

SCHEDULES

SCHEDULE 9

PROTECTIVE PROVISIONS

PART 5

FOR THE PROTECTION OF HOLFORD GAS STORAGE LIMITED

Application

56. For the protection of the undertaker as referred to in this Part of this Schedule the following provisions will, unless otherwise agreed in writing between the promoter and the undertaker, have effect.

Interpretation

57. In this Part of this Schedule—

“acceptable credit provider” means a bank or financial institution with a credit rating that is not lower than “A-” if the rating is assigned by Standard & Poor’s Ratings Group or Fitch Ratings and “A3” if the rating is assigned by Moody’s Investors Services Inc.;

“acceptable insurance” means a third party liability insurance effected and maintained by the promoter with a limit of indemnity of not less than £10,000,000.00 (Ten Million Pounds) per occurrence or series of occurrences arising out of one event. Such insurance shall be maintained for the construction period of the authorised works which constitute specified works and arranged with an internationally recognised insurer of repute operating in the London and worldwide insurance market underwriters whose security/credit rating meets the same requirements as an “acceptable credit provider”, such policy shall include (but without limitation)—

- (a) the undertaker as a co-insured;
- (b) a cross liabilities clause; and
- (c) contractors’ pollution liability for third party property damage and third party bodily damage arising from a pollution/contamination event with cover of £4,000,000.00 (Four Million Pounds) per event or £4,000,000.00 (Four Million Pounds) in aggregate;

“acceptable security” means either—

- (a) a parent company guarantee from a parent company in favour of the undertaker to cover the promoter’s liability to the undertaker to a cap of not less than £10,000,000.00 (Ten Million Pounds) per asset per event up to a total liability cap of £10,000,000.00 (Ten Million Pounds) (in a form reasonably satisfactory to the undertaker and where required by the undertaker, accompanied with a legal opinion confirming the due capacity and authorisation of the parent company to enter into and be bound by the terms of such guarantee); or

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- (b) a bank bond or letter of credit from an acceptable credit provider in favour of the undertaker to cover the promoter's liability to the undertaker for an amount of not less than £10,000,000.00 (Ten Million Pounds) per asset per event up to a total liability cap of £10,000,000.00 (Ten Million Pounds) (in a form reasonably satisfactory to the undertaker);

“apparatus” means cavities, pipelines, cables (electrical and datacoms), roads, compounds and equipment owned by the undertaker and includes any structure in which apparatus is or will be lodged or which gives or will give access to apparatus;

“authorised works” has the same meaning as is given to the term “authorised development” in article 2 of this Order and includes any associated development authorised by the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised works and construction of any works authorised by this Part of this Schedule;

“commence” has the same meaning as in article 2 of this Order and commencement shall be construed to have the same meaning;

“deed of consent” means a deed of consent, crossing agreement, deed of variation or new deed of grant agreed between the parties acting reasonably in order to vary and/or replace existing easements, agreements, enactments and other such interests so as to secure land rights and interests as are necessary to carry out, maintain, operate and use the apparatus in a manner consistent with the terms of this Part of this Schedule;

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

“INOVYN Enterprises” means INOVYN Enterprises Limited (Company No. 04651437);

“maintain” and “maintenance” shall include the ability and right to do any of the following in relation to any apparatus of the undertaker including construct, use, repair, alter, inspect, renew or remove the apparatus;

“plan” or “plans” include all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe and assess the works to be executed;

“parent company” means a parent company of the promoter acceptable to and which shall have been approved by the undertaker acting reasonably;

“promoter” means the undertaker as defined in article 2 of this Order;

“specified works” means any of the authorised works or activities undertaken in association with the authorised works which—

- (a) will or may be situated over, or within 15 metres measured in any direction of any apparatus;
- (b) may in any way adversely affect any apparatus the removal of which has not been required by the promoter under paragraph 62(2) or otherwise; and/or
- (c) include any of the activities that are referred to in paragraph 13 of the Linewatch's “Special Requirements for the safe working in close proximity to high pressure pipelines” (Revision No 16.03); and

“undertaker” means Holford Gas Storage Limited (Company No. SC254265).

58. Except for paragraphs 59 (apparatus in stopped up streets), 62 (retained apparatus), 63 (expenses) and 64 (indemnity) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of the undertaker, the other provisions of this Part of this Schedule do not apply to apparatus in respect of which the relations between the promoter and the undertaker are regulated by the provisions of Part 3 of the 1991 Act.

