

SCHEDULES

SCHEDULE 5

PROTECTIVE PROVISIONS

PART 4

THAMES WATER PROTECTIVE PROVISIONS

Application

1. For the protection of the undertaker referred to in this Part of this Schedule the following provisions have effect unless otherwise agreed in writing between Network Rail and the undertaker.
2. This Part of this Schedule does not apply to apparatus in respect of which the relations between Network Rail and the undertaker are regulated by the provisions of Part 3 of the 1991 Act.
3. This Part of this Schedule includes all protective provisions between Network Rail and the undertaker and Schedule 5 has no effect on the obligations between Network Rail and the undertaker.

Interpretation

4. In this Part of this Schedule—
 - “alternative apparatus” means alternative apparatus adequate to enable the undertaker to fulfil its statutory functions in a manner no less efficient and effective than previously;
 - “apparatus” means—
 - (a) in the case of a water undertaker—
 - (i) mains, pipes or other apparatus or accessories (as defined in section 219(1) (general interpretation) of the Water Industry Act 1991⁽¹⁾) belonging to or maintained by the undertaker for the purposes of water supply; and
 - (ii) any water mains or service pipes which are the subject of a notice of intention to adopt under section 51A⁽²⁾ (adoption of water mains and service pipes) of the Water Industry Act 1991;
 - (b) in the case of a sewerage undertaker—
 - (i) any drain or works vested in the undertaker under the Water Industry Act 1991; and
 - (ii) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4) (adoption of sewers and disposal works) of that Act or an agreement to adopt made under section 104 (agreements to adopt sewer, drain or sewage disposal works, at future date) of that Act,

(1) 1991 c. 56.

(2) Section 51A was inserted by section 92(1) of the Water Act 2003 (c. 37).

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and includes a sludge main, disposal main (within the meaning of section 219 of that Act) or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works,

and any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

“functions” includes powers and duties;

“in”, in a context referring to apparatus or alternative apparatus in land, includes a reference to apparatus or alternative apparatus under, over or upon land; and

“undertaker” means Thames Water Utilities Limited.

Acquisition of apparatus

5. Regardless of any provision in this Order or anything shown on the deposited plans, Network Rail must not acquire any apparatus otherwise than by agreement.

Alternative apparatus

6.—(1) If, in the exercise of the powers conferred by this Order, Network Rail acquires any interest in any land in which any apparatus is placed or over which access to any apparatus is enjoyed or requires that the undertaker’s apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule, and any right of the undertaker to maintain that apparatus in that land and to gain access to it must not be extinguished, until alternative apparatus has been constructed and is in operation, and access to it has been provided, to the reasonable satisfaction of the undertaker in accordance with sub-paragraphs (2) to (8).

(2) If, for the purpose of executing any works in, on, under or over any land purchased, held, appropriated or used under this Order, Network Rail requires the removal of any apparatus placed in that land, it must give to the undertaker written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed.

(3) Any alternative apparatus to be constructed in land of Network Rail under this Part of this Schedule is to be constructed in such manner and in such line or situation as may be agreed between the undertaker and Network Rail, or in default of such agreement settled by arbitration in accordance with article 21 (arbitration).

(4) In any case where alternative apparatus is to be provided or constructed under sub-paragraph (2), or if in consequence of the exercise of any of the powers conferred by this Order the undertaker reasonably needs to remove any of its apparatus, Network Rail must, subject to sub-paragraph (5), afford to the undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of Network Rail and subsequently for the maintenance of that apparatus.

(5) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of Network Rail, or Network Rail is unable to afford such facilities and rights as are mentioned in sub-paragraph (4), in the land in which the alternative apparatus or part of such apparatus is to be constructed, the undertaker must, on receipt of a written notice to that effect from Network Rail, as soon as reasonably possible use its reasonable endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(6) The undertaker must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 21 (arbitration), and after the grant to the undertaker of any such facilities and rights as are referred to in sub-paragraph (4) or (5), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and

subsequently to remove any apparatus required by Network Rail to be removed under the provisions of this Schedule.

(7) Regardless of anything in sub-paragraph (7), if Network Rail gives notice in writing to the undertaker that it desires itself to execute any work to which this paragraph applies, that work, instead of being executed by the undertaker, must be executed by Network Rail without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of the undertaker.

(8) Nothing in sub-paragraph (6) authorises Network Rail to execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within 600 millimetres of the apparatus.

7.—(1) Where, in accordance with the provisions of this Schedule, Network Rail affords to the undertaker facilities and rights for the construction and maintenance in land of Network Rail of alternative apparatus in substitution for apparatus to be removed, those facilities and rights are to be granted upon such terms and conditions as may be agreed between Network Rail and the undertaker or in default of agreement settled by arbitration in accordance with article 21 (arbitration).

