

SCHEDULES

SCHEDULE 8

Article 38

PROTECTIVE PROVISIONS

PART 1

FOR THE PROTECTION OF ELECTRICITY, GAS, WATER AND SEWERAGE UNDERTAKERS

Application

1. For the protection of the undertakers referred to in this Part of this Schedule the following provisions have effect unless otherwise agreed in writing between the Company and the undertaker concerned.

2. The provisions of paragraph 1 of Schedule 6 (provisions relating to statutory undertakers etc.), in so far as they relate to the removal of apparatus, do not apply in relation to apparatus to which this Part of this Schedule applies.

Interpretation

3. In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable the undertaker in question to fulfil its statutory functions in a manner not less efficient than previously;

“apparatus” means—

- (a) in the case of an electricity undertaker, electric lines or electrical plant (as defined in the Electricity Act 1989(1)), belonging to or maintained by that undertaker;
- (b) in the case of a gas undertaker, any mains, pipes or other apparatus belonging to or maintained by a gas transporter for the purposes of gas supply;
- (c) in the case of a water undertaker, mains, pipes or other apparatus belonging to or maintained by that undertaker for the purposes of water supply; and
- (d) in the case of a sewerage undertaker—
 - (i) any drain or works vested in the undertaker under the Water Industry Act 1991; and
 - (ii) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4) of that Act or an agreement to adopt made under section 104 of that Act,

and includes a sludge main, disposal main (within the meaning of section 219 of that Act) or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works,

(1) 1989 c. 29.

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and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

“functions” includes powers and duties;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over or upon land; and

“undertaker” means—

(e) any licence holder within the meaning of Part 1 of the Electricity Act 1989;

(f) a gas transporter within the meaning of Part 1 of the Gas Act 1986(2);

(g) a water undertaker within the meaning of the Water Industry Act 1991; and

(h) a sewerage undertaker within the meaning of Part 1 of the Water Industry Act 1991,

for the area of the authorised works, and in relation to any apparatus, means the undertaker to whom it belongs or by whom it is maintained.

4. This Part of this Schedule does not apply to apparatus in respect of which the relations between the Company and the undertaker are regulated by the provisions of Part 3 of the 1991 Act.

Acquisition of apparatus

5. Regardless of any provision in this Order or anything shown on the Order plans, the Company must not acquire any apparatus otherwise than by agreement.

Alternative apparatus

6.—(1) If in the exercise of the powers conferred by this Order, the Company acquires any interest in any land in which any apparatus is placed, that apparatus must not be removed under this Part of this Schedule and any right of an undertaker to maintain that apparatus in that land must not be extinguished until alternative apparatus has been constructed and is in operation to the reasonable satisfaction of the undertaker in question.

(2) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the Company requires the removal of any apparatus placed in that land, it must give to the undertaker in question written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order an undertaker reasonably needs to remove any of its apparatus) the Company must, subject to sub-paragraph (3), afford to the undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of the Company and subsequently for the maintenance of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the Company, or the Company is unable to afford such facilities and rights as are mentioned in sub-paragraph (2), in the land in which the alternative apparatus or part of such apparatus is to be constructed, the undertaker in question must, on receipt of a written notice to that effect from the Company, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(4) Any alternative apparatus to be constructed in land of the Company under this Part of this Schedule is to be constructed in such manner and in such line or situation as may be agreed between the undertaker in question and the Company or in default of agreement settled by arbitration in accordance with article 40 (arbitration).

(2) 1986 c. 44.

(5) The undertaker in question must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 40 (arbitration), and after the grant to the undertaker of any such facilities and rights as are referred to in sub-paragraph (2) or (3), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the Company to be removed under the provisions of this Part of this Schedule.

(6) Regardless of anything in sub-paragraph (5), if the Company gives notice in writing to the undertaker in question that it desires itself to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the Company, that work, instead of being executed by the undertaker, must be executed by the Company without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of the undertaker.

(7) Nothing in sub-paragraph (6) authorises the Company to execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within 300 millimetres of the apparatus.

7.—(1) Where, in accordance with the provisions of this Part of this Schedule, the Company affords to an undertaker facilities and rights for the construction and maintenance in land of the Company of alternative apparatus in substitution for apparatus to be removed, those facilities and rights are to be granted upon such terms and conditions as may be agreed between the Company and the undertaker in question or in default of agreement settled by arbitration in accordance with article 40 (arbitration).

(2) In settling those terms and conditions in respect of alternative apparatus to be constructed in or along any railway of the Company, the arbitrator must—

- (a) give effect to all reasonable requirements of the Company for ensuring the safety and efficient operation of the railway and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of the Company or the traffic on the railway; and
- (b) so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to the terms and conditions, if any, applicable to the apparatus constructed in or along the railway for which the alternative apparatus is to be substituted.

(3) If the facilities and rights to be afforded by the Company in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the arbitrator less favourable on the whole to the undertaker in question than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the arbitrator must make such provision for the payment of compensation by the Company to that undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Existing apparatus: protection and access

8.—(1) Not less than 28 days before starting the execution of any works of the type referred to in paragraph 6(2) that are near to, or will or may affect, any apparatus the removal of which has not been required by the Company under paragraph 6(2), the Company must submit to the undertaker in question a plan, section and description of the works to be executed.

(2) Those works are to be executed only in accordance with the plan, section and description submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by the undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the undertaker is entitled to watch and inspect the execution of those works.

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(3) Any requirements made by an undertaker under sub-paragraph (2) must be made within a period of 21 days beginning with the date on which a plan, section and description under sub-paragraph (1) are submitted to it.

(4) If an undertaker in accordance with sub-paragraph (3) and in consequence of the works proposed by the Company, reasonably requires the removal of any apparatus and gives written notice to the Company of that requirement, paragraphs 1 to 7 apply as if the removal of the apparatus had been required by the Company under paragraph 6(2).