Apparatus of undertaker in stopped up streets

59.—(1) Without prejudice to the generality of any other protection afforded to the undertaker elsewhere in the Order, where any street is stopped up under the Order, if the undertaker has any apparatus in the street or accessed via that street the undertaker will be entitled to the same rights in respect of such apparatus as it enjoyed immediately before the stopping up and the promoter will grant to the undertaker, or will procure the granting to the statutory undertaker of, legal easements reasonably satisfactory to the specified undertaker in respect of such apparatus and access to it prior to the stopping up of any such street or highway.

(2) Notwithstanding the temporary stopping up or diversion of any highway under the powers of article 13 (temporary prohibition or restriction of use of streets), an undertaker will be at liberty at all times to take all necessary access across any such stopped up highway and/or to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.

Protective works to buildings

60. The promoter, in the case of the powers conferred by article 17 (protective work to buildings), must exercise those powers in accordance with paragraph 62 of this Part of this Schedule.

Acquisition of land

61.—(1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the promoter may not acquire any land interest or apparatus or override any easement and/or other interest of the undertaker otherwise than by agreement.

(2) As a condition of agreement between the parties in sub-paragraph (1), prior to the carrying out of any part of the authorised works (or in such other timeframe as may be agreed between the undertaker and the promoter) that are subject to the requirements of this Part of this Schedule that will cause any conflict with or breach the terms of any easement and/or other legal or land interest of the undertaker and/or affects the provisions of any enactment or agreement regulating the relations between the undertaker and the promoter in respect of any apparatus laid or erected in land belonging to or secured by the promoter, the promoter must as the undertaker reasonably requires enter into such deeds of consent upon such terms and conditions as may be agreed between the undertaker and the promoter acting reasonably and which must be no less favourable on the whole to the undertaker unless otherwise agreed by the undertaker, and it will be the responsibility of the promoter to procure and/or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such authorised works.

(3) Any agreement or consent granted by the undertaker under paragraphs 64 or any other paragraph of this Part of this Schedule shall not be taken to constitute agreement under paragraph 61.

Retained apparatus

62.—(1) Not less than 56 days before the commencement of any specified works the promoter must submit to the undertaker a plan in respect of those works.

(2) The plan to be submitted to the undertaker under sub-paragraph (1) must include a method statement and describe—

- (a) the exact position of the works;
- (b) the level at which these are proposed to be constructed or renewed;

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- (c) the manner of their construction or renewal including details of excavation, positioning of plant etc;
 - (d) the position of all apparatus;
 - (e) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus; and
 - (f) any intended maintenance regimes.
- (3) The promoter must not commence any works to which sub-paragraphs (1) and (2) apply until the undertaker has given written approval of the plan so submitted.
- (4) Any approval of the undertaker required under sub-paragraph (2)—
- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraphs (5) or (7); and
 - (b) must not be unreasonably withheld or delayed.
- (5) In relation to any work to which sub-paragraphs (1) and/or (2) apply, the undertaker may require such modifications to be made to the plans as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the purpose of providing or securing proper and convenient means of access to any apparatus.
- (6) Works to which this paragraph applies must only be executed in accordance with the plan, submitted under sub-paragraph (1) or as relevant sub-paragraph (4), as approved or as amended from time to time by agreement between the promoter and the undertaker and in accordance with such reasonable requirements as may be made in accordance with sub-paragraphs (5) or (7) by the undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the undertaker will be entitled to watch and inspect the execution of those works.
- (7) Where the undertaker requires any protective works to be carried out by itself or by the promoter (whether of a temporary or permanent nature) such protective works, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, must be carried out to the undertakers' satisfaction prior to the commencement of any authorised works (or any relevant part thereof) for which protective works are required and the undertaker must give 56 days' notice of such works from the date of submission of a plan pursuant to this paragraph (except in an emergency).
- (8) Nothing in this paragraph precludes the promoter from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of the authorised works, a new plan, instead of the plan previously submitted, and having done so the provisions of this paragraph will apply to and in respect of the new plan.
- (9) The promoter will not be required to comply with sub-paragraph (1) where it needs to carry out emergency works as defined in the 1991 Act but in that case it must give to the undertaker notice as soon as is reasonably practicable by calling the undertaker's emergency telephone line on 02476 183900 or such other telephone number notified by the undertaker to the promoter in writing and as soon as is reasonably practicable give to the undertaker a plan of those works and must—
- (a) comply with sub-paragraphs (5), (6) and (7) insofar as is reasonably practicable in the circumstances; and
 - (b) comply with sub-paragraph (10) at all times.
- (10) At all times when carrying out any works authorised under the Order the undertaker must comply with the undertaker's policies for safe working in proximity to apparatus.

