

SCHEDULES

SCHEDULE 10

Article 46

PROTECTION OF CERTAIN PERSONS

PART 1

GENERAL

Application of Schedule 10

1. The provisions of each Part of this Schedule including this Part shall have effect for the protection of each of the bodies referred to in that Part below unless, in the case of any such body, it is otherwise agreed in writing between the undertaker and the body concerned.

Arbitration

2. Unless any provision of this Schedule provides the contrary any difference arising between the undertaker and any body referred to in this Schedule (other than a difference as to the meaning or construction of this Schedule) shall be referred to and settled by arbitration in accordance with article 54.

PART 2

PROTECTION OF THE ENVIRONMENT AGENCY

3.—(1) The provisions of this Part of this Schedule shall apply for the protection of the Agency unless otherwise agreed in writing between the undertaker and the Agency.

(2) In this Part of this Schedule—

“the Agency” means the Environment Agency;

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

“damage” includes scouring, erosion and environmental damage and “damaged” shall be construed accordingly;

“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 fish in, or migrating to or from such waters and the spawn, habitat or food of such fish;

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

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“specified work” means so much of any work or operation authorised by this Order as is in, on, under, over or within 16 metres of a drainage work or is otherwise likely to—

- (a) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;
- (b) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;
- (c) cause obstruction to the free passage of fish or damage to any fishery; or
- (d) affect the conservation, distribution or use of water resources;

but shall not include internal works to the new tunnel after Works Nos. 4A and 5 have become watertight; and

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

4. No dredging operations shall take place for the excavation of a trench for placing Works Nos. 4A and 5 south of an imaginary line parallel with and 75 metres south of the line of Howdon Quay during or between the months of April and October in any year.

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

(2) Any such specified work shall not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 15.

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

- (a) shall not be unreasonably withheld;
- (b) shall be deemed to have been given if it is neither given nor refused in writing and in the case of a refusal, accompanied by a statement of the grounds for refusal within 42 days of the submission of the plans for approval; and
- (c) may be given subject to such reasonable requirements as the Agency may make for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution and in the discharge of its environmental and recreational duties.

6. Without prejudice to the generality of paragraph 5, the requirements which the Agency may make under that paragraph include—

- (a) conditions as to the time and the manner in which any other work or operation is to be carried out;
- (b) conditions requiring the undertaker at its own expense—
 - (i) to provide or maintain means of access for the Agency;
 - (ii) to construct such protective works, whether temporary or permanent, during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary to safeguard any drainage work against damage or to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased by reason of any specified work;
 - (iii) to monitor accumulation, erosion or alterations of the tidal flow arising during the construction or following the completion of the specified works; and

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- (iv) to provide, maintain and operate arrangements for dealing with any pollution incidents which may occur during and as a result of the construction of the specified works.

7.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 6, shall be constructed—

- (a) within such period (if any) as the Agency may approve at the time of approval or upon an application by the undertaker thereafter (such approval not to be unreasonably withheld);
- (b) in accordance with the plans approved or deemed to have been approved or settled under this Part of this Schedule; and
- (c) to the reasonable satisfaction of the Agency;

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

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

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

(4) Subject to sub-paragraph (5), if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (3) is served upon the undertaker, it has failed to begin taking steps to comply with the requirements of the notice and thereafter complete them within such reasonable period as may be specified in such notice, the Agency may execute the works specified in the notice and any expenditure reasonably incurred by it in so doing shall be recoverable from the undertaker.

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

8.—(1) Before commencing the construction of a specified work the undertaker shall procure at its expense in liaison with and to the reasonable satisfaction of the Agency a survey of any drainage work liable to be affected by that specified work.

(2) Subject to sub-paragraph (3), the undertaker shall, from the commencement of the construction of the specified works and except to the extent that any approval given by the Agency under this Part of this Schedule permits otherwise, maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land owned by the undertaker or which it otherwise has control of or is in occupation of for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers of the Order or is already in existence.

(3) The obligation imposed on the undertaker under sub-paragraph (2) does not apply where the Agency or another person is liable to maintain any such work and is not precluded by the exercise of the powers of the Order from doing so.

(4) If any drainage work referred to in sub-paragraph (2) is not maintained in good repair and free from obstruction the Agency may by notice in writing require the undertaker to repair and restore the work, or any part thereof, or (if the undertaker so elects and the Agency in writing consents,

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such consent not to be unreasonably withheld), to remove the work and restore the site (including sea defences) to its former condition, to such extent and within such limits as the Agency reasonably requires.

(5) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any work is served under sub-paragraph (4) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and thereafter completed them within such reasonable period as may be specified in the notice, the Agency may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the undertaker.

(6) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (4), the Agency shall not except in a case of emergency exercise the powers of sub-paragraph (5) until the dispute has been finally determined.

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

10.—(1) The undertaker shall 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 undertaker requiring it to take such steps as may be reasonably practicable to make good the damage, or, as the case may be, to protect the fishery against such damage.

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

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

11. The undertaker shall indemnify the Agency in respect of all reasonable and proper costs, charges and expenses which the Agency may reasonably incur or have to pay or which it may sustain—

- (a) in the examination or approval of plans under this Part of this Schedule;
- (b) in the inspection of the construction of the specified works or any protective works required by the Agency under this Part of this Schedule.

12.—(1) Without prejudice to the other provisions of this Part of this Schedule, the undertaker shall indemnify the Agency from all claims, demands, proceedings, costs, damages or expenses or

loss, which may be made or taken against, or recovered from or incurred by the Agency 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 works or any sewers, drains and watercourses;
- (d) any flooding or increased flooding of any such lands; or
- (e) inadequate water quality in any watercourse or other surface waters or in any groundwater;

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

(2) The Agency shall give to the undertaker reasonable notice of any such claim or demand and no settlement or compromise of any such claim or demand shall be made without the consent of the undertaker which shall not be unreasonably withheld.

(3) Prior to incurring any expense which it may seek to recover under this paragraph, the Agency shall, except in a case of urgency, serve notice on the undertaker informing it of the Agency's intentions and requiring it within such time as the Agency may reasonably specify to take such steps as may be reasonably practicable to avoid the need for the Agency to incur such costs.

(4) Nothing in this Part of this Schedule shall impose any liability on the undertaker in respect of any damage to the extent that it is attributable to the negligent act or omission of the Agency, its officers, servants or, if not the undertaker, its contractors or agents.