(5) Nothing in this paragraph precludes the Company from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.

(6) The Company is not required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to the undertaker in question notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph (2) in so far as is reasonably practicable in the circumstances.

Expenses

9.—(1) Subject to the following provisions of this paragraph, the Company must repay to an undertaker the reasonable expenses incurred by that undertaker in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus (including costs or compensation payable in connection with the acquisition of land for that purpose) which may be required in consequence of the execution of any such works as are referred to in paragraph 6(2).

(2) The value of any apparatus removed under the provisions of this Part of this Schedule is to be deducted from any sum payable under sub-paragraph (1), that value being calculated after removal.

(3) If in accordance with the provisions of this Part of this Schedule—

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the Company or, in default of agreement, is not determined by arbitration in accordance with article 40 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to the undertaker in question by virtue of sub-paragraph (1) is to be reduced by the amount of that excess.

(4) For the purposes of sub-paragraph (3)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus must not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole must be treated as if it also had been agreed or had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to an undertaker in respect of works by virtue of sub-paragraph (1) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the undertaker any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

Damage to apparatus: costs, losses, etc.

10.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works referred to in paragraph 6(2), any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of an undertaker, or there is any interruption in any service provided, or in the supply of any goods, by any undertaker, the Company must—

- (a) bear and pay the cost reasonably incurred by that undertaker in making good such damage or restoring the supply; and
- (b) make reasonable compensation to that undertaker for any other expenses, loss, damages, penalty or costs incurred by the undertaker,

by reason or in consequence of any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of an undertaker, its officers, servants, contractors or agents.

(3) An undertaker must give the Company reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the Company which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Enactments and agreements

11. Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the Company and an undertaker in respect of any apparatus laid or erected in land belonging to the Company on the date on which this Order is made.

PART 2

FOR THE PROTECTION OF OPERATORS OF ELECTRONIC COMMUNICATIONS CODE NETWORKS

12.—(1) For the protection of any operator, the following provisions have effect unless otherwise agreed in writing between the Company and the operator.

(2) In this Part of this Schedule—

“electronic communications apparatus” has the same meaning as in paragraph 5 of the electronic communications code;

“the electronic communications code” has the same meaning as in section 106(3) (application of the electronic communications code) of Part 2 of the 2003 Act;

“electronic communications code network” means—

(3) Section 106(1) was amended by section 4 of the Digital Economy Act 2017 (c. 30).

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- (a) so much of an electronic communications network or infrastructure system provided by an electronic communications code operator as is not excluded from the application of the electronic communications code by a direction under section 106 of the 2003 Act; and
- (b) an electronic communications network which the Secretary of State is providing or proposing to provide;

“electronic communications code operator” means a person in whose case the electronic communications code is applied by a direction under section 106 of the 2003 Act;

“infrastructure system” has the same meaning as in paragraph 7(1) of the electronic communications code and references to providing an infrastructure system are to be construed in accordance with paragraph 7(2) of that code; and

“operator” means the operator of an electronic communications code network.

13.—(1) Subject to sub-paragraphs (2) to (4), if as the result of the authorised works or their construction, or of any subsidence resulting from any of those works—

- (a) any damage is caused to any electronic communications apparatus belonging to an operator (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works, or other property of an operator); or
- (b) there is any interruption in the supply of the service provided by an operator,

the Company must bear and pay the cost reasonably incurred by the operator in making good such damage or restoring the supply and must—

- (i) make reasonable compensation to an operator for loss sustained by it; and
- (ii) indemnify an operator against claims, demands, proceedings, costs, damages and expenses which may be made or taken against, or recovered from, or incurred by, an operator by reason, or in consequence of, any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of an operator, its officers, servants, contractors or agents.

(3) The operator must give the Company reasonable notice of any such claim or demand and no settlement or compromise of the claim or demand may be made without the consent of the Company which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

(4) Any difference arising between the Company and the operator under this paragraph is to be referred to and settled by arbitration under article 40 (arbitration).

14. This Part of this Schedule does not apply to—

- (a) any apparatus in respect of which the relations between the Company and an operator are regulated by the provisions of Part 3 of the 1991 Act; or
- (b) any damage, or any interruption, caused by electro-magnetic interference arising from the construction or use of the authorised works.

15. Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the Company and an operator in respect of any apparatus laid or erected in land belonging to the Company on the date on which this Order is made.

PART 3

FOR THE PROTECTION OF DRAINAGE AUTHORITIES AND THE ENVIRONMENT AGENCY

16.—(1) The following provisions of this Part of this Schedule apply for the protection of the drainage authority unless otherwise agreed in writing between the Company and the drainage authority.

(2) In this Part of this Schedule—

“the Agency” means the Environment Agency;

“a category 1 specified work” means so much of any permanent or temporary work or operation authorised by this Order (which includes, for the avoidance of doubt, any dredging and any any geotechnical investigations that may be undertaken) as consists of—

- (a) erecting any structure (whether temporary or permanent) in, over or under a main river if the work is likely to affect any drainage work which is or includes a main river or the volumetric rate of flow of water in or flowing to or from any main river;
- (b) the carrying out of any work of alteration or repair of any structure (whether temporary or permanent) in, over or under a main river if the work is likely to affect the flow of water in the main river or to affect any drainage work;
- (c) erecting or altering any structure (whether temporary or permanent) designed to contain or divert the floodwaters of any part of a main river;
- (d) any work or operation that is in, on, under, over or within 8 metres of a drainage work which is or includes a main river or is otherwise likely to affect any such drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;
- (e) any work likely to affect the flow, purity or quality of water in any watercourse or other surface waters or groundwater; or
- (f) any work or operation likely to cause obstruction to the free passage of fish or damage to any fishery;

“a category 2 specified work” means any of the following—

- (a) erecting any mill dam, weir or other like obstruction to the flow of any ordinary watercourse, or raising or otherwise altering any such obstruction;
- (b) erecting a culvert in any ordinary watercourse;
- (c) altering a culvert in a manner that would be likely to affect the flow of any ordinary watercourse; or
- (d) altering, removing or replacing a structure or feature designated by a local drainage authority under Schedule 1 to the Flood and Water Management Act 2010(4);

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

“the drainage authority” means—

- (a) in relation to a category 1 specified work, the Agency;
- (b) in relation to a category 2 specified work, the drainage board concerned within the meaning of section 23 of the Land Drainage Act 1991(5).

