

SCHEDULE 2

Article 23

PROTECTIVE PROVISIONS

PART 1

PROTECTION FOR HARWICH HAVEN AUTHORITY

1. The provisions of this Part of this Schedule shall have effect for the protection of the Authority unless it is otherwise agreed in writing between the Company and the Authority.

2. In this Part of this Schedule—

“the Authority” means Harwich Haven Authority;

“the Harbour” means Harwich Harbour as described in section 4(1)(a) of the Harwich Harbour Act 1974 (which defines the area of Harwich Harbour);

“the Haven” means the waters over which the Authority exercises jurisdiction as harbour authority;

“plans” includes sections, drawings, descriptions, specifications, programmes and method statements.

3. The Company shall provide the Authority’s harbour master with details of any operations (including programmes of construction), proposed in connection with the construction of any work, which will or may create such conditions in the waters of the Haven that the passage of any vessel navigating outside the limits of deviation may be significantly impeded; and before any such operation commences the Company shall agree with the harbour master any special measures which are to be taken to avoid obstructing vessels navigating in the Haven, including any special measures to ensure unrestricted passage for vessels engaged in the service of Trinity House for the purposes of locating, surveying and marking wrecks.

4. The Company shall appoint the Authority to be the Company’s agent for the purpose of carrying out all environmental monitoring reasonably required as a result of the construction and operation of the works authorised by this Order.

5. The Authority shall keep separate accounts of any expenditure which it incurs in connection with environmental monitoring undertaken by the Authority as the Company’s agent pursuant to paragraph 4.

6.—(1) Not less than 56 days before commencing the construction of any tidal work the Company shall supply to the Authority plans of that work:

Provided that in the case of any work to be carried out under article 6, being a work which is required in an emergency, the Company shall not be required to submit plans of that work before its commencement but shall—

(a) give immediate notice of the work to the Authority; and

(b) submit plans of that work to the Authority as soon as reasonably practicable after its commencement.

(2) Whenever plans are submitted to the Authority under sub-paragraph (1) the Company shall also submit such further particulars by way of clarification of what is proposed as the Authority may, within 21 days from the day on which the plans are submitted under that sub-paragraph, reasonably require.

(3) The Authority may approve plans submitted to it in accordance with this Part of this Schedule or may disapprove them or approve them conditionally and, if the Authority does not within 56 days

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

of the submission to it of any plans under sub-paragraph (1) (or, where relevant, within 56 days of the provision of any information requested under sub-paragraph (2)) notify the Company in writing of its approval of those plans (conditionally or unconditionally), or its disapproval of those plans, the Authority shall be deemed to have approved the plans.

(4) Tidal works shall not be constructed except in accordance with such plans as may have been approved (conditionally or unconditionally) by the Authority under this Schedule or deemed to have been approved in accordance with sub-paragraph (3) or settled as provided in paragraph 11.

(5) The Company shall give to the Authority not less than 28 days' notice of the commencement of any tidal work.

(6) Plans of a tidal work shall not be submitted by the Company to the Secretary of State for approval under article 12 until plans of that work have been approved by the Authority or deemed to have been approved in accordance with sub-paragraph (3) or settled as provided in paragraph 11; and if the Secretary of State requires the alteration of any plans so submitted, the Company shall, not less than 28 days before commencing the work, notify the Authority of the alteration.

(7) If there is any inconsistency between the plans of any tidal work approved or deemed to have been approved in accordance with sub-paragraph (3) or settled under paragraph 11 and the plans approved by the Secretary of State under article 12, the work shall be constructed in accordance with the plans approved by the Secretary of State.

(8) The exercise by the Company of the powers of article 9 for the purpose of improving access to and from the works shall not, for the purpose of section 19 (restriction on works, dredging and moorings) of the Harwich Harbour Act 1974, be taken to be specifically authorised by any enactment.

7. The Company shall carry out any tidal work with all reasonable dispatch and to the reasonable satisfaction of the Authority (and shall promptly remove all temporary works as soon as they are no longer required), so that traffic in the Haven does not suffer more interference than is reasonably necessary, and the Authority shall be entitled at all reasonable times, on giving such notice as may be reasonable in the circumstances, to inspect and survey any tidal work.