13. The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved or deemed to be approved by the Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, shall not relieve the undertaker from any liability under the provisions of this Part of this Schedule.

14. For the purposes of Chapter II of Part II of the Water Resources Act 1991⁽¹⁾ (abstraction and impounding of water) and section 109 of that Act (as to structures in, over or under watercourses) as applying to the construction of any specified work, any consent or approval given or deemed to be given by the Agency under this Schedule with respect to such construction shall be deemed also to constitute an impounding licence under that Chapter or, as the case may be, a consent or approval under those sections, and the undertaker shall not be obliged to serve any notice which would otherwise be required by section 30 of the said Act of 1991 (which relates to the construction of boreholes and similar works in respect of which a licence is not required).

15. Any dispute arising between the undertaker and the Agency under this Part of this Schedule shall, if the parties agree, be determined by arbitration, but shall otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs.

PART 3

PROTECTION OF THE PORT OF TYNE AUTHORITY

16. The provisions of this Part of this Schedule shall, unless otherwise agreed in writing between the undertaker and the Port of Tyne Authority, have effect for the protection of the Port Authority.

17. The undertaker may with the written consent of the Port Authority deviate upwards from the levels shown on the deposited sections to such extent as may be indicated in that consent.

(1) 1991 c. 57.

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18. Before commencing a tidal work or a part of a tidal work the undertaker shall submit plans thereof to the Port Authority for their approval (which approval shall not be unreasonably withheld but may be given subject to reasonable conditions) and shall not commence the same until such plans have been approved by the Port Authority; but if the Port Authority do not within 42 days after the receipt of any such plans notify to the undertaker their disapproval thereof and the grounds for their disapproval they shall be deemed to have approved them.

- (a) (a) Subject to the provisions of this Part of this Schedule, a tidal work shall not be constructed or carried out except in accordance with such plans as may be so approved or deemed to be approved by the Port Authority or determined by arbitration or in such other manner as may be agreed, and in accordance with any reasonable conditions subject to which approval is so given or determined and to the reasonable satisfaction of the Port Authority.
- (b) A tidal work shall be so constructed and thereafter maintained as to ensure that the traffic on the river is not interfered with except with the written approval of the Port Authority (which consent shall not be unreasonably withheld but may be given subject to reasonable conditions) and in any event no more than is reasonably necessary for the construction or maintenance of a tidal work; and, subject to the foregoing, that at all times during construction of the tidal works an unobstructed main navigation channel within the tunnel area for the safe passage of vessels is maintained and kept dredged by the undertaker to such depth as the Port Authority may reasonably require and to a width of not less than 60 metres.

20. The undertaker shall allow the authorised representatives of the Port Authority to inspect and survey all or any of the tidal works on reasonable written notice (or such notice as may be practicable in case of emergency) in that behalf being given to the undertaker by the Port Authority, and shall give all reasonable facilities for so doing.

21. Nothing in this Order shall authorise or empower the undertaker without the previous written consent of the Port Authority (which consent shall not be unreasonably withheld but may be given subject to reasonable conditions), to embank, encroach upon or interfere with any part of the bed, shores or banks of the river except as is expressly authorised by this Order or authorised by the Port Authority pursuant to paragraphs 18 and 19.

22. Except so far as may be unavoidable in the construction of a tidal work, the undertaker shall not, without the written consent of the Port Authority (which consent shall not be unreasonably delayed or withheld), deposit or permit the deposit of any material on or in the river or on the bed, shores or banks of the river; and the undertaker shall within 7 days after receipt of written notice to that effect from the Port Authority remove any material so unavoidably deposited without the written consent of the Port Authority under paragraphs 18 and 19, as in the reasonable opinion of the Port Authority is necessary for facilitating or preserving safety of navigation.

23. The undertaker shall not, except for the purpose of constructing the authorised works, remove any gravel, soil or other material from the bed, shores or banks of the river without the previous written consent of the Port Authority (which consent shall not be unreasonably delayed or withheld), but nothing in this paragraph shall prevent the use by the undertaker of any gravel, soil or other material so removed for the purposes of the construction of other authorised works.

24. From the time when the construction of the tidal works is commenced the undertaker shall proceed with such works with all reasonable diligence and without unreasonable delay until all of the tidal works are completed and all temporary works removed from the river.

- (a) (a) The undertaker shall consult with the Port Authority as to any pile, stump or other obstruction in the river which becomes exposed in consequence of the tidal works and shall forthwith remove from the river any such pile, stump or other obstruction which in the reasonable opinion of the Port Authority is a hazard to navigation or, if it is not reasonably

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practicable to remove it, the same shall be cut off at such level below the maximum dredged depth of the bed of the river as the Port Authority acting reasonably and without delay may from time to time approve (not being more than two metres below that depth in the main navigation channel or one metre so below elsewhere in the river).

- (b) If the undertaker fails to remove from the river any such pile, stump or other obstruction within 7 days after receipt of written notice from the Port Authority requiring the removal, the Port Authority may with all reasonable diligence and without unreasonable delay carry out the removal and recover their reasonable expenses from the undertaker.

26. The undertaker shall, at or near every tidal work exhibit such lights, lay down such buoys and take such other steps for preventing danger to navigation as the Port Authority may from time to time reasonably require.

27. If, except in the case of the new tunnel—

- (a) any tidal work is abandoned or out of repair or is in such other position that it is or is likely to become a danger to or (save as this Order may permit) interfere with navigation or other public rights in the river; and
- (b) the Port Authority by written notice require the undertaker to repair the tidal work or (if the undertaker no longer requires the work) to abate and remove the tidal work or any part of it and restore the site to its former condition; and
- (c) the undertaker fails to comply with the notice within 28 days after the receipt of it;

the Port Authority may abate and remove the work or any part of it and restore the site to its former condition and may recover their reasonable expenses from the undertaker.