(4) 2010 c. 29.

(5) 1991 c. 59.

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“drainage work” means any watercourse and includes any land which provides or 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, flood defence or tidal monitoring;

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

“a main river” and “ordinary watercourse” have the meanings given by respectively the Water Resources Act 1991(6) and the Land Drainage Act 1991;

“plans” includes but is not limited to sections, drawings, specifications and method statements;

“specified work” means a category 1 specified work or a category 2 specified work.

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

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the drainage authority, or determined under paragraph 27.

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

(a) must not be unreasonably withheld;

(b) is deemed to have been given if it is neither given nor refused within 2 months of the receipt of the plans for approval and, in the case of a refusal, accompanied by a statement of the grounds of refusal; and

(c) may be given subject to such reasonable requirements as the drainage authority may make for the protection of any drainage work, fishery, aquatic wildlife, water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

(4) The drainage authority 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).

18. Without limitation on the scope of paragraph 17, the requirements which the drainage authority may make under that paragraph include conditions requiring the Company 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;

(b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased; or

(c) to provide environmental protection for aquatic wildlife,

by reason of any specified work.

19.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the drainage authority under paragraph 18, must be constructed—

(a) without unnecessary delay in accordance with the plans approved or settled under this Part of this Schedule; and

(b) to the reasonable satisfaction of the drainage authority,

and an officer of the drainage authority is entitled to watch and inspect the construction of such works.

(6) 1991 c. 57.

(2) The Company must give to 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 completed.

(3) If any part of a specified work or any protective work required by the drainage authority is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the drainage authority may by notice in writing require the Company at the Company's own expense to comply with the requirements of this Part of this Schedule or (if the Company so elects and the drainage authority 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 drainage authority reasonably requires.

(4) Subject to sub-paragraph (5) and paragraph 23, 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 Company, it has failed to begin taking steps to comply with the requirements of the notice and subsequently to make reasonably expeditious progress towards their implementation, the drainage authority may execute the works specified in the notice and any expenditure incurred by it in so doing is recoverable from the Company.

(5) In the event of any dispute as to whether sub-paragraph (3) 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 drainage authority must not except in an emergency exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined.

(6) 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 Company must provide such alternative means of access to allow the Agency to maintain the flood defence or use the equipment no less effectively than before the obstruction.

20.—(1) Subject to sub-paragraph (5) the Company 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 Company 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 Company is liable to maintain is not maintained to the reasonable satisfaction of the drainage authority, the drainage authority may by notice in writing require the Company to repair and restore the work, or any part of such work, or (if the Company so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the work and restore the site to its former condition, to such extent and within such limits as the drainage authority reasonably requires.

(3) Subject to paragraph 23, 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 Company, the Company 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 drainage authority may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the Company.

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

(5) This paragraph does not apply to—

- (a) drainage works which are vested in the drainage authority, or which the drainage authority or another person is liable to maintain and is not precluded by the powers of the Order from doing so; and

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- (b) any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule.

21. Subject to paragraph 23, if by reason of the construction of any protective works or 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 Company to the reasonable satisfaction of the drainage authority and if the Company fails to do so, the drainage authority may make good the same and recover from the Company the expense reasonably incurred by it in so doing.

22.—(1) The Company 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—

- (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 Company 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 23, 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 Company fails to take such steps as are described in sub-paragraph (2), the Agency may take those steps and may recover from the Company the expense reasonably incurred by it in doing so.

(4) Subject to paragraph 23, 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 Company the reasonable cost of so doing provided that notice specifying those steps is served on the Company as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

23. Nothing in paragraphs 19(4), 20(3), 21, 22(3) and (4) authorises the drainage authority to execute works on or affecting an operational railway forming part of the Company's undertaking without the prior consent in writing of the Company such consent not to be unreasonably withheld or delayed.

24. The Company must indemnify the drainage authority in respect of all costs, charges and expenses which the drainage authority 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; and
- (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.

25.—(1) Without affecting the other provisions of this Part of this Schedule, the Company must indemnify the drainage authority from all claims, demands, proceedings, costs, charges, penalties, damages, expenses and losses, which may be made or taken against, 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 damage to the fishery;
- (c) any raising or lowering of the water table in land adjoining the authorised development or any sewers, drains and watercourses;

- (d) any flooding or increased flooding of any such lands;
- (e) inadequate water quality in any watercourse or other surface waters or in any groundwater;
or
- (f) any damage to aquatic wildlife;

which is caused by the construction of any of the specified works and protective works or any act or omission of the Company, its contractors, agents or employees whilst engaged upon the work.

(2) The drainage authority must give to the Company reasonable notice of any such claim or demand and no settlement or compromise may be made without the agreement of the Company which agreement must not be unreasonably withheld or delayed.

26. The fact that any work or thing has been executed or done by the Company in accordance with plans approved by the drainage authority, or to the drainage authority's satisfaction, or in accordance with any directions or award of an arbitrator, does not relieve the Company from any liability under the provisions of this Part of this Schedule.

27. Any difference arising between the Company and the drainage authority under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) is to be referred to and settled by arbitration in accordance with article 40 (arbitration).

PART 4

FOR THE PROTECTION OF NATIONAL HIGHWAYS

Application

28.—(1) The provisions of this Part of this Schedule apply to the NH works and have effect unless otherwise agreed in writing between the Company and National Highways.

