

SCHEDULES

SCHEDULE 11

Article 58

PROTECTIVE PROVISIONS

PART 1

FOR PROTECTION OF BRITISH WATERWAYS BOARD

1.—(1) For the protection of BW the following provisions of this Part of this Schedule shall, unless otherwise agreed in writing between the Executive and BW, have effect.

Interpretation

(2) In this Part of this Schedule—

“BW” means the British Waterways Board;

“BW’s network” means BW’s network of waterways;

“construction”, in relation to any specified work or protective work, includes—

- (a) the execution and placing of that work; and
- (b) any relaying, renewal, or maintenance of that work as may be carried out during the period of 24 months from the completion of that work;

and “construct” and “constructed” have corresponding meanings;

“detriment” means any damage to a waterway or any other property of BW and, without prejudice to the generality of that meaning, includes—

- (a) any obstruction of, or interference with, or hindrance or danger to, navigation or to any use of a waterway (including towing paths);
- (b) the erosion of the bed or banks of a waterway, or the impairment of the stability of any works, lands or premises forming part of a waterway;
- (c) the deposit of materials or the siltation of a waterway so as to damage the waterway;
- (d) the pollution of a waterway;
- (e) any significant alteration in the water level of a waterway, or significant interference with the supply of water thereto, or drainage of water therefrom;
- (f) any harm to the ecology of a waterway (including any adverse impact on any site of special scientific interest comprised in BW’s network);
- (g) any interference with the exercise by any person of rights over BW’s network;

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

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

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“practical completion” means practical completion of all of the specified work notwithstanding that items which would ordinarily be considered snagging items remain outstanding, and the expression “practically complete” and “practically completed” shall be construed accordingly;

“protective work” means a work constructed under paragraph 7(3)(a);

“specified works” 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 affect the waterway;

“towing path” means the towing path forming part of the waterway;

“waterway” means any canal or inland navigation belonging to or under the management or control of BW, and includes any works, lands or premises belonging to BW, or under its management or control, and held or used by BW in connection with any such canal or inland navigation.

Powers requiring BW's consent

2.—(1) The Executive shall not under the powers conferred by this Order acquire compulsorily any land of BW or any easement or other right over such land, or use any such land, unless such acquisition or use is with the consent of BW.

(2) The Executive shall not in the exercise of the powers conferred by this Order obstruct or interfere with pedestrian or vehicular access to a waterway unless such obstruction or interference with such access is with the consent of BW.

(3) The Executive shall not exercise the powers conferred by article 14(1) in relation to any way over land comprised in a waterway unless such exercise is with the consent of BW.

(4) Nothing in article 22 shall authorise the Executive—

- (a) to discharge any water directly or indirectly into a waterway; or
- (b) to carry out any works to, or make any opening in, or otherwise interfere with, a waterway (including the banks and bed thereof),

except with the consent of BW and on terms that BW may reasonably require, and in accordance with plans approved by, and under the supervision (if given) of, the engineer.

(5) The Executive shall not exercise any power conferred by this Order in such a way as to interfere with the supply of water to or the drainage of water from a waterway unless such exercise is with the consent of BW.

(6) The Executive shall not exercise the powers conferred by article 26, or the powers conferred by section 11(3) of the 1965 Act, in relation to a waterway unless such exercise is with the consent of BW.

(7) The Executive shall not exercise the powers conferred by sections 271 or 272 of the Town and Country Planning Act 1990, as applied by Schedule 10 to this Order, so as to divert any right of access to a waterway, but such right of access may be diverted with the consent of BW.

(8) The consent of BW pursuant to sub-paragraphs (1) to (7) and the approval of plans under paragraph (4) shall not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions which in the case of article 22 may include conditions—

- (a) specifying the maximum volume of water which may be discharged in any period; and
- (b) authorising BW on giving reasonable notice (except in an emergency, when BW may require immediate suspension) to the Executive to require the Executive to suspend the discharge of water or reduce the flow thereof where this is necessary by reason of any operational or environmental requirement of BW.

Vehicles, plant and machinery

3. The Executive shall not use any land or property of BW forming part of a waterway for the passage or siting of vehicles, plant or machinery employed in the construction of the specified works other than—

- (a) with the consent in writing of the engineer whose consent shall not be unreasonably withheld; and
- (b) subject to compliance with such reasonable requirements as the engineer may from time to time specify—
 - (i) for the prevention of detriment; or
 - (ii) in order to avoid or reduce any inconvenience to BW, its officers and agents and all other persons lawfully on such land or property.

but nothing in this paragraph shall apply in relation to anything done in accordance with any approval given by BW under paragraph 7.