28. Subject to paragraph 40 and to complying with paragraph 41, the Port Authority may recover from the undertaker any reasonable expenses howsoever caused (including a proper proportion of the overhead charges of the Port Authority) which the Port Authority incur—

- (a) arising from the approval of plans and the inspection of the construction or carrying out of any tidal work;
- (b) by reason of any act or omission of the undertaker, or of any person in their employ, or of their contractors or workmen whilst engaged upon any tidal work;
- (c) in dredging away any accumulation consequent upon the execution or maintenance of a tidal work;
- (d) in obtaining and depositing in the river such material as is necessary in the reasonable opinion of the Port Authority to protect river users and other works in the river from the effects of scouring of the river bed consequent upon the execution or maintenance of a tidal work;
- (e) in altering any mooring in any way which in the reasonable opinion of the Port Authority may be rendered necessary by reason of the execution or maintenance of a tidal work;
- (f) in carrying out reasonable surveys, inspections, tests and sampling within and of the river (including the bed and banks of the river)—
 - (i) to establish the marine conditions prevailing prior to the construction of a tidal work in such area of the river as the Port Authority have reasonable cause to believe may subsequently be affected by any siltation, scouring or other alteration which the undertaker is liable to remedy under this article; and
 - (ii) where the Port Authority have reasonable cause to believe that the construction of a tidal work is causing or has caused any siltation, scouring or other alteration as aforesaid; and

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- (g) arising from the carrying out of construction of a tidal work or the failure of a tidal work or the undertaking by the Port Authority of works or measures to prevent or remedy danger or impediment to navigation or damage to any property arising from such carrying out of construction, exercise or failure;

and subject as aforesaid the undertaker shall indemnify the Port Authority from and against all claims and demands arising out of such construction or carrying out, failure or act or omission as aforesaid; but the Port Authority shall as soon as reasonably practicable give to the undertaker notice of any claim or demand which is one for which the undertaker may be liable under this paragraph and no settlement or compromise of any such claim or demand shall be made without the consent in writing of the undertaker.

29. Nothing in this Order authorises the doing of anything prohibited by section 85(1), (2) or (3) of the Water Resources Act 1991(2) (offences of polluting controlled waters).

30. The Port Authority shall not be liable, in the absence of negligence or breach of any duty hereunder or otherwise, for any damage or injury howsoever caused to the new tunnel or to any of the authorised works (whether temporary or permanent) resulting from the dredging operations of the Port Authority or the carrying out by them in the execution of their statutory powers and duties of any operations in the river or works for the improvement or maintenance thereof; and it shall be a defence to any proceedings for an offence under article 38 of this Order arising from the carrying out of such dredging or other operations or works by the Port Authority that the same were reasonably necessary and carried out without negligence.

31. After the purpose of any temporary tidal work has been accomplished or after a reasonable period of notice in writing from the Port Authority requiring it so to do, the undertaker shall with all reasonable dispatch, remove that work or any materials relating thereto which may have been placed below the level of high water by or on behalf of the undertaker and, on its failing so to do within a reasonable period after receiving such notice, the Port Authority may remove the same and charge the undertaker with the reasonable expense of so doing, which expense the undertaker shall repay to the Port Authority.

32. If during the construction of a tidal work or within 10 years after the completion of that work and as a consequence whether in whole or in part of its construction, there is caused or created an accumulation or erosion, the undertaker, if so requested by the Port Authority before or within the period of 10 years after such completion, shall remedy such accumulation or erosion in the manner specified in paragraph 34 and, if it refuses or fails so to do, the Port Authority may themselves cause the work to be done and may recover the reasonable cost thereof from the undertaker to the extent that the same is attributable to such construction as aforesaid.

33. Should any such accumulation or erosion as is mentioned in paragraph 32 arise within the period of 10 years mentioned in that paragraph and be remedied in accordance with paragraph 34, any recurrence of such accumulation or erosion shall from time to time be so remedied by the undertaker during that period of 10 years and at any time thereafter, save that the undertaker's obligation under this paragraph shall cease in the event that following the remedying of any accumulation or erosion a period of 10 years elapses from the completion of that remedying, without any further accumulation or erosion being caused or created in consequence of such construction or exercise.

34. For the purpose of paragraphs 32 and 33—

- (a) in the case of an accumulation, the remedy shall be its removal; and
- (b) in the case of erosion, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be reasonably necessary.

(2) 1991 c. 57.

35. In the event it is established that any accumulation or erosion mentioned in paragraph 32 or 33 would have been caused in any event by factors other than the construction of a tidal work, the undertaker shall be liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction as aforesaid.

36. For the purposes of paragraph 32 the date of completion of a tidal work shall be the date on which it is brought into use.

37. The undertaker shall—

- (a) pay to the Port Authority the reasonable costs incurred by the Port Authority of such alterations to the marking and lighting of the navigational channel of the river as may be necessary during or in consequence of the construction of a tidal work;
- (b) provide and maintain on any tidal works such fog signalling apparatus as may be reasonably required by the Port Authority and shall properly operate such apparatus during periods of restricted visibility for the purpose of warning vessels of the existence of the relevant works; and
- (c) afford to the Port Authority such facilities as they may reasonably require for the placing and maintenance on any tidal works of signals, tide-boards, tide-gauges or other apparatus for the safety or benefit of navigation.

38. Nothing in this Part of this Schedule shall impose any liability on the undertaker to the extent that any losses, costs, charges, damages, expenses, claims or demands of the Port Authority or for which the Port Authority may be liable above are attributable to negligence or breach of statutory duty on the part of the Port Authority or any act or omission by it of any person in their employ or of their contractors or agents.

39. The Port Authority shall give to the undertaker notice of any claim or demand in relation to which the undertaker may be liable under this Part of this Schedule and no settlement or compromise of any such claim or demand shall be made without the consent in writing of the undertaker which if it withholds such consent shall have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

40. The fact that any work or thing has been executed or done with the consent of the Port Authority and in accordance with any reasonable conditions or restrictions prescribed by the Port Authority or in accordance with plans approved or deemed to be approved by the Port Authority or to their satisfaction or in accordance with any directions or award of an arbitrator or in accordance with any plans approved by the Secretary of State and any conditions or restrictions imposed by him shall not relieve the undertaker from any liability under the provisions of this Part of this Schedule save where any such liability arises by reason of any conditions or restrictions imposed by the Port Authority.

41. With the exception of any duty owed by the Port Authority to the undertaker which is expressly provided for in the foregoing provisions of this Part of this Schedule, nothing in this Order shall be construed as imposing upon the Port Authority either directly or indirectly, any duty or liability to which the Port Authority would not otherwise be subject and which is enforceable by proceedings before any court.

42. Save as the terms of this Order may otherwise provide nothing in this Order shall affect prejudicially any statutory or other rights, powers or privileges vested in, or enjoyed by, the Port Authority or the harbour master at the date of making of this Order but so that it shall not be necessary for the undertaker to obtain any other consent from the Port Authority unless this Part of this Schedule so provides.

