

“plans” includes sections, designs, drawings, specifications, soil reports, calculations, descriptions (including descriptions 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 another subsidiary of the holding company of Network Rail Infrastructure Limited;

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

“railway property” means any railway belonging to Network Rail and—

(a) any station, land, works, apparatus and equipment belonging to Network Rail and includes any land held or used by Network Rail for the purposes of such railway or works, apparatus or equipment; and

(b) any easement or other property interest held by or for the benefit of Network Rail;

“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; and

“the undertaker” means the Executive.

(1) 1985 c. 6.

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3.—(1) The undertaker shall not exercise the powers conferred by article 23 or 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 7 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.

4.—(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 shall not commence construction of the specified work until 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, and if by the end of the period of 56 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 he shall be deemed to have approved the plans as submitted.

(3) If by the end of the period of 56 days beginning with the date on which such plans have been supplied to Network Rail, Network Rail gives notice 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 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 the 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 train 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 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 a specified work until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

5.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 4(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 4(1);
- (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;

and 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.

(2) The Undertaker shall give to the engineer no less than 180 days' notice of its intention to commence the construction of a specified work and shall give, except in emergency (when it shall give such notice as may be reasonably practicable), 90 days' notice 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.

6. 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.

7. 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.

8.—(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 4(4), or during a period of 12 months after the commencement of regular revenue-earning train operations using the new railways 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 or 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 in 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 the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions referred to in paragraph 8(1) a capitalised sum representing such saving shall be set off against any sum payable by the undertaker to Network Rail under this paragraph.

9. 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 4(3) or in constructing any protective works under the provisions of paragraph 4(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

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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.

10.—(1) In this paragraph—

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail’s apparatus generated by the operation of the authorised works (including the operation of trains using the new railways comprised in the works) where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised works) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph shall apply to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 4(1) for the relevant part of the authorised works giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change) other than any change carried out by Network Rail as part of, or in consequence of the authorised works.

(3) Subject to sub-paragraph (5), the undertaker shall in the design and construction of the authorised works take all measures necessary to prevent EMI and shall establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the undertaker’s compliance with sub-paragraph (3)—

- (a) the undertaker shall consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and thereafter shall continue to consult with Network Rail (both before and after formal submission of plans under paragraph 4(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Network Rail shall make available to the undertaker all information in Network Rail’s possession reasonably requested by the undertaker in respect of Network Rail’s apparatus identified pursuant to sub-paragraph (a); and
- (c) Network Rail shall allow the undertaker reasonable facilities for the inspection of Network Rail’s apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail’s apparatus, Network Rail shall not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution shall be selected in Network Rail’s reasonable discretion, and in relation to such modifications paragraph 4(1) shall have effect subject to this sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning train operations on the new railways comprised in the authorised works and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised works causes EMI then the undertaker shall immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as

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reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

- (a) the undertaker shall afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI;
- (b) Network Rail shall afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI; and
- (c) Network Rail shall make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6)—

- (a) Network Rail shall allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;
- (b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs shall be carried out and completed by the undertaker in accordance with paragraph 5.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 14(1) shall apply to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 9(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 53 to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

11.—(1) 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 the specified work 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.

(2) If at any time after the completion of a specified work, being a work vested in Network Rail, the undertaker gives notice to Network Rail informing it that the state of maintenance of the specified work appears to be such as adversely affects the operation of the authorised tramway, Network Rail 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 the authorised tramway.

12. 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.

13. 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

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of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

14.—(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) reasonably 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.

15. Network Rail shall, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with 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 14) 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 Schedule (including any claim relating to those relevant costs).

16. In the assessment of any sums payable to Network Rail under 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 payment of those sums by the undertaker under this Schedule or increasing the sums so payable.

17. 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.

PART 2

FOR PROTECTION FOR BRITISH WATERWAYS BOARD

1.—(1) For the protection of BW the following provisions of this Part of this Schedule shall, unless otherwise agreed in writing between the undertaker and BW, have effect.