Closure of towing paths, etc.

4. If in consequence of or in connection with the exercise of the powers of this Order any part of a towing path or any public right of way giving access thereto (“the closed section”) is temporarily closed to persons on foot on cycles or in a wheelchair and there is no way which provides a reasonable alternative, the Executive shall to the reasonable satisfaction of BW, provide in substitution a sufficient and convenient way for such persons between the points of commencement and termination of the closed section for such time as the closure continues.

Fencing

5. Where so required by the engineer the Executive shall to the reasonable satisfaction of the engineer fence off a specified work or a protective work or take such other steps as the engineer may require to be taken for the purpose of separating a specified work or a protective work from a waterway, whether on a temporary or permanent basis or both.

Survey of waterway

6.—(1) Before the commencement of the initial construction of any part of the specified works and again following practical completion of the specified works the Executive shall bear the reasonable cost of the carrying out by a qualified engineer (the “engineer”), to be approved by BW and the Executive, of a survey including a dip-survey to measure the depth of the waterway (“the survey”) of so much of the waterway and of any land and existing works of the Executive which may provide support for the waterway as will or may be affected by the specified works.

(2) For the purposes of the survey the Executive shall—

- (a) on being given reasonable notice (save in case of emergency, when immediate access shall be afforded) afford reasonable facilities to the engineer for access to the site of the specified works and to any land and existing works of the Executive which may provide support for the waterway as will or may be affected by the specified works; and
- (b) supply the engineer as soon as reasonable practicable with all such information as he may reasonably require with regard to such existing works of the Executive and to the specified works or the method of construction thereof.

(3) The reasonable costs of the survey shall include the costs of any dewatering or reduction of the water level of any part of the waterway (where reasonably required) which may be effected to facilitate the carrying out of the survey and the provisions of this Part of this Schedule shall apply

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with all necessary modifications to any such dewatering or reduction in the water level as though the same were specified works.

(4) Copies of the survey shall be provided to both BW and the Executive at no cost to BW.

Approval of plans, protective works etc.

7.—(1) The Executive shall before commencing construction of any specified work including any temporary works supply to BW proper and sufficient plans of that work and such further particulars available to it as BW may within 14 days of the submission of the plans reasonably require for the approval of the engineer and shall not commence such construction of a 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 (including any other particulars reasonably required under sub-paragraph (1)) have been supplied to BW 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—

- (a) any protective work (whether temporary or permanent) which in his reasonable opinion should be carried out before the commencement of a specified work to prevent detriment; and
- (b) such other requirements as may be reasonably necessary to prevent detriment;

and such protective works shall be constructed by the Executive or by BW at the Executive's request with all reasonable dispatch and the Executive shall not commence the construction of a specified work until the engineer has notified the Executive that the protective works have been completed to his reasonable satisfaction.

(4) The Executive shall pay to BW a capitalised sum representing the reasonably increased or additional cost of maintaining and, when necessary, renewing any works, including any permanent protective works provided under sub-paragraph (3) above, and of carrying out any additional dredging of the waterway necessitated by the exercise of any of the powers of this Order but if the cost of maintaining the waterway, or of works of renewal of the waterway, is reduced in consequence of any such works, a capitalised sum representing such reasonable saving shall be set off against any sum payable by the Executive to BW under this paragraph.

(5) In the event that the Executive fails to complete the construction of, or part of, the specified works BW may, if it is reasonably required in order to avoid detriment, construct any of the specified works, or part of such works, (together with any adjoining works) in order to complete the construction of, or part of, the specified works or make such works and the Executive shall reimburse BW all costs, fees, charges and expenses it has reasonably incurred in carrying out such works.

Design of works

8. Without prejudice to its obligations under the foregoing provisions of this Part of this Schedule the Executive shall consult, collaborate and respond constructively to any approach, suggestion, proposal or initiative made by BW on—

- (a) the design and appearance of the specified works, including the materials to be used for their construction; and
- (b) the environmental effects of the specified works;

and shall have regard to such views as may be expressed by BW to the extent that these accord with the requirements of the local planning authority in response to such consultation pursuant in

particular to the requirements imposed on BW by section 22 (General environmental and recreational duties) of the British Waterways Act 1995(1) and to the interest of BW in preserving and enhancing the environment of its waterways.

