

Submission – deadline 7

This submission is submitted on behalf of Affinity Water Limited (“Affinity”) in relation to the proposed Five Estuaries Offshore Wind Farm project (“the Project”).

Affinity provided submissions to the Examiner on 10 January 2025 setting out the need for Bespoke Protective Provisions which are not provided for in the standard Protective Provisions included at Part 1 Schedule 9 of the draft Order for the protection of electricity, gas, water and sewerage undertakers (“Standard Protective Provisions”), to address Affinity’s concerns as raised in its Relevant Representation, as follows:

- The provision of details of any potential effects on Affinity’s assets from electromagnetic or high voltage effects and provides an approval mechanism to allow Affinity to require such modifications to the design for the purpose of protecting its assets.
- Protection of and access to its assets during construction and operation – including the requirement to provide Affinity with detailed plans and to obtain approval prior to any works taking place.
- Access to Affinity’s operational sites during construction to ensure continued and unimpeded access to its assets at all times; and
- Agreement re. the reimbursement of Affinity’s reasonable costs and the scope of those costs.

On 11 February 2025, Affinity provided an update to the Examination with regard to progress in getting the Bespoke Protective Provisions agreed with Five Estuaries, along with a copy of the draft provisions. Affinity also set out that with the appropriate level of engagement from Five Estuaries, that we expected agreement could be reached with regard to these Bespoke Protective Provisions by deadline 7.

Unfortunately, we did not receive a response from Five Estuaries’ solicitors regarding the draft provisions until 26 February 2025. Some of these responses provided very minimal explanation or justification. Although Affinity have endeavoured to turn around a response as quickly as possible to Five Estuaries, with our response being provided on 27 February, it is not anticipated that the Bespoke Protective Provisions will be agreed and finalised by deadline 7 as there remain fundamental differences between parties as to the scope of the Bespoke Protective Provisions.

It is noted that the Deadline 6 version of the draft Order only contained the Standard Protective Provisions and no form of protective provisions specifically for the benefit of Affinity were included. As at the date of this submission, it is unclear whether Five Estuaries will include a form of Affinity's Bespoke Protective Provisions in the draft Order submitted at deadline 7 or will insist that the Standard Protective Provisions are sufficient. Five Estuaries has not provided sufficient explanation as to why a form of Affinity's Bespoke Protective Provisions have not been included in the drafts of the Orders submitted in the Examination thus far or adequately justified why they are not considered necessary.

It is Affinity's policy not to accept generic utility protective provisions that are common in first drafts of DCOs as they suffer from a number of shortcomings (in addition to those set out above) and we consider it appropriate therefore to include a further part within the protective provisions schedule specific to Affinity where it is an affected water undertaker.

Notwithstanding the merits of the specific protective provisions, it is important when operating a large network that the legal environment in which operatives are asked to work is largely the same. It is impossible to operate a large network with the efficiency that bill-payers are entitled to expect if operatives are required to check the exact terms of any relationship with third parties each time they carry out an activity. To that end, an efficient operator will always seek to keep the broad terms of such relationships the same. It is for this reason that Affinity Water seeks to achieve (1) consistency of terms and (2) consistency of process.

Variation in apparatus and protective areas: The general provisions provide a blanket prohibition on certain activities within 300 millimetres of underground water apparatus. Affinity Water considers this protected strip far too narrow, requiring at least 600 millimetres. The provisions also do not recognise that the diameters of underground pipes vary and therefore the extent of the area around underground pipes in which works would require Affinity Water approval will also vary. For example, where the apparatus is a pipe the diameter of which is less than 150 millimetres, Affinity Water would need to approve works within 2 metres of such a pipe. In contrast, where a pipe has a diameter of between 150 and 450 millimetres, works within 3 metres would require Affinity Water approval. This presents a rational approach to risk management that benefits both parties. The provisions do not acknowledge the different types of apparatus that Affinity Water is responsible for, which includes assets such as mains and reservoirs as well as pipelines.

Approval process

The general provisions do not provide a detailed process for the approval of works that affect Affinity Water apparatus and the setting out of requirements to enable development to take place. It is sensible to set out this process at the earliest opportunity to allow parties to build approvals in programmes. It also ensures consistency of approach with other development schemes, as referred to above.

Indemnities, expenses and costs

The general provisions do not provide an indemnity for the benefit of water undertakers, instead it provides for the making of reasonable compensation. This is not sufficient or appropriate. Given the specific way that the water industry obtains its funds, it has no way to recoup costs beyond passing on to water customers. Affinity Water should therefore have the benefit of a full indemnity to ensure that it is not adversely penalised by a third-party project interacting with its apparatus.

Environmental permitting

At many points along Affinity Water's network, water is abstracted. This activity requires a permit under the Environmental Permitting (England and Wales) Regulations 2016. If the network is altered using the powers provided by the Development Consent Order in such a way that the location of the abstraction changes, a new permit will be required, otherwise a continuing offence will be committed by Affinity Water. The specific protective provisions ensure that such a permit is in force before any re-routing of abstraction points.