Interpretation

(2) In this Part of this Schedule—

“BW” means the British Waterways Board;

“BW’s network” means BW’s network of waterways;

“construction”, in relation to any specified work or protective work, includes—

- (i) the execution and placing of that work; and
- (ii) any relaying, renewal or maintenance of that work as may be carried out during the period of 24 months from the completion of that work;

and “construct” and “constructed” have corresponding meanings;

“detriment” means any damage to a waterway or any other property of BW and, without prejudice to the generality of that meaning, includes—

- (a) any obstruction of, or interference with, or hindrance or danger to, navigation or to any use of a waterway (including towing paths);
- (b) the erosion of the bed or banks of a waterway, or the impairment of the stability of any works, lands or premises forming part of a waterway;
- (c) the deposit of materials in, or the siltation of, a waterway, so as to damage the waterway;
- (d) the pollution of a waterway;
- (e) any significant alteration in the water level of a waterway, or significant interference with the supply of water thereto, or drainage of water therefrom;
- (f) any harm to the ecology of a waterway (including any adverse impact on any site of special scientific interest comprised in BW’s network);
- (g) any interference with the exercise by any person of rights over BW’s network;

“the engineer” means an engineer appointed by BW for the purpose in question;

“plans” includes sections, designs, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction) and programmes;

“practical completion” means practical completion of all of the specified work notwithstanding that items which would ordinarily be considered snagging items remain outstanding, and the expression “practically complete” and “practically completed” shall be construed accordingly;

“protective work” means a work constructed under sub-paragraph 7(3)(a);

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“specified works” 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 the waterway;

“towing path” means the towing path forming part of the waterway;

“the undertaker” means the Executive; and

“waterway” means any canal or inland navigation belonging to or under the management or control of BW, and includes any works, lands or premises belonging to BW, or under its management or control, and held or used by BW in connection with any such canal or inland navigation.

Powers requiring BW’s consent

2.—(1) The undertaker shall not under the powers conferred by this Order acquire compulsorily any land of BW or any easement or other right over such land, or use any such land, unless such acquisition or use is with the consent of BW.

(2) The undertaker shall not in the exercise of the powers conferred by this Order obstruct or interfere with pedestrian or vehicular access to a waterway unless such obstruction or interference with such access is with the consent of BW.

(3) The undertaker shall not exercise the powers conferred by article 13(1) in relation to any way over land comprised in a waterway unless such exercise is with the consent of BW.

(4) Nothing in article 19 shall authorise the undertaker—

(i) to discharge any water directly or indirectly into a waterway; or

(ii) to carry out any works to, or make any opening in, or otherwise interfere with, a waterway (including the banks and bed thereof),

except with the consent of BW and on terms that BW may reasonably require, and in accordance with plans approved by, and under the supervision (if given) of, the engineer.

(5) The undertaker shall not exercise any power conferred by this Order in such a way as to interfere with the supply of water to or the drainage of water from a waterway unless such exercise is with the consent of BW.

(6) The undertaker shall not exercise the powers conferred by article 23 or the powers conferred by section 11(3) of the 1965 Act, in relation to a waterway, unless such exercise is with the consent of BW.

(7) The undertaker shall not exercise the powers conferred by sections 271 or 272 of the 1990 Act, as applied by Schedule 7 to this Order, so as to divert any right of access to a waterway, but such right of access may be diverted with the consent of BW.

(8) The consent of BW pursuant to sub-paragraphs (1) to (7) and the approval of plans under paragraph (4) shall not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions which in the case of article 19 may include conditions—

(a) specifying the maximum volume of water which may be discharged in any period; and

(b) authorising BW on giving reasonable notice (except in an emergency, when BW may require immediate suspension) to the undertaker to require the undertaker to suspend the discharge of water or reduce the flow thereof where this is necessary by reason of any operational or environmental requirement of BW.

Vehicles, plant and machinery

3. The undertaker shall not use any land or property of BW forming part of a waterway for the passage or siting of vehicles, plant or machinery employed in the construction of the specified works other than—

- (a) with the consent in writing of the engineer whose consent shall not be unreasonably withheld; and
- (b) subject to compliance with such reasonable requirements as the engineer may from time to time specify—
 - (i) for the prevention of detriment; or
 - (ii) in order to avoid or reduce any inconvenience to BW, its officers and agents and all other persons lawfully on such land or property;

but nothing in this paragraph shall apply in relation to anything done in accordance with any approval given by BW under paragraph 7.

Closure of towing paths, etc.

4. If in consequence of or in connection with the exercise of the powers of this Order any part of a towing path or any public right of way giving access thereto (“the closed section”) is temporarily closed to persons on foot on cycles or in a wheelchair and there is no way which provides a reasonable alternative, the undertaker shall, to the reasonable satisfaction of BW, provide in substitution a sufficient and convenient way for such persons between the points of commencement and termination of the closed section for such time as the closure continues.

