

SCHEDULES

SCHEDULE 8

PROTECTIVE PROVISIONS

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;

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“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);

“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(1) 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(2) 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.

(1) 1995 c. i.
(2) 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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