(2) In settling those terms and conditions in respect of alternative apparatus to be constructed in or along any railway of Network Rail, the arbitrator must—

- (a) give effect to all reasonable requirements of Network Rail for ensuring the safety and efficient operation of the railway and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with any proposed works of Network Rail or the traffic on the railway; and
- (b) so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to the terms and conditions, if any, applicable to the apparatus constructed in or along the railway for which the alternative apparatus is to be substituted.

(3) If the facilities and rights to be afforded by Network Rail in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the arbitrator less favourable on the whole to the undertaker than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the arbitrator must make such provision for the payment of compensation by Network Rail to the undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Existing apparatus: protection and access

8.—(1) In connection with the execution of any of the authorised works that are near to, or will or may affect, any apparatus the removal of which has not been required by Network Rail under paragraph 6(2) Network Rail must 2 months prior to any notice required under paragraph 8(2) consult with the undertaker on its plans and works to be executed and use reasonable endeavours to incorporate any comments from the undertaker.

(2) Not less than 35 days before starting the execution of any of the authorised works that are near to, or will or may affect, any apparatus the removal of which has not been required by Network Rail under paragraph 6(2), Network Rail must submit to the undertaker a plan, section and description of the works to be executed.

(3) Those works are to be executed only in accordance with the plan, section and description submitted under sub-paragraph (2) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (4) by the undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and an officer of the undertaker is entitled to watch and inspect the execution of those works.

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(4) Any requirements made by the undertaker under sub-paragraph (3) must be made within a period of 30 days beginning with the date on which a plan, section and description under sub-paragraph (2) are submitted to it.

(5) If the undertaker in accordance with sub-paragraph (4) and in consequence of the works proposed by Network Rail, reasonably requires the removal of any apparatus and gives written notice to Network Rail of that requirement, paragraphs 1 to 8 apply as if the removal of the apparatus had been required by Network Rail under paragraph 6(2).

(6) Nothing in this paragraph precludes Network Rail from submitting at any time or from time to time, but in no case less than 35 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.

(7) Network Rail is not required to comply with sub-paragraphs (1) and (2) in a case of emergency but in that case it must give to the undertaker notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph (3) in so far as is reasonably practicable in the circumstances.

Expenses

9.—(1) Subject to the following provisions of this paragraph, Network Rail will indemnify the undertaker in respect of all reasonable costs, charges and expenses incurred by that undertaker in, or in connection with, the inspection, removal, alteration or protection of any apparatus (and in considering whether these are required) or the construction of any new apparatus (including costs or compensation payable in connection with the acquisition of rights or interests in land for that purpose) which may be required in consequence of the execution of any of such works as are referred to in paragraph 6(2).

(2) The value of any apparatus removed under the provisions of this Part of this Schedule (other than apparatus that is re-used as alternative apparatus) is to be deducted from any sum payable under sub-paragraph (1), that value being calculated after removal.

(3) If in accordance with the provisions of this Schedule—

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by Network Rail or, in default of agreement, is not determined by arbitration in accordance with article 21 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to the undertaker by virtue of sub-paragraph (1) is to be reduced by the amount of that excess provided always that no deduction is to be applied should the new apparatus or its specific placement be required in order to comply with current design standards.

(4) For the purposes of sub-paragraph (3)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus must not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and

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- (b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole must be treated as if it also had been agreed or had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to the undertaker in respect of works under sub-paragraph (1) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the undertaker any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

(6) Any dispute as to whether a financial benefit is conferred in accordance with sub-paragraph (5) or as to the amount of such financial benefit which cannot be agreed is to be determined in accordance with article 21 (arbitration).

Damage to apparatus: costs, losses, etc.

10.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of any of the authorised works or in consequence of the construction, use, maintenance or failure of any of the authorised works or in consequence of any act or default of the Network Rail (or any person employed or authorised by him) in the course of carrying out such works or any subsidence resulting from any of the authorised works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or damage to the property of the undertaker, or there is any interruption in any service provided, or in the supply of any goods, by the undertaker, or the undertaker becomes liable to a third party for any expense, loss, demand, proceeding, damage, interruption, claim, penalty, cost, action or liability to the extent that is attributable to the act, neglect or default of Network Rail, its officers, contractors or agents, Network Rail must—

- (a) indemnify the reasonable cost incurred by the undertaker in making good such damage or restoring the supply; and
- (b) 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.

(2) Nothing in sub-paragraph (1) imposes any liability on Network Rail with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of the undertaker, its officers, servants, contractors or agents.

(3) The undertaker must give Network Rail reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of Network Rail which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Enactments and agreements

11. Nothing in this Schedule affects the provisions of any enactment or agreement regulating the relations between Network Rail and the undertaker in respect of any apparatus laid or erected in land belonging to Network Rail on the date on which this Order is made.