43. Unless otherwise agreed in writing, any difference which may arise between the undertaker and the Port Authority under this Part of this Schedule (other than under paragraphs 21 and 42

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or a difference as to the meaning or construction of this Part of this Schedule) shall be settled by arbitration in accordance with article 54 of this Order.

44. In this Part of this Schedule—

“accumulation” means any accumulation of silt or other material which constitutes an impediment to navigation;

“construction” includes execution and placing, maintenance, extension, improvement, enlargement, relaying and renewal and “constructed” shall be construed accordingly;

“erosion” means any erosion of the bed or banks of the river or other structure of whatever nature;

“plans” includes arrangements, sections, descriptions, drawings and specifications;

“the river” means the River Tyne; and

“tidal work” means so much of any temporary or permanent work authorised by this Order (which includes the demolition of any structure, any removal of gravel or other material, any dredging or similar work, and any geotechnical investigations that may be undertaken) as is in, on, under or over—

- (a) the surface of land below the level of high water spring tides forming part of the river; or
- (b) any land owned, occupied or used by the Port Authority for operational purposes.

PART 4

PROTECTION OF TELECOMMUNICATIONS UNDERTAKERS

45.—(1) The provisions of this Part of this Schedule shall have effect for the protection of each of the bodies referred to in this Part unless, in the case of any such body, it is otherwise agreed in writing between the undertaker and the body concerned.

(2) In this Part of this Schedule—

“BT” means British Telecommunications PLC;

“C&W” means Cable & Wireless UK;

“installation” shall include construction and “construct” shall be construed accordingly; and

“public communications provider” has the same meaning as in section 151(1) of the Communications Act 2003⁽³⁾.

46. The temporary stopping up or diversion of any street under article 8 shall not affect any right of a public communications provider under paragraph 9 of the Electronic Communications Code (the “Code”), contained in Schedule 2 to the Telecommunications Act 1984⁽⁴⁾ as amended by Schedule 3 to the Communications Act 2003, in respect of any apparatus which at the time of the temporary stopping up or diversion is in that street.

47. If BT or C&W suffer damage in consequence of the construction, use or failure of the authorised works or any subsidence resulting from the works, the undertaker shall pay the cost reasonably incurred by BT or C&W respectively in making good such damage, and shall indemnify BT or C&W against claims, demands, proceedings, costs, damages and expenses which may be made or taken against or recovered from or incurred by BT or C&W by reason or in consequence of any such damage, but—

(3) 2003 c. 21.

(4) 1984 c. 12. Schedule 2 was amended by the New Roads and Street Works Act 1991, Schedule 8, paragraphs 113 to 117 and the Communications Act 2003.

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- (a) nothing in this paragraph shall impose any liability on the undertaker with respect to any damage to the extent that such damage is attributable to any act or omission of BT or C&W, their officers, servants, contractors or other agents; and
- (b) BT and C&W shall give to the undertaker reasonable notice of any claim, demand or proceedings and shall make no settlement or compromise thereof without the consent of the undertaker, such consent not to be unreasonably withheld.

48. Nothing in this Order shall affect any right of a public communications provider under the Code.

PART 5

PROTECTION OF NEXUS

49.—(1) The provisions of this Part of this Schedule shall, unless otherwise agreed in writing between Nexus and the undertaker, have effect for the protection of Nexus.

(2) In this Part of this Schedule—

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

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

“maintenance” means works of maintenance and repair that are material to the structures and safe operation of railway property;

“Nexus” means the Tyne and Wear Passenger Transport Executive;

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

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

“railway property” means any railway belonging to Nexus, any works, apparatus and equipment of Nexus connected with any such railway and any land or premises belonging to or used by Nexus for the purposes of any such railway, works, apparatus or equipment;

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

“subsidiary” has the same meaning as in section 736 of the Companies Act 1985⁽⁵⁾.

50.—(1) The undertaker shall not exercise the powers conferred by article 16 or the powers conferred by section 11(3) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of Nexus.

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

(3) Except with the consent of Nexus, the undertaker shall not under the powers of Part 3 of this Order—

- (a) acquire or enter upon,

(5) 1985 c. 6.

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- (b) take or use, whether temporarily or permanently,
- (c) acquire any new right over, or
- (d) acquire any existing right of Nexus relating to,

any railway property.

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

51.—(1) The undertaker shall, before commencing construction of any specified work, supply to Nexus proper and sufficient plans of that work for the reasonable approval of the engineer and shall not commence such construction of the 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, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Nexus 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 any protective works (whether temporary or permanent) which in his reasonable opinion should be carried out before the commencement of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of any railway belonging to Nexus (including any relocation of works, apparatus and equipment necessitated by a specified work), and such protective works as may reasonably be necessary for those purposes shall be constructed by Nexus or by the undertaker, if Nexus so desires, with all reasonable dispatch and the undertaker shall not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

(4) The engineer shall inspect the protective works and notify the undertaker that they have been completed to his reasonable satisfaction, or otherwise, as soon as reasonably practicable after they have been completed.

52.—(1) Any specified work and any protective work specified pursuant to paragraph 51(3) shall, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 51;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway belonging to Nexus or the traffic thereon and the use by passengers of railway property,

and, if any damage to the railway property or any such interference or obstruction is caused or takes place in consequence of the construction of a specified work, the undertaker shall, notwithstanding any such approval, make good such damage and shall pay to Nexus all reasonable expenses to which Nexus may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(2) Nothing in this paragraph shall impose any liability on the undertaker with respect to any damage, cost, expense or loss attributable to the negligence of Nexus or its servants, contractors or agents and any liability to the undertaker under this paragraph shall be reduced proportionately to the extent to which any damage, cost, expense or loss is attributable to the negligence of Nexus or its servants, contractors or agents.

53. The undertaker shall—

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

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

55.—(1) If any alterations or additions, either permanent or temporary, to railway property are reasonably necessary during the a period of 12 months after the new tunnel is opened to traffic, in consequence of the construction of a specified work, and Nexus gives to the undertaker reasonable notice of its intention to carry out any such alterations or additions specifying the alterations or additions to be carried out, the undertaker shall pay to Nexus 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 Nexus in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) The engineer shall, in respect of the capitalised sums referred to in this paragraph and paragraph 56(a), provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(3) If the cost of maintaining, working or renewing railway property 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 Nexus under this paragraph.