Notice of works

9. The Executive shall give to the engineer 56 days' notice of its intention to commence the construction of any of the specified or protective works, or, in the case of repair carried out in an emergency, such notice as may be reasonably practicable so that, in particular, BW may where appropriate arrange for the publication of notices bringing those works to the attention of users of BW's network.

Lighting

10. The Executive shall provide and maintain at its own expense in the vicinity of the specified or protective works such temporary lighting and such signal lights for the control of navigation as the engineer may reasonably require during the construction or failure of the specified or protective works.

Construction of specified works

- 11.—(1) Any specified or protective works 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 and with any requirements made under paragraph 7(3) and paragraph 8;
 - (b) under the supervision (if given) and to the reasonable satisfaction of the engineer;
 - (c) in such manner as to cause as little detriment as is reasonably practicable;
 - (d) in such manner as to cause as little inconvenience as is reasonably practicable to BW, its officers and agents and all other persons lawfully using the waterways, except to the extent that temporary obstruction has otherwise been agreed by BW.

(2) Nothing in this Order shall authorise the Executive to make or maintain any permanent works in or over a waterway so as to impede or prevent (whether by reducing the width of a waterway or otherwise) the passage of any vessel which is of a kind (as to its dimensions) for which BW is required by section 105(1)(b) and (2) of the Transport Act 1968(2) to maintain the waterway.

(3) Following the completion of the construction of the specified works the Executive shall restore the waterway to a condition no less satisfactory than its condition immediately prior to the commencement of those works.

Prevention of pollution

12. The Executive shall not in the course of constructing a specified work or a protective work or otherwise in connection therewith do or permit anything which may result in the pollution of a waterway or the deposit of materials therein and shall take such steps as the engineer may reasonably require to avoid or make good any breach of its obligations under this sub-paragraph.

(1) 1995 c. i.
(2) 1968 c. 73.

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Access to work: provision of information

- 13.**—(1) The Executive on being given reasonable notice shall—
- (a) at all times allow 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.
- (2) BW on being given reasonable notice shall—
- (a) at all times afford reasonable facilities to the Executive and its agents for access to any works carried out by BW under this Part of this Schedule during their construction; and
 - (b) supply the Executive with such information as it may reasonably require with regard to such works or the method of constructing them and the Executive shall reimburse BW's reasonable costs in relation to the supply of such information.

Alterations to waterway

14.—(1) If during the construction of a specified work or a protective work or during a period of 24 months after the completion of those works any alterations or additions, either permanent or temporary, to a waterway are reasonably necessary in consequence of the construction of the specified work or the protective work in order to avoid detriment, and BW gives to the Executive reasonable notice of its intention to carry out such alterations or additions (which shall be specified in the notice), the Executive shall pay to BW 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 BW in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If the cost of maintaining, working or renewing the waterway 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 Executive to BW under this paragraph.

Maintenance of works

15. If at any time after the completion of a specified work or a protective work, not being a work vested in BW, BW gives notice to the Executive informing it that the state of maintenance of the work appears to be such that the work is causing or likely to cause detriment, the Executive shall, on receipt of such notice, take such steps as may be reasonably necessary to put the work in such state of maintenance as not to cause such detriment.

Repayment of BW's fees, etc.

16. The Executive shall repay to BW all fees, costs, charges and expenses reasonably incurred by BW—

- (a) in constructing any protective works under the provisions of paragraph 7(3)(a);
- (b) in respect of the approval by the engineer of plans submitted by the Executive and the supervision by him of the construction or repair of a specified work and any protective works;
- (c) in respect of the employment during the construction of the specified works or any protective works of any inspectors, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, watching and lighting any waterway and for preventing, so far as may be reasonably practicable, interference, obstruction, danger

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or accident arising from the construction or failure of the specified works or any protective works; and

- (d) in bringing the specified works or any protective works to the notice of users of BW's network.

Costs of alterations, etc.

17. Any additional expenses which BW may reasonably incur in altering, reconstructing or maintaining a waterway 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 Executive, be repaid by the Executive to BW.

Making good of detriment; compensation and indemnity, etc.