Fencing

5. Where so required by the engineer the undertaker shall to the reasonable satisfaction of the engineer fence off a specified work or a protective work or take such other steps as the engineer may require to be taken for the purpose of separating a specified work or a protective work from a waterway, whether on a temporary or permanent basis or both.

Survey of waterway

6.—(1) Before the commencement of the initial construction of any part of the specified works and again following practical completion of the specified works the undertaker shall bear the reasonable cost of the carrying out by a qualified engineer (“the engineer”), to be approved by BW and the undertaker, of a survey including a dip-survey to measure the depth of the waterway (“the survey”) of so much of the waterway and of any land and existing works of the undertaker which may provide support for the waterway as will or may be affected by the specified works.

(2) For the purposes of the survey the undertaker shall—

- (i) on being given reasonable notice (save in case of emergency, when immediate access shall be afforded) afford reasonable facilities to the engineer for access to the site of the specified works and to any land and existing works of the undertaker which may provide support for the waterway as will or may be affected by the specified works; and
- (ii) supply the engineer as soon as reasonably practicable with all such information as he may reasonably require with regard to such existing works of the undertaker and to the specified works or the method of construction thereof.

(3) The reasonable costs of the survey shall include the costs of any dewatering or reduction of the water level of any part of the waterway (where reasonably required) which may be effected to facilitate the carrying out of the survey and the provision of this Part of this Schedule shall apply

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with all necessary modifications to any such dewatering or reduction in the water level as though the same were specified works.

(4) Copies of the survey shall be provided to both BW and the undertaker at no cost to BW.

Approval of plans, protective works etc.

7.—(1) The undertaker shall before commencing construction of any specified work including any temporary works supply to BW proper and sufficient plans of that work and such further particulars available to it as BW may within 14 days of the submission of the plans reasonably require for the approval of the engineer and shall not commence such construction of a specified work until plans of that work 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 within 56 days after such plans (including any other particulars reasonably required under sub-paragraph (1)) have been supplied to BW, the engineer has not intimated his disapproval of those plans and the grounds of his disapproval he shall be deemed to have approved the plans as submitted.

(3) When signifying his approval of the plans the engineer may specify—

- (a) any protective work (whether temporary or permanent) which in his reasonable opinion should be carried out before the commencement of a specified work to prevent detriment; and
- (b) such other requirements as may be reasonably necessary to prevent detriment;

and such protective works shall be constructed by the undertaker or by BW at the undertaker's request with all reasonable dispatch and the undertaker shall not commence the construction of a specified work until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

(4) The undertaker shall pay to BW a capitalised sum representing the reasonably increased or additional cost of maintaining and, when necessary, renewing any works, including any permanent protective works provided under sub-paragraph (3), and of carrying out any additional dredging of the waterway necessitated by the exercise of any of the powers of this Order but if the cost of maintaining the waterway, or of works of renewal of the waterway, is reduced in consequence of any such works, a capitalised sum representing such reasonable saving shall be set off against any sum payable by the undertaker to BW under this paragraph.

(5) In the event that the undertaker fails to complete the construction of, or part of, the specified works BW may, if it is reasonably required in order to avoid detriment, construct any of the specified works, or part of such works, (together with any adjoining works) in order to complete the construction of, or part of, the specified works or make such works and the undertaker shall reimburse BW all costs, fees, charges and expenses it has reasonably incurred in carrying out such works.

Design of works

8. Without prejudice to its obligations under the foregoing provisions of this Part of this Schedule the undertaker shall consult, collaborate and respond constructively to any approach, suggestion, proposal or initiative made by BW on—

- (a) the design and appearance of the specified works, including the materials to be used for their construction; and
- (b) the environmental effects of the specified works;

and shall have regard to such views as may be expressed by BW to the extent that these accord with the requirements of the local planning authority in response to such consultation pursuant in

particular to the requirements imposed on BW by section 22 (General environmental and recreational duties) of the British Waterways Act 1995⁽²⁾ and to the interest of BW in preserving and enhancing the environment of its waterways.

Notice of works

9. The undertaker shall give to the engineer 56 days' notice of its intention to commence the construction of any of the specified or protective works, or, in the case of repair carried out in an emergency, such notice as may be reasonably practicable so that, in particular, BW may where appropriate arrange for the publication of notices bringing those works to the attention of users of BW's network.

Lighting

10. The undertaker shall provide and maintain at its own expense in the vicinity of the specified or protective works such temporary lighting and such signal lights for the control of navigation as the engineer may reasonably require during the construction or failure of the specified or protective works.