56. The undertaker shall repay to Nexus all reasonable fees, costs, charges and expenses reasonably incurred by Nexus—

- (a) in constructing any protective works under the provision of paragraph 51(3) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;
- (b) in respect of the employment or procurement of the services of any inspectors, supervisory staff, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, monitoring, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work and to ensure the continued safe and economic operation of the railway undertaking of Nexus (including any relocation of works, apparatus and equipment necessitated by a specified work) and the comfort and safety of passengers;
- (c) in respect of any special traffic working resulting from any speed restrictions which may, in the reasonable opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work, or from the substitution or diversion of services which may be reasonably necessary for the same reason;
- (d) in respect of any additional temporary lighting of railway property in the vicinity of a specified work, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work; and
- (e) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction of a specified work.

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

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

- (a) by reason of the construction of a specified work or the failure thereof; or
- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work,

and the undertaker shall indemnify Nexus from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission; and the fact that any act or thing may have been done by Nexus 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 this supervision shall not (if it was done without negligence on the part of Nexus or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.

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

(3) Any liability of the undertaker under this paragraph shall be reduced proportionately to the extent to which any cost, charge, damage, expense, claim, demand or loss is attributable to the negligence of Nexus or its servants, contractors or agents.

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

60. The undertaker and Nexus may enter into, and carry into effect, agreements for the transfer to the undertaker of—

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

PART 6

PROTECTION OF NETWORK RAIL INFRASTRUCTURE LTD

Interpretation

61. In this Part of this Schedule—

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

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“the engineer” means an engineer appointed by Network Rail Infrastructure Ltd for the purpose in question;

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

“NRI” means Network Rail Infrastructure Ltd;

“Network Rail” means NRI and any associated company of NRI which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 736 of the Companies Act 1985⁽⁶⁾) the holding company of NRI, a subsidiary of NRI or another subsidiary of the holding company of NRI;

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

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

Powers requiring consent of NRI

62.—(1) The undertaker shall not under the powers conferred by this Order acquire or use, or acquire new rights over, any railway property unless such acquisition or use is with the consent of NRI.

(2) The undertaker shall not exercise the powers conferred by article 16 or the powers conferred by section 11(3) of the 1965 Act in respect of any railway property unless the exercise of such powers is with the consent of NRI.

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

(4) The undertaker shall not exercise the powers conferred by section 271 or 272 of the Town and Country Planning Act 1990, as applied by Schedule 11 to this Order, in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of NRI.

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

Fencing

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

Approval of plans

64.—(1) The undertaker shall before commencing construction of any specified work supply to NRI proper and sufficient plans of that work for the reasonable approval of the engineer and shall

(6) 1985 c. 6.

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not commence such construction of the 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 have been supplied to NRI the engineer has not intimated his disapproval of those plans and the grounds of his disapproval he shall be deemed to have approved the plans as submitted.

(3) If within 56 days after such plans have been supplied to NRI, NRI gives notice to the undertaker that NRI desires itself to construct any part of the specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of NRI then, if the undertaker desires such part of the specified work to be constructed, NRI shall construct it (together with any adjoining part of the specified work which the undertaker reasonably requires to be constructed in one operation with those works) with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled as aforesaid and under the supervision (where appropriate and if given) of the undertaker.

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

(5) In the event of NRI not constructing or completing any part of a specified work pursuant to paragraph (3) with all reasonable dispatch and to the reasonable satisfaction of the undertaker in accordance with such programme as may be agreed with the undertaker or settled by arbitration, NRI shall pay compensation to the undertaker for any loss which it may sustain as a result.

Construction of specified works

65.—(1) Any specified work (together with any protective works specified by the engineer pursuant to paragraph 64(4)) shall, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled as aforesaid;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of NRI or the traffic thereon;

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

(2) Nothing in this paragraph shall impose any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents.

Access

66. The undertaker shall—

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

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

Alterations, etc. to railway property

68.—(1) If during the construction of a specified work or during a period of 12 months after the completion of that work any alterations or additions, either permanent or temporary, to railway property are reasonably necessary in consequence of the construction of a specified work in order to ensure the safety of railway property or the continued safe and efficient operation of the railways of NRI, and NRI 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 NRI the reasonable cost of those alterations or additions including, in respect of any such alterations or additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) The engineer shall, in respect of the capitalised sums referred to in this paragraph and paragraph 69(a), provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(3) If the cost of maintaining, working or renewing railway property 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 NRI under this paragraph.

Repayment of Network Rail's fees etc.

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

- (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 64(3) or in constructing any protective works under the provisions of paragraph 64(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works; and
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction of a specified work and any protective works.

Maintenance of specified works

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

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Illuminated signs etc.

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

Alterations etc. to railway property : repayment of additional expenses

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

Indemnity

73.—(1) The undertaker shall be responsible for and make good to NRI all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason of the construction or maintenance of a specified work or the failure thereof; or
- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the undertaker shall indemnify Network Rail from and against all claims and demands arising out of or in connection with any specified work or any such failure, act or omission as aforesaid; and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.

(2) NRI 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.

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

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

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

(6) In this paragraph—

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

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“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993⁽⁷⁾.

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

75. The undertaker and NRI may enter into, and carry into effect, agreements for the transfer to the undertaker of—

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

PART 7

PROTECTION OF ELECTRICITY AND GAS UNDERTAKERS

Interpretation

76.—(1) In this Part of this Schedule—

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

“apparatus” means—

- (a) in the case of an electricity company, electric lines or electrical plant (as defined in the Electricity Act 1989⁽⁸⁾) belonging to or maintained by that company; and
- (b) in the case of a gas company, any mains, pipes or other apparatus belonging to or maintained by a gas transporter for the purposes of the conveyance of gas;

and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus; but the provisions of paragraphs 78 to 86 do not apply to apparatus in respect of which the relations between the undertaker and the companies are regulated by the provisions of Part III of the 1991 Act;

“company” means any of the following, namely, a public electricity supplier within the meaning of Part I of the Electricity Act 1989 and a gas transporter within the meaning of Part I of the Gas Act 1986⁽⁹⁾; and, in relation to any apparatus, means the company to whom it belongs or by whom it is maintained;

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

“functions” includes powers and duties;

“goods” includes electricity supplied by a public electricity supplier and gas conveyed by a gas transporter;

(7) 1993 c. 43.

(8) 1989 c. 29.

(9) 1986 c. 44. as amended by the Utilities Act 2000 (c. 27), section 76.

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“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

“plans” includes sections and method statements.

