

SCHEDULES

SCHEDULE 10

PROTECTIVE PROVISIONS

PART 3

PROTECTION FOR THE ENVIRONMENT AGENCY

General

29. For the protection of the Agency, the following provisions of this Part of this Schedule shall, unless otherwise agreed in writing between the undertaker and the Agency, have effect.

Interpretation

30. 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 have corresponding meanings;

“drainage work” means any watercourse and any bank, wall, embankment of the River Mersey or other structure, or any appliance, constructed or used for land drainage, flood defence or tidal monitoring, and includes any land which, taking account of flood defences, is expected to provide flood storage capacity for any watercourse at intervals not less frequent than—

(a) in the case of areas providing fluvial flood storage, once in 100 years; and

(b) in the case of areas providing tidal or coastal flood storage, once in 200 years;

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

“excluded work” means Work Numbers 1a, 1b, 1c, 1d, 1e, 1f, 2a, 2b, 3a, 3b, 4h, 4i, 4j, 5a, 5b, 5c, 5d, 5e, 5f, 5g and 5h;

“the fishery” means the River Mersey and fish in, or migrating to or from, the River Mersey and the spawn, habitat or food of such fish;

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

“River Mersey” means the River Mersey and its tributaries within the Order limits;

“specified work” means so much of any permanent or temporary work or operation authorised by this Order (including, for the avoidance of doubt, any dredging and any geotechnical investigations that may be undertaken) as is in, on, under, over or within 16 metres of a drainage work or is otherwise likely to—

(c) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;

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- (d) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;
- (e) cause obstruction to the free passage of fish or damage to any fishery; or
- (f) affect the conservation, distribution or use of water resources;

and reference to protection of or damage to a drainage work includes reference to the protection of or damage to the drainage work as a natural resource or in respect of the effects of that drainage work on the environment.

Plan approval

31.—(1) Before beginning to construct any specified work other than an excluded 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 other than an excluded work shall not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 42.

(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 2 months of the submission of the plans for approval; and
- (c) may be given subject to such reasonable requirements as the Agency may impose—
 - (i) for the protection of any drainage work;
 - (ii) for the protection of the fishery;
 - (iii) for the protection of water resources;
 - (iv) for the prevention of flooding;
 - (v) for the prevention of water pollution; or
 - (vi) for the discharge of its environmental and recreational duties.

32. Without limiting the scope of paragraph 31, 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 for 5 years following the completion, of the specified works; and
 - (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.

Construction of works

33.—(1) Subject to sub-paragraph (2), any specified work other than an excluded work, and all protective works required by the Agency under paragraph 32, 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 subsequently (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 an officer of the Agency shall be entitled 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 other than an excluded 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 a specified work other than an excluded work or any protective work required by the Agency 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 and within such limits 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 subsequently to make reasonably expeditious progress towards their implementation, 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 sub-paragraph (3), 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.

Liability for damage to tidal and fluvial regimes

34.—(1) If, during the construction of any specified work, or within 5 years after the completion of such work, there is caused or created an accumulation or erosion or an alteration to tidal flow or littoral drift which in whole or in part is reasonably attributable to the construction of such work and which causes damage or reasonable expectation of damage, the undertaker shall, if so required by the Agency before or within the period of 5 years after such completion and to the extent that it is so attributable, remedy such accumulation or erosion or alteration to tidal flow or littoral drift in the manner specified in sub-paragraph (4) and, if it refuses to do so, the Agency may itself cause such remedy to be carried out and may recover the reasonable cost of so doing from the undertaker.

(2) Should an accumulation or erosion or alteration of tidal flow or littoral drift which in whole or in part is reasonably attributable to the construction of the specified works arise which causes such damage or reasonable expectation of damage within the said period of 5 years and be required to be remedied in accordance with sub-paragraph (1), any continuation or recurrence of such accumulation or erosion or alteration of tidal flow or littoral drift shall to the extent that it is reasonably attributable to the construction or operation of any specified work be so remedied by the undertaker during the said period of 5 years and at any time subsequently, save that the undertaker's obligation under this sub-paragraph shall cease in the event that following the remedying of any accumulation or erosion or alteration of tidal flow or littoral drift a period of 5 years elapses without any further accumulation

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or erosion or alteration of tidal flow or littoral drift reasonably attributable to the construction of the specified works.

(3) In sub-paragraphs (1) and (2) and in paragraph 37 “damage” means, in the context of damage to flood defence capability or operation, any damage affecting the following—

- (a) the efficacy of flood defences;
- (b) the bed or banks of a river; or
- (c) 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⁽¹⁾.