18.—(1) If any detriment shall be caused by the construction or failure of the specified works or the protective works if carried out by the Executive, the Executive (if so required by BW) shall make good such detriment and shall pay to BW all reasonable expenses to which BW may be put, and compensation for any loss which BW may sustain, in making good or otherwise by reason of the detriment.

(2) The Executive shall be responsible for and make good to BW all costs, charges, damages, expenses and losses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by BW—

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

and subject to sub-paragraph (4) the Executive shall effectively indemnify and hold harmless BW from and against all claims and demands arising out of or in connection with any of the matters referred to in paragraphs (a) and (b).

(3) The fact that any act or thing may have been done by BW on behalf of the Executive or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision or in accordance with any directions or awards of an arbitrator shall not (if it was done without negligence on the part of BW or of any person in its employ or of its contractors or agents) excuse the Executive from any liability under the provisions of this paragraph.

(4) BW shall give the Executive 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 Executive.

Details of capitalised sums to be provided

19. If BW or the Executive cannot jointly agree the formula by which the capitalised sum is calculated it shall be settled by arbitration in accordance with article 57.

Arbitration

20. Any difference arising between the Executive and BW under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) shall be referred to and settled by arbitration in accordance with article 57.

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PART 2

FOR PROTECTION OF ENVIRONMENT AGENCY

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

(2) In this Part of this Schedule—

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

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

“drainage work” shall mean any watercourse and includes any land which 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 or flood defence;

“the fishery” shall mean any waters containing fish and fish in, or migrating to or from such waters and the spawn, habitat or food of such fish;

“plans” shall include sections, drawings, specifications and method statements;

“specified work” shall mean so much of any work or operation authorised by this Order as is in, on, under, over or within 16 metres of a watercourse 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; and

“watercourse” shall include 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 Executive shall submit to the Environment Agency plans of the work and such further particulars available to it as the Environment 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 Environment Agency, or determined under paragraph 12.

(3) Any approval of the Environment 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 within 56 days of the submission of the plans for approval and in the case of a refusal, accompanied by a statement of the grounds of refusal; and
- (c) may be given subject to such reasonable requirements as the Environment Agency 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 and in the discharge of its environmental and recreational duties.

3. Without prejudice to the generality of paragraph 2, the requirements which the Environment Agency may make under that paragraph include conditions requiring the Executive at its own expense 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—

- (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 any specified work.

4.—(1) Any specified work, and all protective works required by the Environment Agency under paragraph 3, shall be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under this Part of this Schedule; and
- (b) to the reasonable satisfaction of the Environment Agency,

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

(2) The Executive shall give to the Environment 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 drainage work is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the Environment Agency may by notice in writing require the Executive, at the Executive's own expense, to comply with the requirements of this Part of this Schedule or (if the Executive so elects and the Environment 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 Environment 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 Executive, it has failed to begin taking steps to comply with the requirements of the notice and thereafter to make reasonably expeditious progress towards their implementation, the Environment Agency may execute the works specified in the notice and any expenditure incurred by it in so doing shall be recoverable from the Executive.

(5) In the event of any dispute as to whether sub-paragraph (3) is properly applicable to any work in respect of which a notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the Environment Agency shall not except in emergency exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined.

5.—(1) The Executive shall 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 owned by the Executive or which it otherwise has control of or on land held by the Executive 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.

(2) If any such work which the Executive is liable to maintain is not maintained to the reasonable satisfaction of the Environment Agency, the Environment Agency may by notice in writing require the Executive to repair and restore the work, or any part thereof, or (if the Executive so elects and the Environment Agency in writing consents, such consent not to be unreasonably withheld), to remove the work and restore the site to its former condition, to such extent and within such limits as the Environment Agency 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 work is served under sub-paragraph (2) on the Executive, the

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Executive has failed to begin taking steps to comply with the reasonable requirements of the notice and has not thereafter made reasonably expeditious progress towards their implementation, the Environment Agency may do anything necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from that person.

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

6. 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 Executive to the reasonable satisfaction of the Environment Agency and if the Executive fails to do so, the Environment Agency may make good the same and recover from the Executive the expense reasonably incurred by it in so doing.

7.—(1) The Executive shall 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
- (b) the failure of any such work,

damage to the fishery is caused, or the Environment Agency has reason to expect that such damage may be caused, the Environment Agency may serve notice on the Executive 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 Environment Agency of any damage or expected damage to the fishery, the Executive fails to take such steps as are described in sub-paragraph (2), the Environment Agency may take those steps and may recover from the Executive the expense reasonably incurred by it in doing so.