8.—(1) If any tidal work is abandoned or falls into decay, the Authority may by notice in writing to the Company require them either to repair and restore that work or any part of it or (if the Company no longer require the work) to remove that work and restore the site to its former condition to such extent as the Authority reasonably requires.

(2) If a work which consists of a tidal work and a non-tidal work is abandoned or falls into decay and the non-tidal work is in such condition as to interfere with navigational safety, a notice under this paragraph may include the non-tidal work, or any part of it.

(3) In sub-paragraph (2), “non-tidal work” means so much of any work as is on or over land above the level of high water.

(4) If after such reasonable period as may be specified in a notice under this paragraph the work specified in that notice has not been carried out, the Authority may take whatever steps it considers appropriate to achieve the result required by the notice and the Company shall pay the amount of any expenditure reasonably incurred by the Authority in so doing.

9.—(1) If any berth approach within the Harbour becomes subject to sedimentation, scouring, currents or wave action which is wholly or partly caused by the construction or carrying on of the tidal works (including any temporary works) and which occurs during the period beginning with the commencement of the construction or carrying on of the tidal works and ending with the expiration of five years after the date on which the last of those works is completed or the removal of such temporary works, as the case may be, the Company shall either—

(a) pay to the Authority any additional expense which the Authority may reasonably incur for the preservation or proper maintenance of the berth approach—

- (i) in dredging the Harbour to remove the sedimentation,
 - (ii) in taking such action as the Authority considers to be necessary for the purpose of making good such scouring or the effects of such currents or wave action, or
 - (iii) as a result of increased frequency of maintenance dredging; or
- (b) take the necessary action at their own cost subject to prior approval of the Authority, such prior approval not to be unreasonably withheld or delayed.
- (2) Where dredging is undertaken under sub-paragraph (1) the Company shall pay for or carry out such dredging as may be necessitated by further sedimentation, scouring or wave action occurring within five years after completion of the dredging undertaken under sub-paragraph (1).

10.—(1) The Company shall be responsible for and make good to the Authority all financial losses which may be reasonably incurred or suffered by the Authority by reason of the construction, maintenance or operation of the works or the failure thereof or by reason of any act or omission of the Company, their employees, contractors or agents or others whilst engaged upon the construction or maintenance of the works or dealing with any failure of such works.

(2) The Company shall indemnify the Authority from and against all claims and demands arising out of or in connection with the works or any such failure, act or omission; and the fact that any act or thing may have been done by the Authority on behalf of the Company or by the Company, their employees, contractors or agents with plans or particulars submitted to or modifications or conditions specified by the Authority, or in a manner approved by the Authority, or under its supervision or the supervision of its duly authorised representative shall not (if it was done or required without negligence on the part of the Authority or its duly authorised representative, employee, contractor or agent) excuse the Company from liability under the provisions of this sub-paragraph.

(3) The Authority shall give the Company reasonable notice of any such loss, claim or demand as is referred to in sub-paragraphs (1) and (2), and no settlement or compromise thereof shall be made without the prior consent of the Company.

11. Any difference between the Company and the Authority arising out of any of the provisions of this Part of this Schedule shall be referred to and determined by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after notice in writing to the other) by the President of the Institution of Civil Engineers.

PART 2

PROTECTION FOR THE ENVIRONMENT AGENCY

1.—(1) The following provisions shall apply for the protection of the Agency unless otherwise agreed in writing between the Company and the Agency.

(2) In this Part of this Schedule—

“accumulation” means any accumulation of silt or other material;

“the Agency” means the Environment Agency;

“completion” in relation to a work means the date on which it is brought into use;

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

“damage” includes scouring and erosion 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, outfall

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

or other structure, or any appliance, constructed or used for land drainage, flood defence or tidal monitoring;

“erosion” means any erosion of the bed or shore of the sea or of the bed or banks of any river;

“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;

“outfall” means—

- (a) any existing land drainage outfall for which the Agency is responsible;
- (b) any sewer, pipe or drain provided for groundwater, surface water or storm overflow sewerage;

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

“specified work” means any permanent or temporary work or operation authorised by this Order (which includes for the avoidance of doubt, any dredging and any exploratory geotechnical investigations that may be undertaken);

“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.