(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 protective works or measures as may reasonably be required by the Agency; and
- (b) in the case of erosion or alteration of tidal flow or littoral drift, the remedy shall be the carrying out of such reconstruction works and protective works or measures as may reasonably be required by the Agency.

(5) To the extent that the undertaker establishes by surveys, inspections, tests or sampling that such accumulation or erosion or alteration of tidal flow or littoral drift referred to in sub-paragraph (1) or (2) would have been caused in any event by factors other than the construction or operation of a specified work, the undertaker shall not be liable to remedy such accumulation or erosion or alteration of tidal flow.

(6) In carrying out any surveys, inspections, tests or sampling under sub-paragraph (5) the undertaker shall not unreasonably delay the execution of any remedial action required under sub-paragraph (1) or (2).

Prior survey of drainage works

35. Before commencing the construction of a specified work the undertaker shall procure at its own expense, in liaison with and to the reasonable satisfaction of the Agency, a survey of any drainage work liable to be affected by the specified work.

Maintenance by undertaker of drainage works

36.—(1) Subject to sub-paragraph (2), the undertaker shall, from the commencement of the construction of the specified works until their completion 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 conferred by this Order or is already in existence.

(2) The obligation imposed on the undertaker under sub-paragraph (1) 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 conferred by this Order from doing so.

(3) If any such drainage work which the undertaker is liable to maintain 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 drainage work, or any part of it, or (if the undertaker so elects and the Agency in writing consents, 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.

(4) 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 (3) on the undertaker, the undertaker

(1) 1991 c. 57.

has failed to begin taking steps to comply with the reasonable requirements of the notice and not subsequently made reasonably expeditious progress towards their completion, the Agency may carry out the measures specified in the notice and may recover any expenditure reasonably incurred by it in doing so from the undertaker.

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

Impairment of efficiency of and damage to drainage works

37.—(1) 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 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 doing so.

(2) If such impaired or damaged drainage work is not made good to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the undertaker to repair and restore the work to its former standard of efficiency or where necessary to construct some other work in substitution for it.

(3) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any impaired or damaged drainage work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their completion, the Agency may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in doing so from the undertaker.

(4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (1), the Agency shall not, except in a case of emergency, exercise its powers to make good the drainage works until the dispute has been finally determined.

Protection of the fishery

38.—(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 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 expenses reasonably incurred by it in doing so provided that written notice specifying those steps is served on the undertaker as

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soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

Indemnity in respect of particular expenses incurred by Agency under this Part of this Schedule

39. 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; or
- (b) in the inspection, for the purposes of compliance with this Part of this Schedule, of the construction of the specified works or any protective works required by the Agency under this Part of this Schedule.

General indemnity by the undertaker

40.—(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, 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; or
- (b) any damage to the fishery in so far as it has not already been compensated; or
- (c) any raising or lowering of the water table in land adjoining the authorised works or any sewers, drains and watercourses; or
- (d) any flooding or increased flooding of land adjoining the authorised works; 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 thereof shall be made without the agreement of the undertaker which agreement shall not be unreasonably withheld, and if such agreement is not given by the undertaker, the Agency shall diligently defend such claim or demand.

(3) Prior to incurring any expense which it may seek to recover under this paragraph, the Agency shall serve a written 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) 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 (in the absence of negligence on the part of the Agency, its officers, contractors or agents) relieve the undertaker from any liability under this paragraph.

Dispute resolution

41.—(1) For the purposes of Chapter 2 of Part 2 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 be deemed also to constitute an impounding licence under that Chapter or, as the case may be, a consent or approval under that section.

(2) Section 23 of the Land Drainage Act 1991(2) (prohibition on obstructions, etc. in watercourses) and any byelaws made under that Act or under the Water Resources Act 1991 shall not apply to anything done under or in pursuance of this Order.

42. Any dispute arising between the undertaker and the Agency under this Part of this Schedule (other than a difference as to its meaning or construction) shall, if the parties agree, be determined by arbitration under article 62 (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 on a reference to them by either party after notice in writing to the other.

43. Nothing in paragraphs 37(1) and 40(1) shall impose any liability on the undertaker in respect of accumulation or erosion or alteration of the tidal flow or littoral drift other than such accumulation or erosion or alteration of the tidal flow or littoral drift which the undertaker is liable to remedy under paragraph 34(1) or (2).