(2) The provisions of Schedule 11 to this Order shall not apply in relation to apparatus to which this Part of this Schedule applies.

Temporarily stopped up streets, etc: maintenance of apparatus

77. Notwithstanding the temporary stopping up or diversion of any highway pursuant to article 8, a company shall be at liberty at all times to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain or use any apparatus which at the time of the stopping up or diversion was in that highway provided that this provision shall not apply where alternative apparatus has been installed to replace the apparatus in question and is in operation or the apparatus is otherwise redundant.

Acquisition of apparatus

78. Notwithstanding anything in this Order or shown on the deposited plans the undertaker shall not acquire any apparatus or operational land belonging to a company otherwise than by agreement or consent of that company which shall not be unreasonably withheld or delayed but may be given subject to reasonable conditions.

Removal of apparatus: alternative apparatus

79.—(1) If, in the exercise of the powers of this Order, the undertaker acquires any interest in any land in which any apparatus is placed, that apparatus shall not be removed under this Part of this Schedule, and any right of a company to maintain that apparatus in that land shall not be extinguished, until alternative apparatus has been constructed and is in operation to the reasonable satisfaction of the company 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 undertaker requires the removal of any apparatus placed in that land, it shall give to the company 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 of this Order a company reasonably needs to remove any of its apparatus) the undertaker shall, subject to sub-paragraph (3), afford to the company the necessary facilities and rights (including for the avoidance of doubt legal easements satisfactory to the company) for the construction of alternative apparatus in other land of the undertaker and thereafter for the retention and 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 undertaker, or the undertaker 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 company in question shall, on receipt of a written notice to that effect from the undertaker, forthwith use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(4) The obligations imposed by sub-paragraph (3) shall not extend to the exercise by the company of any power to acquire compulsorily any land or rights in land.

(5) Any alternative apparatus to be constructed in land of the undertaker under this Part of this Schedule shall be constructed in such manner and in such line or situation as may be agreed between

the company in question and the undertaker or in default of agreement settled by arbitration pursuant to article 54.

(6) The company in question shall, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 54, and after the grant to the company of any such facilities and rights as are referred to in sub-paragraph (2) or (3), proceed with all reasonable dispatch to construct and bring into operation the alternative apparatus and thereafter to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(7) Notwithstanding anything in sub-paragraph (6), if the undertaker gives notice in writing to the company in question that it desires itself to execute any part of so much of the work necessary in connection with the construction of the alternative apparatus, or the removal of the apparatus required to be removed, as will take place in any land of the undertaker, that work may, with the prior written consent of the company (which shall not be unreasonably withheld and shall be subject to any such conditions as are reasonable and proper to protect the apparatus), in lieu of being executed by the company be executed by the undertaker with all reasonable despatch under the superintendence, if given, and to the reasonable satisfaction of the company.

(8) Nothing in sub-paragraph (7) shall authorise the undertaker to execute the actual 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 600 millimetres of the apparatus where the apparatus is operating or only capable of operating at below 7 bar pressure or within 1,500 millimetres of the apparatus where the apparatus is operating or capable of operating at or in excess of 7 bar pressure.

80.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to a company facilities and rights for the construction, and maintenance, in land of the undertaker of alternative apparatus in substitution for apparatus to be removed, those facilities and rights shall be granted upon such terms and conditions as may be agreed between the undertaker and the company in question or in default of agreement settled by arbitration in accordance with article 54.

(2) In settling those terms and conditions in respect of alternative apparatus to be constructed in or along the tunnel crossing or adjacent to any other of the authorised works, the arbitrator shall—

- (a) give effect to all reasonable requirements of the undertaker for ensuring the safety and efficient operation of the tunnel crossing 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 undertaker or the traffic in the tunnel crossing; and
- (b) so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to any terms and conditions applicable to the apparatus for which the alternative apparatus is to be substituted.

(3) If the facilities and rights to be afforded by the undertaker 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 company 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 shall make such provision for the payment of compensation by the undertaker to that company as appears to him to be reasonable having regard to all the circumstances of the particular case.

Protection of apparatus

81.—(1) Not less than 56 days before commencing the execution of any works of the type referred to in paragraph 79(2) that are near to, or will or may affect, any apparatus the removal of which

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has not been required by the undertaker under paragraph 79(2), the undertaker shall submit to the company in question a plan, section and description of the works to be executed.

(2) Those works shall 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 company for the alteration or otherwise for the protection of the apparatus, or for securing access thereto, and the company shall be entitled by its officer to watch and inspect the execution of those works.

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

(4) If a company in accordance with sub-paragraph (3) and in consequence of the works proposed by the undertaker reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, the foregoing provisions of this Part of this Schedule shall apply as if the removal of the apparatus had been required by the undertaker under paragraph 79(2).

(5) Nothing in this paragraph shall preclude the undertaker 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 in lieu of the plan, section and description previously submitted, and thereupon the provisions of this paragraph shall apply to and in respect of the new plan, section and description.

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

Stopped up highways: access to apparatus

82. Where, by reason of this Order, any part of any highway in which any apparatus is situated ceases to be part of a highway a company may exercise the same rights of access to such apparatus as it enjoyed immediately before the coming into force of this Order and the undertaker will grant to the company legal easements satisfactory to the company in respect of such apparatus and access thereto but nothing in this paragraph shall affect any right of the company or of the undertaker to require removal of such apparatus under this Part of this Schedule or the power of the undertaker to execute works in accordance with paragraph 81.

Repayment of expenses

83.—(1) Subject to the following provisions of this paragraph, the undertaker shall repay to a company the reasonable expenses incurred by that company in, or in connection with the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus which may be required in consequence of the execution of any such works as are referred to in paragraph 79(2).

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

(3) If in pursuance of 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

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(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 undertaker or, in default of agreement, is not determined by 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 paragraph would be payable to the company in question by virtue of sub-paragraph (1), shall 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 shall 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 shall be treated as if it also had been agreed or had been so determined.

Indemnity

84.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works as are referred to in paragraph 79(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 a company or there is any interruption in any service provided or in the supply or conveyance of any goods by the company, the undertaker shall—

- (a) bear and pay the cost reasonably incurred by that company in making good such damage or restoring the supply or conveyance; and
- (b) indemnify the company against all claims, demands, proceedings, costs, damages and expenses which may be made against, or recovered from, or incurred by it,

by reason or in consequence of any such damage or interruption or exercise by the undertaker of its powers pursuant to this Order.

