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## SCHEDULES

### SCHEDULE 32

#### PROTECTIVE PROVISIONS

#### PART 4

##### LAND DRAINAGE, FLOOD DEFENCE, WATER RESOURCES AND FISHERIES

- 40 (1) The following provisions of this Part have effect, unless otherwise agreed in writing between the nominated undertaker and the drainage authority concerned.
- (2) In this Part—
- “the Agency” means the Environment Agency;
  - “a category 1 specified work” means so much of any permanent or temporary work or operation authorised by this Act (which includes, for the avoidance of doubt, any dredging and any geotechnical investigations that may be undertaken) as—
    - (a) consists of a flood risk activity, a water discharge activity or groundwater activity within the meaning of the Environmental Permitting Regulations, or
    - (b) involves abstraction of water, or is likely to materially affect the quantity or quality of water which any person is licensed or permitted to abstract, from a source of supply within the meaning of the Water Resources Act 1991;
  - “a category 2 specified work” means any of the following—
    - (a) erecting any mill dam, weir or other like obstruction to the flow of any ordinary watercourse, or raising or otherwise altering any such obstruction,
    - (b) erecting a culvert in an ordinary watercourse,
    - (c) altering a culvert in a manner that would be likely to affect the flow of an ordinary watercourse, or
    - (d) altering, removing or replacing a structure or feature designated by a local drainage authority under Schedule 1 to the Flood and Water Management Act 2010;
  - “construction” includes execution, placing, altering, replacing, relaying and removal and “construct” and “constructed” are construed accordingly;
  - “the drainage authority” means—
    - (a) in relation to a category 1 specified work, the Agency;
    - (b) in relation to a category 2 specified work, the drainage board concerned within the meaning of section 23 of the Land Drainage Act 1991;
  - “drainage work” means any watercourse and any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage,

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flood defence or tidal monitoring, and includes land which provides or is to provide flood storage capacity for any watercourse;

“the Environmental Permitting Regulations” means the Environmental Permitting (England and Wales) Regulations 2016 (S.I. 2016/1154);

“fishery” means any waters containing fish and fish in, or migrating to or from such waters and the spawn, spawning grounds or food of such fish;

“local drainage authority” means a drainage authority other than the Agency;

“ordinary watercourse” has the meaning given by the Land Drainage Act 1991;

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

“watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and passages through which water flows except a public sewer as defined by the Water Industry Act 1991.

- (3) Where any approval is required under this Part from a local drainage authority, that authority must—
- (a) have regard, in imposing any conditions or requirements, to any model conditions issued by the Agency (following consultation with the other drainage authorities and the nominated undertaker);
  - (b) consult the Agency in any case where it proposes to impose conditions or requirements, or to refuse approval, and must specifically seek the Agency's advice concerning any proposal to depart from the model conditions;
  - (c) provide the nominated undertaker with reasons and supporting evidence in any case where it gives a decision which does not accord with the view or advice of the Agency given in response to consultation under paragraph (b).
- 41 (1) Before beginning to construct any specified work, the nominated undertaker must submit to the drainage authority plans of the work and such further particulars available to it as the drainage authority may within 28 days of the submission of the plans reasonably require.
- (2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the drainage authority, or determined under paragraph 51.
- (3) Any approval of the drainage authority required under this paragraph—
- (a) must not be unreasonably withheld,
  - (b) is to be deemed to have been given if it is neither given nor refused within 56 days of the submission of the plans for approval or where further particulars are submitted under sub-paragraph (1), within 56 days of the submission of those particulars, and
  - (c) may be given subject to such reasonable requirements or conditions as the drainage authority may make for the protection of any drainage work or fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its statutory environmental duties.
- 42 (1) This paragraph applies to any request for approval of plans under paragraph 41 to the extent that the plans relate to a groundwater activity within the meaning of paragraph 3 of Schedule 22 to the Environmental Permitting Regulations, except where the circumstances described in paragraph 3(3) of that Schedule apply.