(2) National Highways must act reasonably and in good faith when considering any request for approval pursuant to these protective provisions and when negotiating any agreement, strategy or other arrangement referred to in or otherwise contemplated by these provisions or subsequent iteration of such agreement, strategy or arrangement.

Interpretation

29.—(1) Where the terms defined in article 2 (interpretation) of this Order are inconsistent with the terms set out in sub-paragraph (2), the latter will prevail.

(2) In this Part of this Schedule—

“as built information” means one electronic copy of the following information—

- (a) as constructed drawings in both PDF and AutoCAD DWG formats for anything designed by the Company; in compliance with DMRB GG184 Standards for Highways or any successor document;
- (b) list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the works;
- (e) method statements for the works carried out;
- (f) in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;

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- (g) organisation and methods manuals for all products used;
- (h) as constructed programme;
- (i) test results and records as required by the detailed design information and during the construction phase of the project;
- (j) a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the Company and National Highways both acting reasonably;
- (k) the health and safety file; and
- (l) such other information as is reasonably required by National Highways to be used to update all relevant databases and to ensure compliance with the National Highways Asset Data Management Manual as is in operation at the relevant time.

“the bond sum” means the sum equal to 200% of the cost of the carrying out of the NH works (to include all costs including any commuted sum) or such other sum agreed between the Company and National Highways;

“the cash surety” means the sum agreed between the Company and National Highways once the Level Crossing Order relating to the A21 has been made as a surety for the purposes of paragraph 39 (security) of this Part of this Schedule;

“commuted sum” means such sum calculated as provided for in paragraph 41 of this Part of this Schedule to be used to fund any additional future cost to National Highways of maintaining the trunk road arising as a result of the NH works;

“condition survey” means a survey of the condition of National Highways structures and assets within the Order limits or other structures and assets that in the reasonable opinion of National Highways may be affected by the NH works;

“contractor” means the contractor and any subcontractor appointed by the Company to carry out the NH works;

“defects period” means the period from the date of the provisional certificate to the date of the final certificate which shall be no less than 12 months from the date of the provisional certificate;

“DLOA” means a detailed local operating agreement or other maintenance and repair strategy entered into by National Highways and the Company that will set out the agreed operational and communication protocols for the trunk road and define the obligations of the Company in relation to maintenance during both the construction phase of the NH works and following the issue of the final certificate, and will define those parts of the NH works that are within the railway corridor and/or comprise part of the level crossing and its associated infrastructure or assets that will fall to the Company to maintain following the issue of the final certificate and will include a dispute resolution provision based on paragraph 45 of this Part of this Schedule;

“detailed design information” means only such of the following drawings specifications and calculations as are relevant to the development—

- (a) site clearance details;
- (b) boundary, environmental and mitigation fencing;
- (c) road restraints systems and supporting road restraint risk appraisal process assessment;
- (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage Surveys – Standards for Highways;
- (e) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
- (f) pavement, pavement foundations, kerbs, footways and paved areas;

- (g) traffic signs and road markings;
- (h) traffic signal equipment and associated signal phasing and timing detail;
- (i) road lighting (including columns and brackets);
- (j) regime of California Bearing Ratio testing;
- (k) electrical work for road lighting, traffic signs and signals;
- (l) highway structures and any required structural approval in principle;
- (m) landscaping;
- (n) proposed departures from DMRB standards;
- (o) walking, cycling and horse-riding assessment and review report;
- (p) utilities diversions;
- (q) topographical survey;
- (r) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it;
- (s) health and safety information including any asbestos survey required by DMRB GG105 Asbestos management or any successor document; and
- (t) other such information that may be reasonably required by National Highways to be used to inform the detailed design of the NH works,

“dilapidation survey” means a survey of the condition of the roads, bridges and retaining walls along the routes approved for construction traffic for the authorised works;

“DMRB” means the Design Management for Roads and Bridges published at <https://www.standardsforhighways.co.uk/dmr/> or any replacement or modification of it;

“final certificate” means the certificate relating to those aspects of the NH works that have resulted in any alteration to the trunk road to be issued by National Highways pursuant to paragraph 38;

“the health and safety file” means the file or other permanent record containing the relevant health and safety information for the authorised works required by the Construction (Design and Management) Regulations 2015(7) (or such updated or revised regulations as may come into force from time to time);

“NH works” means all the authorised works and associated works relating to the construction, maintenance and operation of a level crossing over the A21 at Robertsbridge, East Sussex and required by an Order made under the Level Crossing Act and any works by or on behalf of the Company that are in, on or under the trunk road or other National Highways land, including, without limitation, works to form or layout means of access to the trunk road and works to the trunk road highway drainage;

“nominated persons” means the Company’s representatives or the contractor’s representatives on site during the carrying out of the NH works as notified to National Highways from time to time;

“programme of works” means a document setting out the sequence and timetabling of the NH works;

“provisional certificate” means the certificate of provisional completion relating to those aspects of the NH works that have resulted in any alteration to the trunk road to be issued by National Highways in accordance with paragraph 35 when it considers the NH works are substantially complete and may be opened for traffic;

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“road safety audit” means an audit carried out in accordance with the road safety audit standard;
“road safety audit standard” means DMRB Standard GG119 or any replacement or modification of it;

“RSA actions” means those actions identified in the road safety audit decision log;

“Specification for Highways Works” means the specification for highways works forming part of the manual of contract documents for highway works published by National Highways and setting out the requirements and approvals procedures for work, goods or materials used in the construction, improvement or maintenance of the trunk road network;

“trunk road” means the A21 trunk road near Robertsbridge, East Sussex, at the location of the proposed level crossing forming part of the NH works;

“utilities” means any pipes, wires, cables or equipment belonging to any person or body having power or consent to undertake street works under the 1991 Act;

“walking, cycling and horse-riding assessment and review process” means the process set out in the walking, cycling and horse-riding assessment and review standard; and

“walking, cycling and horse-riding assessment and review standard” means DMRB standard GG142 or any replacement or modification of it.