2.—(1) Before beginning to construct any specified work, the Company shall submit to the Agency for its approval plans of the work and such further particulars available to them as the Agency may within 28 days of the submission of the plans reasonably require.

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

- (a) shall not be unreasonably withheld;
- (b) shall be deemed to have been given if, within 42 days of the submission of the plans for approval, it is neither—
 - (i) given in writing, nor
 - (ii) refused in writing (the refusal being 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 conditions as the Agency may impose in the discharge of its environmental and recreational duties for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution, or in the discharge of its environmental and recreational duties.

3. Without prejudice to the generality of paragraph 2 but subject to paragraph 13, the conditions which the Agency may impose under paragraph 2 include—

- (a) conditions as to the time and the manner in which any work is to be carried out; and
- (b) conditions requiring the Company at their 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.

4.—(1) Subject to sub-paragraph (2)—

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (a) any specified work, and all protective works required by the Agency under paragraph 2(2)(c), shall be constructed within such period (if any) as the Agency may specify at the time when it gives its approval under paragraph 2, or may approve at any later time on application by the Company (such approval not to be unreasonably withheld);
- (b) any specified work shall be constructed in accordance with the plans approved or deemed to have been approved or settled under this Part of this Schedule and in accordance with any conditions imposed under paragraph 2; and
- (c) any protective works required by the Agency under paragraph 2(2)(c) shall be constructed 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 Company shall give to the Agency not less than 14 days' notice in writing of their 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 specified works or any protective work of a type described in paragraph 3(b)(ii) 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 Company at the Company's own expense to comply with the requirements of this Part of this Schedule or (if the Company so elect and the Agency in writing consents, such consent not to be unreasonably withheld) to remove, alter or pull down that work and, in the case of removal, 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 beginning with the date when a notice under sub-paragraph (3) is served upon the Company, they have 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 may recover any expenditure reasonably incurred by it in so doing from the Company.

(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.

5.—(1) Before commencing the construction of a specified work the Company shall procure at their 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 Company 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 Company or which they otherwise have control of or are 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 this Order or is already in existence.

(3) The obligation imposed on the Company by sub-paragraph (2) does not apply where the Agency or another person other than the Company is liable to maintain the drainage work in question and is not precluded by the exercise of the powers of this Order from doing so.

(4) If any drainage work referred to in sub-paragraph (2) is not maintained in good repair and condition and free from obstruction the Agency may by notice in writing require the Company to repair and restore that drainage work, or any part thereof, or (if the Company so elect and the Agency in writing consents, such consent not to be unreasonably withheld), to remove the drainage work

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

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 under sub-paragraph (4) is served on the Company, they have failed to begin taking steps to comply with the reasonable requirements of the notice and thereafter complete 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 Company.

(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 conferred by sub-paragraph (5) until the dispute has been finally determined.

6.—(1) If, during the construction of a specified work or within 10 years after the completion of any such work and wholly or partly in consequence of its construction, there is caused or created an accumulation or erosion which causes damage, the Company shall, if so required by the Agency before or within the period of 10 years after such completion, remedy such accumulation or erosion, in the manner specified in sub-paragraph (4), and, if they refuse or fail so to do, the Agency may itself cause work to be done and may recover the reasonable cost thereof from the Company.

(2) Should any accumulation or erosion, in consequence of such construction, arise within the said period of 10 years and be remedied in accordance with sub-paragraph (1), any recurrence of such accumulation or erosion shall from time to time be so remedied by the Company during the said period of 10 years and at any time thereafter, save that the Company'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 without any further accumulation or erosion being caused or created in consequence of such construction.

(3) In sub-paragraphs (1) and (2), "damage" means any damage to the bed or banks of the river or any adverse effect upon the structure or operation of any outfall, flood or sea defences or any jetty or other structure under the jurisdiction of the Agency for the purposes of the Water Resources Act 1991.

(4) For the purposes of sub-paragraphs (1) and (2)—

- (a) in the case of an accumulation, the remedy shall be its removal or such other protective works or measures as may be reasonably required by the Agency; 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 required by the Agency,

any such protective works being subject to paragraph 13.