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- (2) In exercising its functions in relation to that request the drainage authority must comply with the requirements of paragraph 7(2) to (5) of Schedule 22 to the Environmental Permitting Regulations, subject to paragraph 8 of that Schedule, as if the request for approval were as an application for a permit under those regulations.
- 43 The requirements which the drainage authority may make under paragraph 41 include conditions requiring the nominated undertaker at its own expense to construct such protective works (including any new works as well as alterations to existing works) as are reasonably necessary—
- (a) to safeguard any drainage work against damage, or
  - (b) 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 the specified work.
- 44 (1) Any specified work, and all protective works required by the drainage authority under paragraph 41, must be constructed to the reasonable satisfaction of the drainage authority and an officer of the drainage authority is entitled on giving such notice as may be reasonable in the circumstances, to inspect and watch the construction of such works.
- (2) The nominated undertaker must give to the drainage authority not less than 14 days' notice of its intention to commence construction of any specified work and notice 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, the drainage authority may by notice require the nominated undertaker at the nominated undertaker's own expense to comply with the requirements of this Part or (if the nominated undertaker so elects and the drainage authority 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 drainage authority 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 nominated 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 drainage authority may execute the works specified in the notice and any expenditure reasonably incurred by it in so doing is to be recoverable from the nominated undertaker.
- (5) In the event of any dispute as to whether sub-paragraph (3) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the drainage authority must not, except in an emergency, exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined.
- 45 (1) Subject to sub-paragraph (5) the nominated undertaker must from the commencement of the construction of the specified works maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by the nominated undertaker for the purposes or in connection with the specified works, whether the drainage work is constructed under this Act or is already in existence.

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- (2) If any such drainage work is not maintained to the reasonable satisfaction of the drainage authority, the drainage authority may by notice require the nominated undertaker to repair and restore the work, or any part of it, or (if the nominated undertaker so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the drainage work and restore the site to its former condition, to such extent and within such limits as the drainage authority reasonably requires.
- (3) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the nominated undertaker, the nominated 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 implementation, the drainage authority may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the nominated undertaker.
- (4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the drainage authority must not except in a case of emergency exercise the powers of sub-paragraph (3) until the dispute has been finally determined.
- (5) This paragraph does not apply to—
- (a) drainage works which are vested in the drainage authority, or which the drainage authority or another person is under an obligation to maintain and is not proscribed by the powers of the Act from doing so;
  - (b) any obstruction of a drainage work for the purpose of a work or operation authorised by the Act and carried out in accordance with the provisions of this Part.
- 46 (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 work is otherwise damaged, so as to require remedial action, such impairment or damage must be made good by the nominated undertaker to the reasonable satisfaction of the drainage authority and if the nominated undertaker fails to do so, the drainage authority may make good the same and recover from the nominated undertaker the expense reasonably incurred by it in doing so.
- (2) In any case where immediate action by the drainage authority is reasonably required in order to secure that the imminent flood risk is avoided or reduced, the drainage authority may take such steps as are reasonable for the purpose, and may recover from the nominated undertaker the reasonable cost of so doing provided that notice specifying those steps is served on the nominated undertaker as soon as reasonably practicable after the drainage authority has taken, or commenced to take, the steps specified in the notice.
- (3) Nothing in paragraph 44, 45 or 46 authorises the drainage authority to execute works on or affecting an operational railway without the prior consent in writing of the nominated undertaker, such consent not to be unreasonably withheld.
- 47 (1) The nominated undertaker must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in any fishery during the construction of any specified work.
- (2) If by reason of—
- (a) the construction of any specified work, or

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- (b) the failure of any such work,  
damage to a fishery is caused, or the Agency has reason to expect that such damage may be caused, the Agency may serve notice on the nominated 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 nominated undertaker fails to take such steps as are described in sub-paragraph (2), the Agency may take those steps and may recover from the nominated 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 a fishery is avoided or reduced, the Agency may take such steps as are reasonable for the purpose, and may recover from the nominated undertaker the reasonable cost of so doing provided that notice specifying those steps is served on the nominated undertaker as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.
- 48 (1) The nominated undertaker must indemnify the drainage authority from all claims, demands, proceedings or damages, which may be made or taken against, or recovered from the drainage authority by reason of—
- (a) any damage to any drainage work so as to impair its efficiency for flood defence purposes,
  - (b) any damage to a fishery,
  - (c) any raising or lowering of the water table in land adjoining the works authorised by this Act or adjoining any sewers, drains and watercourses, or
  - (d) any flooding or increased flooding of any such lands,
- which is caused by, or results from, the construction of any specified work or any act or omission of the nominated undertaker, its contractors, agents or employees whilst engaged upon the work.
- (2) The drainage authority must give to the nominated undertaker reasonable notice of any such claim or demand and no settlement or compromise of any such claim or demand is to be made without the consent of the nominated undertaker which, if it withholds such consent, is to have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.
- 49 Nothing in paragraph 48 requires the nominated undertaker to indemnify the drainage authority in respect of any claim, demand, proceedings or damages which the drainage authority could reasonably make, take against or recover from any other person.
- 50 The fact that any work or thing has been executed or done in accordance with a plan approved or deemed to be approved by the drainage authority, or to its satisfaction, or in accordance with any determination under paragraph 51, does not (in the absence of negligence on the part of the drainage authority, its officers, contractors or agents) relieve the nominated undertaker from any liability under the provisions of this Part.
- 51 Any dispute arising between the nominated undertaker and the drainage authority under this Part is to be determined by arbitration.

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