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

8. The Executive shall indemnify the Environment Agency in respect of all costs, charges and expenses which the Environment 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 Environment Agency under this Part of this Schedule.

9.—(1) Without prejudice to the other provisions of this Part of this Schedule, the Executive shall indemnify the Environment 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 Environment 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 works authorised by this Order 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, or results from, the construction of any of the works or any act or omission of the Executive, its contractors, agents or employees whilst engaged upon the work.

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

10. 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 Environment Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, shall not relieve the Executive from any liability under the provisions of this Part of this Schedule.

11. For the purposes of Chapter II of Part II of the Water Resources Act 1991⁽³⁾ (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 Environment 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, approval under that section, and the Executive 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).

12. Any dispute arising between the Executive and the Environment 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, 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 the Executive or the Environment Agency, after notice in writing by one to the other.

PART 3

FOR PROTECTION OF NETWORK RAIL INFRASTRUCTURE LIMITED

1. The following provisions of this Part of this Schedule shall have effect, unless otherwise agreed in writing between the Executive and Network Rail and, in the case of paragraph 15, any other person on whom rights or obligations are conferred by that paragraph.

2. In this Part of this Schedule—

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

“the engineer” means an engineer appointed by Network Rail for the purposes of this Order; “network licence” means the network licence, as the same is amended from time to time, granted to Network Rail by the Secretary of State in exercise of his powers under section 8 of the 1993 Act;

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

(3) 1991 c. 57.

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programmes and details of the extent, timing and duration of any proposed occupation of railway property;

“Network Rail” means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited 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⁽⁴⁾) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

“railway operational procedures” means procedures specified under any access agreement (as defined in the 1993 Act) or station lease;

“railway property” means any railway belonging to Network Rail and any station, land, works, apparatus and equipment belonging to Network Rail connected therewith and includes any land easement or other property interest 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 affect, railway property.

3.—(1) The Executive shall not exercise the powers conferred by article 26 of this Order 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 Network Rail.

(2) The Executive 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 Network Rail.

(3) The Executive shall not under the powers of this Order acquire or use or acquire new rights over any railway property except with the consent of Network Rail.

(4) The Executive shall not exercise the powers conferred by sections 271 or 272 of the 1990 Act, as applied by Schedule 10 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 Network Rail.

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

4.—(1) Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures.

(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures Network Rail shall—

(a) co-operate with the Executive with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and

(b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised works pursuant to this Order.

5.—(1) The Executive shall before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and shall not commence construction of the specified work until such plans as have been approved in writing by the engineer or settled by arbitration.

(4) 1985 c. 6.

(2) The approval of the engineer under sub-paragraph (1) shall not be unreasonably withheld, and if by the end of the period of 56 days beginning with the date on which such plans have been supplied to Network Rail 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 by the end of the period of 56 days beginning with the date on which such plans have been supplied to Network Rail, Network Rail gives notice to the Executive that Network Rail desires itself to construct any part of a 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 Network Rail then, if the Executive desires such part of the specified work to be constructed, Network Rail shall construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the Executive in accordance with the plans approved or deemed to be approved or settled under this paragraph and under the supervision (where appropriate and if given) of the Executive.

(4) When 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 the construction of a specified work to ensure the safety or stability of railway property, or the continuation of safe and efficient operation of the railways of Network Rail or the services of train operators using the same (including any relocation, decommissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes shall be constructed by Network Rail or if Network Rail so desires such protective works shall be carried out by the Executive at its own expense, with all reasonable dispatch and the Executive shall not commence the construction of a specified work until the engineer has notified the Executive that the protective works have been completed to his reasonable satisfaction.

6.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 5(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 under paragraph 5(1);
- (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 as little interference as may be with the conduct of traffic on the railways of Network Rail.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the Executive shall, notwithstanding any such approval, make good such damage and shall pay to Network Rail 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.

(3) The Executive shall give to the engineer no less than 90 days' notice of its intention to commence the construction of a specified work and also, except in emergency (when it shall give such notice as may be reasonably practicable), of its intention to carry out any works for the maintenance or repair of a specified work in so far as such work of repair or maintenance may affect railway property.