Prior Approvals and Security

30. In the event that National Highways reasonably requires, or the Company reasonably considers that the implementation of the Order requires, the carrying out of works of improvement to the trunk road that are outside of the Order limits, the parties must enter into an agreement to provide for the carrying out of those works and the Company must be responsible for the costs of such works, including the costs of National Highways incurred in connection with the agreement and its implementation.

31.—(1) The NH works must not commence until—

- (a) a stage 1 and a stage 2 road safety audit processes have been completed in full in accordance with the road safety audit standard;
- (b) the programme of works has been approved by National Highways;
- (c) the detailed design of the NH works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways—
 - (i) the detailed design information, incorporating the RSA actions;
 - (ii) details of the proposed road space bookings;
 - (iii) a scheme of traffic management;
 - (iv) the identity of the contractor and nominated persons;
 - (v) a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the Company, both acting reasonably; and
 - (vi) the walking, cycling and horse-riding assessment and review process appropriate to the completion of detailed design has been completed;
- (d) in the event that National Highways considers that an amendment to the speed limit in the vicinity of the level crossing or other measures under the 1984 Act are reasonably necessary to secure the safety and efficiency of the A21, that a Road Traffic Regulation Order has been made to give force to those measures;

- (e) a scheme of traffic management has been submitted by the Company and approved by National Highways such scheme to be capable of amendment by agreement between the Company and National Highways from time to time;
- (f) stakeholder liaison has taken place in accordance with the process for such liaison agreed between the Company and National Highways under sub-paragraph (c)(v);
- (g) the Company has agreed the estimate of the commuted sum with National Highways, both acting reasonably;
- (h) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the Company during the construction of the NH works has been agreed in writing by National Highways;
- (i) the Company has procured to National Highways collateral warranties in a form approved by National Highways from the contractor and designer of the NH works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the NH (power to survey and investigate land) works, including in the selection of materials, goods, equipment and plant;
- (j) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways, in its reasonable opinion, considers will be affected by the NH works, has been agreed in writing by National Highways; and
- (k) a DLOA has been entered into, the completion of which must not be unreasonably withheld or delayed by either party.

(2) National Highways must provide the Company with a list, to be agreed between the Company and National Highways, both acting reasonably, of all structures and assets to be subject to a condition survey and regime of monitoring pursuant to paragraph 31(1)(j) before the first condition survey is conducted.

(3) National Highways must prior to the commencement of the NH works inform the Company of the identity of the person who will act as a point of contact on behalf of National Highways for consideration of the information required under sub-paragraph (1).

(4) National Highways must notify the Company of its approval or, as the case may be, of its disapproval of any matter under paragraph 31 and the grounds of disapproval within 56 days of the information required under this paragraph being received by National Highways.

(5) In the event of any disapproval, the Company may re-submit the information required under the relevant sub-paragraph with modifications and National Highways must notify the Company of its approval or disapproval and the grounds of disapproval within 56 days of the revised detailed design being received by National Highways.

(6) Approval under this paragraph may be given subject to such reasonable requirements as National Highways may make for the protection of the A21 in the vicinity of the NH works.

(7) In its approval of the contractor pursuant to sub-paragraph 31(1)(c)(iv), National Highways is entitled to take into consideration the experience and expertise of the proposed contractor, including previous experience of level crossing installation over the public highway. National Highways will not be acting unreasonably if, in National Highways' reasonable opinion, the proposed contractor does not have sufficient experience and expertise, but will not be entitled to refuse to approve a contractor merely on grounds that the contractor is providing services to the Company in a volunteer capacity, or intends to use suitably experienced volunteer workers to carry out all or part of the NH works.

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Construction traffic and route surveys

32.—(1) The NH works must not commence until a dilapidation survey of the condition of the roads, bridges and retaining walls along the routes approved for construction traffic for the authorised development has been carried out by the Company and has been submitted to and approved in writing by National Highways.

(2) No more than 28 days after the completion of construction of the authorised development, the roads, bridges and retaining walls surveyed under sub-paragraph (1) must be re-surveyed by the Company.

(3) If the re-survey carried out under sub-paragraph (2) indicates that there has been damage to the roads, bridges or retaining walls that have been surveyed, and that such damage is attributable to the use of those roads, bridges and retaining walls by construction traffic for the authorised development, the Company must submit a scheme of remedial works for those damaged roads, bridges and retaining walls to National Highways for its approval in writing, which must not be unreasonably withheld.

Construction of the NH works

33.—(1) The Company must, prior to commencement of the NH works, give to National Highways 28 days' notice in writing of the date on which the NH works will start unless otherwise agreed by National Highways, acting reasonably.

(2) The Company must comply with the National Highways road space booking procedures (in accordance with the National Highways Asset Management Operational Requirements including the Network Occupancy Management System used to manage the road space bookings and network occupancy) prior to and during the carrying out of the NH works and no NH works for which a road space booking is required is to commence without a road space booking having first been secured, National Highways acting reasonably.

(3) The NH works must be carried out to the reasonable satisfaction of National Highways in accordance with—

- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 31(1) of this Part of this Schedule or as subsequently varied by agreement between the Company and National Highways, both acting reasonably;
- (b) the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway Works together with all other relevant standards and guidance as reasonably required by National Highways to include, inter alia; all relevant interim advice notes and the Traffic Signs Manual and save to the extent that exceptions from those standards and guidance apply which have been approved by National Highways;
- (c) the Traffic Signs Regulations and General Directions 2016⁽⁸⁾ and any amendment to or replacement thereof for the time being in force;
- (d) such approvals or requirements of National Highways that are required by the provisions of paragraph 31 of this Part of this Schedule to be in place prior to commencement of the NH works;
- (e) insofar as relevant to the NH works, all aspects of the Construction (Design and Management) Regulations 2015 or any statutory amendment or variation of the same and in particular the Company, as client, must ensure that all client duties (as defined in those regulations) are undertaken to the reasonable satisfaction of National Highways; and
- (f) the requirements of the DLOA.