Construction of specified works

11.—(1) Any specified or protective works shall, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled as aforesaid and with any requirements made under sub-paragraph 7(3) and paragraph 8;
- (b) under the supervision (if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little detriment as is reasonably practicable;
- (d) in such manner as to cause as little inconvenience as is reasonably practicable to BW, its officers and agents and all other persons lawfully using the waterways, except to the extent that temporary obstruction has otherwise been agreed by BW.

(2) Nothing in this Order shall authorise the undertaker to make or maintain any permanent works in or over a waterway so as to impede or prevent (whether by reducing the width of a waterway or otherwise) the passage of any vessel which is of a kind (as to its dimensions) for which BW is required by section 105(1)(b) and (2) of the Transport Act 1968⁽³⁾ to maintain the waterway.

(3) Following the completion of the construction of the specified works the undertaker shall restore the waterway to a condition no less satisfactory than its condition immediately prior to the commencement of those works.

Prevention of pollution

12. The undertaker shall not in the course of constructing a specified work or a protective work or otherwise in connection therewith do or permit anything which may result in the pollution of a waterway or the deposit of materials therein and shall take such steps as the engineer may reasonably require to avoid or make good any breach of its obligations under this sub-paragraph.

(2) 1995 c. i.
(3) 1968 c. 73.

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Access to work: provision of information

- 13.**—(1) The undertaker on being given reasonable notice shall—
- (a) at all times allow 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.
- (2) BW on being given reasonable notice shall—
- (a) at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by BW under this Part of this Schedule during their construction; and
 - (b) supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them and the undertaker shall reimburse BW's reasonable costs in relation to the supply of such information.

Alterations to waterway

14.—(1) If during the construction of a specified work or a protective work or during a period of 24 months after the completion of those works any alterations or additions, either permanent or temporary, to a waterway are reasonably necessary in consequence of the construction of the specified work or the protective work in order to avoid detriment, and BW gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which shall be specified in the notice), the undertaker shall pay to BW 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 BW in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If the cost of maintaining, working or renewing the waterway is reduced in consequence of any such alterations or additions a capitalised sum representing such saving shall be set off against any sum payable by the undertaker to BW under this paragraph.

Maintenance of works

15. If at any time after the completion of a specified work or a protective work, not being a work vested in BW, BW gives notice to the undertaker informing it that the state of maintenance of the work appears to be such that the work is causing or likely to cause detriment, the undertaker shall, on receipt of such notice, take such steps as may be reasonably necessary to put the work in such state of maintenance as not to cause such detriment.

Repayment of BW's fees, etc.

16. The undertaker shall repay to BW all fees, costs, charges and expenses reasonably incurred by BW—

- (a) in constructing any protective works under the provisions of paragraph 7(3)(a) above;
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction or repair of a specified work and any protective works;
- (c) in respect of the employment during the construction of the specified works or any protective works of any inspectors, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, watching and lighting any waterway and for preventing, so far as may be reasonably practicable, interference, obstruction, danger

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or accident arising from the construction or failure of the specified works or any protective works; and

- (d) in bringing the specified works or any protective works to the notice of users of BW's network.

Costs of alterations, etc.

17. Any additional expenses which BW may reasonably incur in altering, reconstructing or maintaining a waterway 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 BW.

Making good of detriment; compensation and indemnity, etc.

18.—(1) If any detriment shall be caused by the construction or failure of the specified works or the protective works if carried out by the undertaker, the undertaker (if so required by BW) shall make good such detriment and shall pay to BW all reasonable expenses to which BW may be put, and compensation for any loss which BW may sustain, in making good or otherwise by reason of the detriment.

(2) The undertaker shall be responsible for and make good to BW all costs, charges, damages, expenses and losses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by BW—

- (a) by reason of the construction of a specified work or a protective 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 the construction of a specified work or a protective work;

and subject to paragraph (4) below the undertaker shall effectively indemnify and hold harmless BW from and against all claims and demands arising out of or in connection with any of the matters referred to in sub-paragraphs (a) and (b) above.

(3) The fact that any act or thing may have been done by BW 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 or in accordance with any directions or awards of an arbitrator shall not (if it was done without negligence on the part of BW or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.

(4) BW shall give the undertaker reasonable notice of any such claim or demand as aforesaid and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

Details of capitalised sums to be provided

19. If BW or the undertaker cannot jointly agree the formula by which the capitalised sum is calculated it shall be settled by arbitration in accordance with article 53.

Arbitration

20. Any difference arising between the undertaker and BW under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) shall be referred to and settled by arbitration in accordance with article 53.

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