7. The Executive 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.

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

9.—(1) If any alterations or additions, either permanent or temporary, to railway property are reasonably necessary during the construction of a specified work or any protective works under paragraph 5(4), or during a period of 12 months after the commencement of regular revenue-earning tram operations using the new railways comprised in any specified work, in consequence of the construction of a specified work, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the Executive reasonable notice of its intention to carry out such alterations or additions, the Executive shall pay to Network Rail 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 in 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) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions referred to in paragraph 9(1) a capitalised sum representing such saving shall be set off against any sum payable by the Executive to Network Rail under this paragraph.

10. The Executive shall repay to Network Rail 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 Executive as provided by paragraph 5(3) or in constructing any protective works under the provisions of paragraph 5(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 Executive and the supervision by him of the construction of a specified work and otherwise in connection with the implementation of the provisions of this Part of this Schedule.
- (c) in respect of the employment or procurement of the services of any inspectors, signalmen, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, signaling, 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;
- (d) in respect of any special traffic working resulting from any speed restrictions which may, in the 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; and
- (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

11.—(1) In this paragraph—

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail’s apparatus generated by the operation of the authorised works (including the operation of trams using the new railways comprised in the works) where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s 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 Network Rail 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.

(2) This paragraph shall apply to EMI only to the extent that such EMI is not attributable to any change to Network Rail's apparatus carried out after approval of plans under paragraph 5(1) for the relevant part of the authorised works giving rise to EMI (unless the Executive has been given notice in writing before the approval of those plans of the intention to make such change) other than any change carried out by Network Rail as part of, or in consequence of the authorised works.

(3) Subject to sub-paragraph (5), the Executive shall in the design and construction of the authorised works take all measures necessary to prevent EMI and shall establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate the Executive's compliance with sub-paragraph (3)—

- (a) the Executive shall consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter shall continue to consult with Network Rail (both before and after formal submission of plans under paragraph 5(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Network Rail shall make available to the Executive all information in Network Rail's possession reasonably requested by the Executive in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and
- (c) Network Rail shall allow the Executive reasonable facilities for the inspection of Network Rail's apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail shall not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution shall be selected in Network Rail's reasonable discretion, and in relation to such modifications paragraph 5(1) shall have effect subject to this sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning tram operations on the new railways comprised in the authorised works and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised works causes EMI then the Executive shall immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the Executive's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

- (a) the Executive shall afford reasonable facilities to Network Rail for access to the Executive's apparatus in the investigation of such EMI;
- (b) Network Rail shall afford reasonable facilities to the Executive for access to Network Rail's apparatus in the investigation of such EMI; and
- (c) Network Rail shall make available to the Executive any additional material information in its possession reasonably requested by the Executive in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6)—

- (a) Network Rail shall allow the Executive reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

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(b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs shall be carried out and completed by the Executive in accordance with paragraph 6.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) shall apply to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 10(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 57 of this Order to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

12.—(1) If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the Executive informing it that the state of maintenance of the specified work appears to be such as adversely affects the operation of railway property, the Executive 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.

(2) If at any time after the completion of a specified work, being a work vested in Network Rail, the Executive gives notice to Network Rail informing it that the state of maintenance of the specified work appears to be such as adversely affects the operation of the authorised tramway Network Rail 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 the authorised tramway.

13. Before either Network Rail or the Executive provide any new illumination or illuminated traffic sign on or in the vicinity of the authorised works, it shall consult the other and comply with any reasonable requirements of that other party made for the purpose of preventing confusion between such illumination or illuminated sign and any signal or other light used for controlling, directing or securing the safety of traffic on the railway or the authorised tramway as the case may be.

14. 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 Executive, be repaid by the Executive to Network Rail.

15.—(1) The Executive shall pay to Network Rail 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 Executive or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and the Executive shall indemnify Network Rail 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 Network Rail on behalf of the Executive 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 Executive from any liability under the provisions of this Part of this Schedule.

(2) Network Rail shall give the Executive 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 Executive.

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

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

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

(6) In this paragraph—

“the 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 railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in sub-paragraph (1); and

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

16. Network Rail shall, on receipt of a request from the Executive, from time to time provide the Executive free of charge with written estimates of the costs, charges, expenses and other liabilities for which the Executive is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 15) and with such information as may reasonably enable the Executive to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).

17. In the assessment of any sums payable to Network Rail 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 Executive under this Part of this Schedule or increasing the sums so payable.

18. The Executive and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the Executive 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 Network Rail relating to any railway property.