⁽⁸⁾ S.I. 2016/362.

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(4) The Company must permit and must require the contractor to permit at all reasonable times persons authorised by National Highways (whose identity must have been previously notified to the Company by National Highways) to gain access to the NH works for the purposes of inspection and supervision of the NH works.

(5) The Company must permit and must require the contractor to act upon any reasonable request made by National Highways in relation to the construction of the NH works as soon as reasonably practicable provided such a request is not inconsistent with and does not fall outside the contractor's obligations under its contract with the Company or the Company's powers or obligations under the Order.

(6) If any part of the NH works is constructed otherwise than in accordance with the requirements of this Part of this Schedule, National Highways may by notice in writing require the Company, at the Company's own expense, to comply with the requirements of this Part of this Schedule.

(7) If within 28 days on which a notice under sub-paragraph (6) is served on the Company (or in the event of there being (in the reasonable opinion of National Highways) a danger to road users, within such lesser period as National Highways may stipulate), the Company has failed to take the steps required by that notice, National Highways may carry out—

- (a) the NH works; or
- (b) such works to reinstate the highway and other land and premises of National Highways as may be reasonably necessary to eliminate the significant danger to road users,

and National Highways may in either case recover from the Company any expenditure reasonably incurred by it in so doing.

(8) If during the carrying out of the authorised works the Company causes damage to the strategic road network then National Highways may by notice in writing require the Company, at the Company's own expense, to remedy the damage.

(9) If within 28 days of the date on which a notice under sub-paragraph (8) is served on the Company, the Company has failed to take steps to comply with the notice, National Highways may carry out the steps required of the Company and may recover from the Company any expenditure reasonably incurred by National Highways in so doing, such sum to be payable within 28 days of demand.

(10) Nothing in this Part of this Schedule prevents National Highways from carrying out any work or taking any such action as it reasonably believes to be necessary as a result or in connection with of the carrying out or maintenance of the authorised works without prior notice to the Company in the event of an emergency or to prevent the occurrence of danger to road users and National Highways may recover from the Company any reasonable expenditure incurred by National Highways in so doing.

(11) In constructing the NH works, the Company must at its own expense divert or protect all utilities and all agreed alterations and reinstatement of the highway over existing utilities must be constructed to the reasonable satisfaction of National Highways.

Payments

34.—(1) The Company must fund the whole of the cost of the NH works and all costs incidental to the NH works and must also pay to National Highways in respect of the NH works a sum equal to the whole of any costs and expenses which National Highways reasonably incurs (including reasonable costs and expenses for using internal or external staff) in relation to the NH works including—

- (a) the checking and approval of the information required under paragraph 31(1);
- (b) the supervision of the NH works;
- (c) all costs in relation to the transfer of any land required for the NH works;

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- (d) all legal and administrative costs in relation to paragraphs (a), (b) and (c); and
 - (e) any value added tax which is payable by National Highways in respect of such costs and expenses and for which it cannot obtain reinstatement from HM Revenue and Customs,
- together comprising “the NH costs”.

(2) The Company must pay to National Highways upon demand and prior to such costs being incurred the total costs that National Highways believe will be properly and necessarily incurred by National Highways in undertaking any statutory procedure or preparing and bringing into force any traffic regulation order or orders necessary to carry out or for effectively implementing the NH works.

(3) National Highways must, within 28 days of receipt of a written request from the Company to do so, provide the Company with a schedule showing its estimate of the NH costs prior to the commencement of the NH works and the Company must pay to National Highways the estimate of the NH costs prior to commencing the NH works and in any event prior to National Highways incurring any cost.

(4) If at any time after the payment referred to in sub-paragraph (3) has become payable, National Highways reasonably believes that the NH costs will exceed the estimated NH costs it may give notice to the Company of the amount that it believes the NH costs will exceed the estimate of the NH costs (excess) and the Company must pay to National Highways within 28 days of the date of the notice a sum equal to the excess.

(5) National Highways must give the Company a final account of the costs referred to in sub paragraph (1) within 91 days of the issue of the provisional certificate pursuant to paragraph 35.

(6) Within 28 days of the issue of the final account—

- (a) if the account shows a further sum is due to National Highways the Company must pay to National Highways the sum shown due to it in that final account; and
- (b) if the account shows that the payment or payments previously made by the Company have exceeded the costs incurred by National Highways, National Highways must refund the difference to the Company.

(7) If any payment due under any of the provisions of this Part of this Schedule is not made on or before the date on which it falls due the party from whom it was due must at the same time as making the payment pay to the other party interest at 2% above the Bank of England base lending rate from time to time being in force for the period starting on the date upon which the payment fell due and ending with the date of payment of the sum on which interest is payable together with that interest.

Completion

35.—(1) Following any closure or partial closure of the trunk road for the purposes of carrying out the NH works, the Company must give National Highways the opportunity to carry out a site inspection in order for National Highways to satisfy itself that the trunk road is, in its reasonable opinion, safe for traffic and the Company must comply with any reasonable requirements of National Highways prior to opening the trunk road.

(2) As soon as the Company considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.

(3) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable—

- (a) inspect the NH works; and
- (b) provide the Company with a written list of works that NH, acting reasonably, considers are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(4) When—

- (a) a stage 3 road safety audit process for the NH works has been completed in full accordance with the road safety audit standard;
- (b) the NH works incorporating the RSA actions have been completed to the reasonable satisfaction of National Highways;
- (c) any further works notified to the Company by National Highways pursuant to sub-paragraph 7(3)(b) have been completed to the reasonable satisfaction of National Highways;
- (d) the as built information has been provided to National Highways; and
- (e) the Company has paid the commuted sum to National Highways,

National Highways must issue the provisional certificate.