Expenses

63. Subject to the following provisions of this paragraph, the promoter must pay to the undertaker on demand all charges, costs and expenses reasonably incurred by the undertaker in, or in connection

with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus which may be required in consequence of the execution of any authorised works as are referred to in this Part of this Schedule including without limitation—

- (a) in connection with the cost of the carrying out of any assessment of the undertaker's apparatus under the Control of Major Accident Hazards Regulations 2015⁽¹⁾ reasonably necessary as a consequence of the authorised works;
- (b) implementing any mitigation measures required as a result of any assessment referred to in sub-paragraph (a) reasonably necessary as a consequence of the authorised works;
- (c) the approval of plans;
- (d) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works; and
- (e) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Part of this Schedule.

Indemnity

64.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule or in consequence of the construction, use, maintenance, decommissioning or failure of any of the authorised works by or on behalf of the promoter or in consequence of any act or default of the promoter (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the promoter under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any apparatus or property of the undertaker, or there is any interruption in any service provided by the undertaker, or the undertaker becomes liable to pay any amount to any third party (including but not limited to INOVYN Enterprises), the promoter will bear and pay on demand the cost reasonably incurred by the undertaker in making good such damage, restoring the supply or paying such amount and indemnify the undertaker for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from the undertaker, by reason or in consequence of any such damage or interruption or the undertaker becoming liable to any third party as aforesaid provided that at all times the undertaker shall be under an obligation to take reasonable steps to mitigate its loss.

(2) The fact that any act or thing may have been done by the undertaker on behalf of the promoter or in accordance with a plan approved by the undertaker or in accordance with any requirement of the undertaker or under its supervision will not (unless sub-paragraph (3) applies), excuse the promoter from liability under the provisions of this sub-paragraph (1) unless the undertaker fails to carry out and execute the works properly with due care and attention and in a skilful and workman like manner or in a manner that does not accord with the approved plan.

(3) Nothing in sub-paragraph (1) shall impose any liability on the promoter in any circumstances in respect of—

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of the undertaker, its officers, servants, contractors or agents;
- (b) loss of profits, loss of use, loss of revenue, loss of contract, loss of goodwill, loss of products, loss of productivity, loss of profitability or any indirect or consequential losses of any nature whatsoever save that the sums payable by the promoter under sub-paragraph (1) shall include a sum equivalent to the relevant costs in circumstances where

(1) [S.I. 2015/483](#).

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- (i) the undertaker is liable to make payment of the relevant costs pursuant to the terms of an agreement between the undertaker and a gas storage customer relating to the storage of gas in the undertaker's apparatus; and
- (ii) the existence of that agreement and the extent of the undertaker's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the promoter,

but not otherwise.

(4) Not to commence construction (and not to permit the commencement of such construction) of the authorised works on any land owned by the undertaker or in respect of which the undertaker has an easement, wayleave or lease for its apparatus or any other interest or to carry out any works within 15 metres of the undertaker's apparatus until the following conditions are satisfied—

- (a) unless and until the undertaker is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the promoter has first provided the acceptable security (and provided evidence that it shall maintain such acceptable security for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and the undertaker has confirmed the same to the promoter in writing; and
- (b) unless and until the undertaker is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the promoter has procured acceptable insurance (and provided evidence to the undertaker that it shall maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and undertaker has confirmed the same in writing to the promoter.

(5) In the event that the promoter fails to comply with sub-section (4) nothing in this Part of this Schedule shall prevent the undertaker from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.

(6) "relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by a gas storage customer as a consequence of any restriction of the use of the undertaker's apparatus as a result of the construction, maintenance or failure of any specified works or any such act or omission as mentioned in sub-paragraph (1); "gas storage customer" means any person licensed to ship, transmit, distribute or supply gas under the Gas Act 1986(2).

Co-operation

65.—(1) Where in consequence of the proposed construction of any of the authorised works, the undertaker makes requirements for the protection or alteration of apparatus under paragraphs 62(5) or 62(7), the promoter shall use its best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised development and taking into account the need to ensure the safe, efficient and economic operation of the undertaker's apparatus and the undertaker shall use its best endeavours to co-operate with the promoter for that purpose.

(2) For the avoidance of doubt whenever the undertaker's consent, agreement or approval to is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.

(2) 1986 c. 44.

Access

66. If in consequence of the agreement reached in accordance with paragraph 61(1) of this Schedule or the powers granted under this Order the access to any apparatus is materially obstructed, the promoter must provide such alternative means of access to such apparatus as will enable the undertaker to maintain or use the apparatus no less effectively than was possible before such obstruction.

Arbitration

67. Any difference or dispute arising between the promoter and the undertaker under this Part of this Schedule must, unless otherwise agreed in writing between the promoter and the undertaker, be determined by arbitration in accordance with article 40 (arbitration).