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

(3) A company shall give the undertaker reasonable notice of any such claim or demand and no settlement or compromise shall be made without the consent of the undertaker which, if it withholds such consent, shall have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Payment for redundant apparatus

85.—(1) Where, by reason of the stopping up of any highway pursuant to this Order, any apparatus belonging to a company and laid or placed in such highway or elsewhere is rendered derelict or unnecessary, the undertaker shall, subject to sub-paragraph (2), pay to the company the value of such apparatus (which shall then become the property of the undertaker) and the reasonable cost of and any costs incidental to the cutting off of such apparatus from any other apparatus, and of and incidental to the execution or doing of any works or things rendered necessary or expedient by reason of such apparatus being so rendered derelict or unnecessary.

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(2) The undertaker shall not under the provisions of this paragraph be required to pay to a company the value of any apparatus rendered derelict or unnecessary if, to the reasonable satisfaction of the company, other apparatus has at the expense of the undertaker been provided and laid and made ready for use in substitution for the apparatus so rendered derelict or unnecessary.

Existing enactments and agreements

86. Nothing in this Part of this Schedule shall affect the provisions of any enactment or agreement regulating the relations between the undertaker and a company in respect of any apparatus laid or erected in land belonging to the undertaker on the coming into force of this Order.

PART 8

PROTECTION FOR SEWERAGE AND WATER UNDERTAKERS

87. In this Part of this Schedule—

“alteration” includes the provision of alternative means of operation or the diversion of any apparatus;

“apparatus” means—

- (a) mains, pipes or other apparatus belonging to, or maintained by, the company for the purposes of water supply; and
- (b) any sewer, drain or works vested in the company under the Water Industry Act 1991⁽¹⁰⁾ 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;

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

“the company” means Northumbrian Water Limited or its successor for the time being in its capacity as either a water undertaker or a sewerage undertaker within the meaning of the Water Industry Act 1991;

“construction” includes execution, placing, altering, replacing, relaying and removal and, in its application to works which include or comprise any operation, means the carrying out of that operation;

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

“specified work” means so much of the authorised works as will or may be situated over or within 15 metres (or 200 metres where explosives are used) measured in any direction of any apparatus, or (wherever situated) as will or may impose any load directly upon any apparatus.

No application where street works code applies

88. This Part of this Schedule (other than paragraphs 89 and 92) shall not apply to anything done or proposed to be done in relation to or affecting any apparatus in so far as the relations between the undertaker and the company are regulated by the provisions of Part III of the 1991 Act.

(10) 1991 c. 56.

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Disapplication of Schedule 11 in part

89. Paragraphs 1(1) and 2 of Schedule 11 to this Order shall not apply in relation to apparatus to which this Part of this Schedule applies and paragraph 1(3) and (4) of that Schedule shall have effect as if they referred to apparatus removed under this Part of this Schedule.

Acquisition of apparatus etc.

90. Notwithstanding anything in the Order or shown on the deposited plans, the undertaker shall not acquire from the company any apparatus or land pursuant to the Order otherwise than by agreement or with the company's consent which shall not be unreasonably withheld or delayed but may be given subject to reasonable conditions.

Exercise of powers respecting trial holes

91. The undertaker shall not, in the exercise of the powers of section 11(3) of the 1965 Act, as applied by this Order, or of article 16, make any trial holes which interfere with any apparatus without the consent of the company (which shall not be unreasonably withheld).

Access

92.—(1) The undertaker shall ensure that the construction of the authorised works does not prevent or materially obstruct access (including access by heavy goods vehicles) to or from either of the company's sewage treatment works at Howdon or Jarrow.

(2) If in consequence of the exercise of the powers of the Order the access to any apparatus is materially obstructed the undertaker shall provide reasonable alternative means of access to such apparatus which is not materially less convenient to the access enjoyed by the company prior to the obstruction.

(3) Where, in consequence of this Order, any part of a highway in which any apparatus is situated ceases to be part of a highway, the company may exercise the same rights of access to such apparatus as it enjoyed immediately before the making of this Order, but nothing in this sub-paragraph shall prejudice or affect the right of the undertaker to make provision for the alteration or removal of such apparatus in submitting plans under paragraph 95.

(4) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 8, the company shall be at liberty at all times after giving reasonable notice except in a case of urgency to construct and do all such works and things in, upon or under any such highway as may be reasonably necessary to enable it to maintain, protect, or use any apparatus which at the time of the stopping up or diversion was in that highway.

Condition surveys

93.—(1) Before commencing the construction or renewal of any specified work and again not later than 6 months after their completion, the undertaker shall procure in liaison with the company and to the company's reasonable satisfaction a survey of the condition of any apparatus liable to be affected.

(2) A copy of the report and any other information resulting from each such survey shall be supplied directly to the company.

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Prior investigation

94.—(1) Prior to the submission of plans pursuant to paragraph 95, the undertaker shall commission the company or such other body as the company acting reasonably may approve to undertake on behalf of the undertaker an investigation of any apparatus reasonably likely to be affected by the specified works.

- (2) The investigation undertaken for the purposes of this paragraph will—
- (a) include appropriate monitoring of flows in different conditions to establish the loading and capacity of sewers, drains and associated works forming part of such apparatus;
 - (b) have regard to the need to maintain existing services without any lowering in their performance and to the desirability of securing that sewers operate on the basis of gravity flows;
 - (c) identify such works to be designed by the undertaker as may be reasonably necessary for the alteration and protection of any apparatus which is the subject of such an investigation; and
 - (d) where undertaken by the company be carried out with all reasonable expedition on behalf of the undertaker and delivered to the undertaker together with all surveys, models, reports, monitoring data and the like used in the investigation upon its completion.

Plan approval

95.—(1) Without prejudice to the other provisions of this Part of this Schedule, before commencing the construction or renewal of any specified work, and in the case of any specified work of a temporary nature its removal, the undertaker shall submit to the company plans as described in sub-paragraph (2) (“the plans”) and shall not commence that work until the company has signified in writing its approval of those plans.

(2) The plans to be submitted to the company shall be detailed plans, drawings, sections and specifications describing the position and manner in which, and the level at which, any specified work is proposed to be constructed and the position of all apparatus within 15 metres of that work (or 200 metres where explosives are to be used) or upon which the specified work will impose a load and shall include detailed drawings of any works for alteration or replacement or protection of such apparatus which the undertaker may propose.