(5) The Company must at its own expense remedy any defects in the NH Works as are reasonably required by National Highways to be remedied during the defects period and must continue to comply with the requirements of the DLOA. All identified defects must be remedied in accordance with the following timescales—

- (a) in respect of matters of urgency, within 24 hours of receiving notification for the same (urgency to be determined at the absolute discretion of National Highways);
- (b) in respect of matters which National Highways considers, acting reasonably, to be serious defects or faults, within 14 days of receiving notification of the same; and
- (c) in respect of all other defects notified to the Company, within 4 weeks of receiving notification of the same.

(6) Following the issue of the provisional certificate National Highways has responsibility for routine maintenance of the highway save for any soft landscaping works which must be established and which must thereafter be maintained for a period of 3 years by and at the expense of the Company.

(7) The Company must submit stage 4 road safety audits as required by and in line with the timescales stipulated in the road safety audit standard. The Company must comply with the findings of the stage 4 road safety audits and must pay all costs of and incidental to such audits and provide updated as-built information to National Highways.

Final condition survey

36.—(1) The Company must, as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 35(2), arrange for the highways structures and assets that were the subject of the condition survey to be re-surveyed and must submit the re-survey to National Highways for its approval, such approval not to be unreasonably withheld or delayed.

(2) If the re-survey carried out pursuant to sub-paragraph (1) indicates that any damage has been caused to a structure or asset, the Company must submit a scheme for remedial works in writing to National Highways for its approval in writing, such approval not to be unreasonably withheld or delayed, and the Company must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(3) If the Company fails to carry out the remedial work in accordance with the approved scheme, National Highways may carry out the steps required of the Company and may recover any expenditure it reasonably incurs in so doing.

(4) National Highways may, at its discretion, at the same time as giving its approval to the re-survey pursuant to sub-paragraph (1) give notice in writing that National Highways will remedy any damage identified in the re-survey and National Highways may recover any expenditure it reasonably incurs in so doing.

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(5) The Company must make available to National Highways upon reasonable request copies of any survey or inspection reports produced pursuant to any inspection or survey of any specified work following its completion that the Company may from time to time carry out.

Opening

37.—(1) The Company must notify National Highways of the intended date of opening to the public of the railway authorised by the Order not less than 56 days in advance of the intended date and the Company must notify National Highways of the actual date the NH works will be brought into operation within 14 days of that date.

(2) The level crossing must not be opened for traffic until all such works as are set out in any agreement entered into pursuant to paragraph 30 are completed in accordance with the terms of the agreement and any traffic regulation measures pursuant to paragraph 31(1)(d) are in force.

Final Certificate

38.—(1) The Company must apply to National Highways for the final certificate no sooner than 12 months from the date of the provisional certificate.

(2) Following receipt of the application for the final certificate, National Highways must as soon as reasonably practicable—

- (a) inspect the NH works; and
- (b) provide the company with a written list of any further works required to remedy or make good any defect or damage in the NH works or confirmation that no such works are required for this purpose.

(3) The Company must carry out such works notified to it pursuant to sub-paragraph (2).

(4) When National Highways is satisfied, acting reasonably, that any defects or damage arising from defects during the defects period and any defects notified to the Company pursuant to sub-paragraph (2) and any remedial works required as a result of the stage 4 RSA safety audit have been made good to the reasonable satisfaction of National Highways, National Highways must issue the final certificate.

(5) The Company must pay to National Highways within 28 days of demand the costs reasonably incurred by National Highways in identifying the defects and supervising and inspecting the Company's work to remedy the defects that it is required to remedy pursuant to these provisions.

Security

39.—(1) The NH works must not commence until—

- (a) the NH works are secured by a bond from a bondsman first approved by National Highways substantially as detailed in the draft bond in Form 1 in paragraph 46 or such other form that may be agreed between the Company and National Highways to indemnify National Highways against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the Company in respect of the NH works under the provisions of this Part of this Schedule provided that the maximum liability of the bond must not exceed the bond sum; and
- (b) prior to the commencement of the NH works the Company must provide the cash surety which may be utilised by National Highways in the event of the Company failing to meet its obligations to make payments under paragraph 34 or to carry out works the need for which arises from a breach of one or more of the obligations of the Company under the provisions of this Part of this Schedule (which must for the avoidance of doubt be a single cash surety for the entire value of the NH works).

- (2) The bond sum and the cash surety must be progressively reduced as follows—
- (a) within 20 working days of the issue of the provisional certificate pursuant to paragraph 35(1) National Highways must release the bond provider from its obligations in respect of 80% of the bond sum save insofar as any claim or claims have been made against the bond and/or liability on its part has arisen prior to that date in which case National Highways will retain a sufficient sum to meet all necessary costs to settle the claim or claims; and
 - (b) within 20 working days of the issue of the final certificate pursuant to paragraph 37 National Highways must in writing release the bond provider from its obligations in respect of all remaining liability and release the remainder of the cash security to the Company save insofar as any claim or claims have been made against the bond or liability on its part has arisen prior to that date in which case National Highways will retain a sufficient sum to meet all necessary costs to settle the claim or claims.

(3) Any sums payable to National Highways pursuant to these protective provisions shall be reduced by an amount equivalent to such sums as are payable by the Company to National Highways or the Secretary of State pursuant to the indemnity and any other arrangements for the reimbursement of the costs of National Highways and/or the Secretary of State for Transport that are required for compliance with the discharge of planning conditions relevant to the authorised works pursuant to Rother District Council's grant of planning permission reference RR/2014/1608/P, so that there shall be no double recovery by National Highways or the Secretary of State.

Commuted sums

40. National Highways must provide to the Company an estimate of the commuted lump sum prior to the commencement of the NH works.

41. The Company must pay to National Highways the Commuted Sum calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 prior to the issue of the provisional certificate pursuant to paragraph 35(1).