(5) In the event that surveys, inspections, tests or sampling establish that such accumulation or erosion would have been caused in any event by factors other than the construction of a specified work the Company shall be liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction.

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

8.—(1) The Company 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 a written notice on the Company requiring them 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 a notice under sub-paragraph (2), the Company fail to take such steps as are described in the notice, the Agency may take those steps and may recover from the Company 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 Company the reasonable cost of so doing provided that notice specifying those steps is served on the Company as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

9. The Company 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.

10.—(1) Without prejudice to the other provisions of this Part of this Schedule, the Company shall indemnify the Agency against all claims, demands, proceedings, costs, damages, expenses or losses, 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 Company, their contractors, agents or employees whilst engaged upon the specified works.

(2) The Agency shall give to the Company reasonable notice of any such claim, demand, or proceedings and no settlement or compromise of any such claim, demand, proceedings, costs, damages, expenses or losses shall be made without the consent of the Company which shall not be unreasonably withheld.

11. The fact that any work or thing has been executed or done by the Company 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 Company from any liability under the provisions of this Part of this Schedule.

12. For the purposes of Chapter II of Part II of the Water Resources Act 1991 (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 Part of this Schedule with respect to such construction shall

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

be deemed also to constitute a licence under that Chapter to obstruct or impede the flow of inland waters at that point by means of impounding works or, as the case may be, a consent or approval under section 109.

13.—(1) This paragraph applies in relation to any protective work required by the Agency under this Part of this Schedule (“relevant protective work”).

(2) Relevant protective works shall be taken to be works which fall within paragraph (ii) of the proviso to section 19 of the Harwich Harbour Act 1974 (restrictions on works, dredgings and moorings) and, accordingly, to be exempt from the requirement to be licensed under section 20 (licensing of works) of that Act.

(3) Before imposing any requirement of a type referred to in paragraph 3(b)(ii) or 6(4), the Agency shall first consult in writing the Harwich Haven Authority (“the Authority”) who may comment in writing (with or without specifying objections) within 21 days of being so consulted; and the Agency shall within 7 days of receiving such comments from the Authority, provide the Company with a copy of those comments.

(4) Not less than 56 days before commencing the construction of any relevant protective work the Company or the Agency shall supply to the Authority plans of that work.

(5) Whenever plans are submitted to the Authority under sub-paragraph (4) the Company or the Agency shall also submit such further particulars by way of clarification of what is proposed as the Authority may, within 21 days from the day on which the plans are submitted, reasonably require.

(6) The Authority may approve plans submitted to it under sub-paragraph (4) or may disapprove them or approve them conditionally and, if the Authority does not within 56 days of the submission to it of any plans under sub-paragraph (4) (or, where relevant, within 56 days of the provision of any information requested under sub-paragraph (5)) notify the Agency and the Company in writing of its approval of those plans (conditionally or unconditionally), or its disapproval of those plans, the Authority shall be deemed to have approved the plans.

(7) A relevant protective work shall not be constructed except in accordance with such plans as may have been approved (conditionally or unconditionally) by the Authority under this Part of this Schedule or deemed to have been approved in accordance with sub-paragraph (6) or settled as provided in paragraph 14.

(8) The Company or the Agency shall give to the Authority not less than 28 days’ notice of the commencement of any relevant protective work.

(9) Plans of any relevant protective work which is a tidal work shall not be submitted by the Company to the Secretary of State for approval under article 12 until plans of that work have been approved by the Authority or deemed to have been approved in accordance with sub-paragraph (6) or settled as provided in paragraph 14; and if the Secretary of State requires the alteration of any such plans the Company shall, not less than 28 days before commencing the work, notify the Authority and the Agency of the alteration.

(10) Subject to notification by the Secretary of State in accordance with sub-paragraph (9), if there is any inconsistency between the plans of any relevant protective work which is a tidal work approved or deemed to have been approved in accordance with sub-paragraph (6) or settled under paragraph 14 and the plans approved by the Secretary of State under article 12, the relevant protective work in question shall be constructed in accordance with the plans approved by the Secretary of State.

14. Any dispute arising between the Company 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 and the Secretary of State for Transport acting jointly.