(3) For the purpose of the preparation of the plans and subject to such reasonable requirements as it may specify, the company shall promptly upon the undertaker’s reasonable request permit the undertaker to have access to plans in its possession and to any of its apparatus.

- (4) Any approval of the company required under this paragraph—
- (a) may be given subject to reasonable conditions;
 - (b) shall not be unreasonably withheld; and
 - (c) shall be deemed to have been given if it is neither given nor refused within 42 days of the submission of plans for approval.

(5) Prior to their approval under sub-paragraph (1), the company may require such modifications to be made to the plans as may be reasonably necessary for the alteration or replacement of apparatus, to secure apparatus and the remainder of its undertaking as a sewerage undertaker and water undertaker against interference or risk of damage and to provide and secure reasonably proper and convenient means of access to apparatus and its sewage treatment works.

96.—(1) The specified works shall be constructed and in the case of any temporary work removed in accordance with plans approved, or deemed to be approved, or settled by arbitration, as the

same may be amended from time to time by agreement between the undertaker and the company, and in the construction and removal of the specified works, the undertaker shall comply with all reasonable requirements of the company (which shall be given as soon as reasonably practicable) and shall provide new, altered or substituted apparatus or works for the protection of apparatus and the remainder of its undertaking as a sewerage undertaker and water undertaker, in such manner as the company may reasonably require, by way of replacement provision for or for the proper protection of, and for preventing injury or impediment to, any such apparatus and the remainder of its undertaking by reason of the specified works.

(2) All works under sub-paragraph (1), for the provision of new, altered or substituted apparatus or the protection of any apparatus shall, where so required by the company, be constructed by the company or under the supervision, if given, of an officer of the company duly appointed for the purpose and to the company's reasonable satisfaction, and all costs, charges and expenses reasonably incurred by the company in the construction of such works, or in the preparation or examination of plans or designs of such works, or in such supervision, shall be paid to the company by the undertaker.

(3) Where works are constructed under sub-paragraph (1) by the company, they shall be constructed with all reasonable despatch and also to the reasonable satisfaction of the undertaker.

(4) When works for the provision of any such new, altered or substituted apparatus, or any such protective work forming part of any such new, altered or substituted apparatus or any existing apparatus, have been completed under this Part of this Schedule to the reasonable satisfaction of the company, they shall be vested in the company forthwith but shall be maintainable by the undertaker until a period of 12 months has elapsed and the company or an engineer appointed by the company acting reasonably has issued a certificate of final inspection of the new, altered or substituted apparatus.

97.—(1) Subject to the following provisions of this Part of this Schedule, the undertaker shall be liable to make good, or, if the company so decides, to repay to the company any reasonable expense reasonably incurred by the company in making good, all injury or damage to any apparatus (except in so far as such apparatus is intended for alteration or removal for the purposes of the specified work) caused by or resulting from the construction of any specified work or any investigation undertaken in relation to any specified works and the provision of any new, altered or substituted apparatus or any protective work under this Part of this Schedule and shall pay to the company any reasonable additional expense to which it may be put in the maintenance, management or renewal or any new, altered or substituted apparatus which may be necessary in consequence of the construction of any specified work save to the extent that sub-paragraph (6) applies provided that the undertaker may at its request pay a capitalised sum to the company in settlement of any such claim by the company representing the reasonable additional expense to which the company reasonably expects to be put.

(2) The company shall, in respect of the capitalised sums referred to in sub-paragraph (1) provide such details of the formula by which those sums should be calculated as the undertaker may reasonably require.

(3) The undertaker shall indemnify the company against all actions, claims, demands, costs, expenses, damages or loss which may be made on or against the company which the company may incur or have to pay or which it may sustain in consequence of the construction of a specified work or of the failure or want of repair of a specified work or any subsidence caused by any specified work or in consequence of any act or omission of the undertaker, their contractors, agents, workmen or servants, whilst engaged upon the specified work and any new, altered or substituted apparatus or any protective work.

(4) The company shall give to the undertaker reasonable notice of any such claim or demand and no settlement or compromise thereof shall be made without the agreement in writing of the undertaker which, if it withholds any such consent, shall have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

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(5) Nothing in sub-paragraph (1) or (3) shall impose any liability on the undertaker in respect of any damage to the extent that it is attributable to the act, neglect or default of the company, its officers, servants, or, if not the undertaker, its contractors or agents.

(6) If pursuant to the provisions of this Part of this Schedule—

(a) alternative apparatus of better type, or greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions, except where this has been solely due to using the nearest currently available type, or

(b) apparatus (whether existing apparatus or alternative apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

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 undertaker or, in default of agreement, is not determined by arbitration to be necessary having regard, among other things, to the nature of the authorised works, then, if it involves cost in the construction of works under paragraph 92 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 company by virtue of sub-paragraph (1) shall be reduced by the amount of that excess.

(7) For the purposes of sub-paragraph (6), an extension of apparatus to a length greater than the length of existing apparatus shall not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus except in a case where the apparatus as so extended serves a purpose (either additional to or instead of that served by the existing apparatus) which was not served by the existing apparatus.

(8) An amount which apart from this sub-paragraph would be payable to the company in respect of works by virtue of this paragraph shall, 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 company any financial benefit by deferment of the time for renewal of the apparatus or of the system of which it forms part in the ordinary course, be reduced by the amount which represents that benefit.

(9) In any case where work is carried out by the undertaker pursuant to paragraph 92 and, if such work had been carried out by the company, the repayment made to the company under this paragraph would fall to be reduced pursuant to sub-paragraphs (4) to (6), the company shall pay to the undertaker such sum as represents the amount of that reduction.

98.—(1) An officer of the company duly appointed for the purpose may, at any reasonable time and, if required by the undertaker, under their supervision and control, enter upon and inspect any specified work or any other works constructed under this Part of this Schedule but may not give instructions to any person engaged in or about the specified works except the undertaker or such person as it may from time to time nominate.

(2) The approval by the company of any plans, drawings, sections or specifications or the supervision by it of any work under this Part of this Schedule shall not (if it was done without negligence on the part of the company, its officers, servants, or, if not the undertaker, its contractors or agents) exonerate the undertaker from any liability or affect any claim for damages by the undertaker.

99. As soon as reasonably practicable after the completion of the construction of the specified works, the undertaker shall deliver to the company a plan and section showing the position and level of those works as constructed and all new, altered or substituted works provided under this Part of this Schedule.