Insurance

42. The Company must prior to commencement of the NH works effect sufficient public liability insurance with an insurer to indemnify National Highways in the minimum sum of £10,000,000.00 (ten million pounds) in respect of any legal liability for damage, loss or injury to any property or any person as a direct result of the execution of the NH works or the use of the NH works by the Company and must provide evidence of such insurance having been taken out prior to commencement of the NH works.

Indemnity

43.—(1) The Company must indemnify National Highways from and against all costs, expenses, damages, losses and liabilities suffered by National Highways arising from or in connection with any claim, demand, action or proceedings (including but not limited to statutory claims) resulting from:

- (a) the construction and maintenance of the NH works; and
- (b) the use of the NH works,

PROVIDED THAT—

- (c) National Highways notifies the Company upon receipt of any claim; and
- (d) National Highways following the acceptance of any claim notifies the quantum of the claim to the Company in writing.

(2) Within 14 days of the receipt of the notification referred to in sub-paragraph (1)(c) the Company must pay to National Highways the amount specified as the quantum of such claim.

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(3) Sub-paragraphs (1) and (2) do not apply if the costs, expenses, liabilities and damages were caused by or arose out of the neglect or default of National Highways or its officers, servants, agents or contractors or any person or body for whom it is responsible.

(4) National Highways must not settle any claim without first consulting the Company and having all proper regards to the Company's response to such consultation.

Maintenance of the NH works

44.—(1) Following the issue of the Final Certificate, the Company must maintain those parts of the NH works that it is required to maintain under the DLOA, in accordance with the DLOA.

(2) If the Company fails to maintain any part of the NH works which it is required to maintain pursuant to the DLOA and National Highways reasonably considers that such failure to maintain is causing or may cause a danger to road users or damage to the strategic road network or a National Highways asset or structure, or excessive delays to road users, National Highways may by notice in writing require the Company, at the Company's own expense, to comply with the requirements of this Part of this Schedule.

(3) If within 28 days on which a notice under sub-paragraph (2) is served on the Company (or in the event of there being in the reasonable opinion of National Highways a danger to or delay to road users within such lesser period as National Highways may stipulate), the Company has failed to take the steps required by that notice, National Highways may carry out such works as it reasonably considers necessary and may recover from the Company any expenditure reasonably incurred by it in so doing.

(4) The Company must, prior to the commencement of any works of maintenance to the HE works for which it is responsible pursuant to the DLOA, give National Highways 28 days' notice in writing of the date on which such maintenance works will start unless otherwise agreed by National Highways, acting reasonably; and where carrying out maintenance works following a notice served on it by National Highways pursuant to paragraph 44(2), the Company must give as much notice as is reasonably practicable.

(5) Nothing in this Part of this Schedule prevents National Highways from carrying out any work or taking any such action as it reasonably believes to be necessary in respect of any part of the NH works that the Company are required to maintain pursuant to the DLOA without prior notice to the Company in the event of emergency or to prevent the occurrence of danger or significant delay to road users and National Highways may recover from the Company any reasonable expenditure incurred by National Highways in so doing.

(6) If, for the purposes of maintaining the works pursuant to this paragraph 44, the Company needs to occupy any road space, the Company must comply with the National Highways road space booking requirements and no maintenance works for which a road space booking is required is to commence without a road space booking having first been secured.

(7) The Company must comply with any reasonable requirements that National Highways may notify to the Company, such requirements to be notified to the Company not less than 7 days in advance of the planned commencement date of the maintenance works.

(8) The provisions of paragraph 35(1) apply to the opening of any part of the trunk road following occupation of any road space under paragraph 43(1).

Expert Determination

45.—(1) Article 40 (arbitration) of the Order does not apply to this Part of this Schedule.

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed

by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

(3) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date of a dispute first being notified in writing by one party to the other and in the absence of the difference being settled within that period the expert must be appointed within 21 days of the notification of the dispute.

(4) The expert must—

- (a) invite the parties to make submissions to the expert in writing and copied to the other party to be received by the expert within 21 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 21 days of receipt of the submission;
- (c) issue a decision within 42 days of receipt of the submissions under paragraph (b); and
- (d) give reasons for the decision.

(5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 40.

(6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.

Bond Form

46. Form 1 as referred to in paragraph 39(1)(a)—

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Form 1

Bond – National Highways

BY THIS BOND [] [(Company Regn No)] whose registered office is situated at [] (“the Company”) and [] [(Company Regn No)] whose registered office is situated at [] (“the Surety”) are jointly and severally bound to [] of [] (“the []”) this [] day of [] 202[] in the sum of [] pounds (£[Surety Sum to the payment of which sum the Company and the Surety hereby jointly and severally bind themselves their successors and assigns.

WHEREAS under an Order under the Transport and Works Act 1992 known as the Rother Valley Railway (Bodiam to Robertsbridge Junction Order 2023 (“the Order”) the Company is empowered to commence execute perform and complete the highway works to the A21 Trunk Road mentioned therein in such manner and within such time and subject to such conditions and stipulations as are particularly specified and set forth in the Order and also to pay to National Highways such sums as are therein provided NOW THE CONDITIONS of this Bond are such that if the Company shall duly observe and perform all the terms provisions covenants conditions and stipulations of Part 4 of Schedule 8 to the Order on the Company’s part to be observed and performed according to the true purport intent and meaning thereof or if on default by the Company the Surety shall satisfy and discharge the damages sustained by National Highways thereby up to the amount of this Bond then this obligation shall be null and void but otherwise shall be and remain in full force and effect in accordance with the provisions of the Order (and including any reductions as provided for in the Order) but no allowance of time by National Highways under the Order nor any forbearance or forgiveness in or in respect of any matter or thing concerning the Order on the part of National Highways shall in any way release the Surety from any liability under this Bond.

It is hereby agreed that this Bond will be reduced and released in accordance with paragraph 39(2) of Part 4 of Schedule 8 to the Order.

[Attestation]