Contingency arrangements

It is not often possible to seamlessly switch flows from to-be-abandoned apparatus to new apparatus without any loss of service to customers. Over-pumping or by-pass arrangements may be required, and sometimes test flows or wash-out flows are required. The general utility provisions envisage the right to maintain the old apparatus lasting until the new is in operation, but in reality the physical substitution of flows is equally important. The specific provisions therefore make it clear that contingency arrangements like these must be in place before switching of flows is attempted.

Physical access to apparatus

The general utility provisions ensure that where works are near or affecting apparatus, access arrangements are provided for, but no more than that. However, it is entirely conceivable that the undertaker's works are not near the apparatus and do not in the normal sense of the word affect it. Furthermore, Affinity Water only has private rights (in the form of land ownership or easements) to access a very small percentage of its assets, relying as it does on statutory powers in practically all cases. Access must be maintained at all times to ensure consistency of water supply to customers and to enable Affinity Water to remedy issues in an emergency, particular given that some of Affinity Water's assets are reservoirs containing large amounts of water which could impact on surrounding areas.

Use of existing process

As stated above, it is considered more efficient if the undertaker would use the existing processes provided to all landowners under section 41 (requisition of new water main), section 98 (requisition of new public sewer or public lateral drain), section 51A (adoption of new water main), section 104 (adoption of new private sewer or water main) or section 185 of the Water Industry Act 1991. The specific protective provisions direct the undertaker to use such processes.

Affinity will continue to engage with Five Estuaries to reach agreement by the close of Examination on 17 March 2025 and will provide a further update to the Examination then.

We attach for the Examiner's information, the current draft of these Bespoke Protective Provisions.

SCHEDULE 9

PART []

FOR THE PROTECTION OF AFFINITY WATER LIMITED

Application

1. The following provisions have effect for the protection of Affinity Water, unless otherwise agreed in writing between the undertaker and Affinity Water.

Interpretation

2. In this Part of this Schedule—

“Affinity Water” means Affinity Water Limited (Company Registration No. 02546950) whose registered office address is at Tamblin Way, Hatfield, Hertfordshire. AL10 9EZ or any wholly-owned subsidiary (as defined in section 1159 of the Companies Act 2006⁽¹⁾);

“1991 Act” means the New Roads and Street Works Act 1991;

“alternative apparatus” means alternative apparatus adequate to enable Affinity Water to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” means:

- (a) mains, pipes, connections, reservoirs, or any other apparatus belonging to or maintained by Affinity for the purposes of water supply; and
- (b) mains, pipes, connections or any other apparatus that is the subject of an agreement to adopt made under section 51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991⁽²⁾

“authorised works” means “authorised development” and “ancillary works” as both are defined in article 2 of the Order together with the use and maintenance of such authorised development or ancillary works, which for the avoidance of doubt includes the construction, use and maintenance of any works pursuant to this Schedule;

“commence” and “commencement” includes the first carrying out of any below ground surveys, monitoring, work operations, remedial work in respect of any contamination or other adverse ground condition, the receipt and erection of construction plant and equipment, intrusive investigations for the purpose of assessing ground conditions, and the first implementation of environmental mitigation, including planting;

“functions” includes powers and duties;

“HAUC Advice Note” means HAUC Advice Note No 2010/01 (available at https://static.hauc-uk.org.uk/downloads/Advice_Note_No_2010-01.pdf), including the Diversionary Works Calculator HAUC(UK) ([hauc-uk.org.uk](https://www.hauc-uk.org.uk)) (<https://www.hauc-uk.org.uk/resources/diversionary-works-calculator>) referred to at paragraph 29.4 of that advice note;

“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;

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

“specified works” means any authorised works or any other works in land purchased, held, appropriated or used under the Order (including any works of maintenance) that—

- (a) may in any way adversely affect any easement or other property interest held or used by Affinity Water;

(1) 2006 c.46

(2) 1991 c. 56. Section 51A was amended by sections 10(2)(a) – (c) of the Water Act 2014 (c. 21) and sections 92(1) and 105(3) of the Water Act 2003 (c. 37)

- (b) are within the following distances of Affinity Water's apparatus measured from the outer surface of such apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise—
- (i) where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres;
 - (ii) where the apparatus is a pipe, 3 metres where the diameter of the pipe is between 150 and 450 millimetres;
 - (iii) where the apparatus is a pipe, 4 metres where the diameter of the pipe exceeds 450 millimetres; and
 - (iv) 4 metres of any other apparatus,
- or such other distances as are expressly notified in writing by Affinity to the undertaker from time to time; or
- (c) outside the distances referred to in (b) will or may affect any apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and
- “water main” has the meaning given in the Water Industry Act 1991.

On street apparatus

3. Except for paragraphs 4 (*apparatus in stopped up streets*), 9 (*specified works*), 10 (*expenses and costs*) and 11 (*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 Affinity Water, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and Affinity Water are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

Apparatus in stopped up streets

4. Regardless of the temporary stopping up, alteration, diversion or restriction of use of any street under the powers conferred by article 14 (temporary restriction of use of streets), Affinity Water is at liberty at all times to take all necessary access across any such stopped up street and to execute and do all such works and things in, upon or under any such street 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 street.

Protective works to buildings

5. The undertaker, in the case of the exercise of the powers conferred by article 20 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to, or maintenance of, any apparatus unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

Acquisition of land

6.—(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 undertaker must not (a) appropriate or acquire or take temporary possession of any apparatus (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water.

(2) Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to)

- (a) provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require; and
- (b) where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result of any appropriation, acquisition, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the

undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus

Removal of apparatus

7.—(1) If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in or possesses temporarily any land in which any apparatus is placed or over which any access to any apparatus is enjoyed and requires that Affinity Water's apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule, and any right of Affinity Water to maintain that apparatus in that land and to gain access to it must not be extinguished, until:

- (a) alternative apparatus has been constructed and is in operation, and access to it has been granted to the reasonable satisfaction of Affinity Water in accordance with sub-paragraphs (2) to (9); and
- (b) facilities and rights have been secured for that alternative apparatus in accordance with paragraph 9 (alternative apparatus).

(2) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Affinity Water 56 days' written notice of that requirement, together with a plan of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed. In that case (or where, in consequence of the exercise of any of the powers conferred by this Order, Affinity Water reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to Affinity Water, in so far as the undertaker has the ability to grant or transfer them, the necessary facilities and rights and consents, and the benefit of any statutory permits granted to the undertaker in respect of the apparatus in question (whether under the Environmental Permitting Regulations 2010 or other legislation), for the construction of alternative apparatus in other land of the undertaker and subsequently for the maintenance of that apparatus. Such rights will include reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker or land secured by the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed, or the benefit of any statutory permits granted to the undertaker, Affinity Water may in its sole discretion, on receipt of a written notice to that effect from the undertaker, take such steps that it considers reasonable in the circumstances to assist the undertaker to obtain the necessary facilities and rights and consents in the land in which the alternative apparatus is to be constructed, and any required statutory permits.

(4) Affinity Water will have an absolute discretion whether or not to use or seek any powers of compulsory acquisition that may be available to Affinity Water for the purposes of sub-paragraph (3).

(5) Any alternative apparatus to be constructed in land of, or land secured by, the undertaker under this Part of this Schedule must be constructed in such manner and in accordance with such plans as may be agreed between Affinity Water and the undertaker or in default of agreement settled by arbitration in accordance with article 47 (arbitration).

(6) Affinity Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 47 (arbitration), and subject to any written diversion agreement having been entered into between the parties and after the grant to Affinity Water of any such facilities and rights or statutory permits as are referred to in sub-paragraphs (2) or (3), proceed in accordance with a programme that has been agreed or settled by arbitration in accordance with article 47 (arbitration) to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(7) Regardless of anything in sub-paragraph (5) but subject to sub-paragraph (10), if the undertaker gives notice in writing to Affinity Water that the undertaker desires itself to execute any work, or part of any such work, in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by Affinity Water, may be executed by the undertaker, with the

prior written consent of Affinity Water (which must not be unreasonably withheld or delayed and is to be subject to any conditions as are reasonable and proper to protect the apparatus) in accordance with plans and in a position agreed between Affinity Water and the undertaker, or in default of agreement determined by arbitration in accordance with article 47 (arbitration), without unnecessary delay under the superintendence, if given, and to the reasonable approval of Affinity Water. Following such approval given in writing by Affinity Water, any alternative apparatus will be deemed to be adopted by Affinity Water as though it had been adopted under s.51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991 on the date 28 days after the giving of such approval or such later date as is agreed in writing between Affinity Water and the undertaker.

(8) If Affinity Water fails either reasonably to approve, or to provide reasons for its failure to approve along with an indication of what would be required to make acceptable, any proposed details relating to required removal works under sub-paragraph (2) within 28 days of receiving a notice of the required works from the undertaker, then the undertaker shall have recourse to arbitration in accordance with article 47 (arbitration).

(9) In carrying out any work under sub-paragraph (7), the undertaker must comply with all statutory obligations which would have been applicable had the works been carried out by Affinity Water.

(10) Nothing in sub-paragraph (7) authorises the undertaker to:

- (a) execute any work of connection to, or disconnection from, Affinity Water's operational network;
- (b) execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any excavation and filling around any apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or
- (c) carry out any works in relation to any water mains.

(11) Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker shall, before taking any steps which will trigger the need for those substitution works, use all reasonable endeavours to comply with Affinity Water's reasonable requests for a reasonable period of time to enable Affinity Water to:

- (a) make network contingency arrangements; or
- (b) bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question.

Facilities and rights for alternative apparatus

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to Affinity Water facilities and rights for the construction, use, maintenance and protection of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and Affinity Water and must be no less favourable on the whole to Affinity Water than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by Affinity Water or in default of agreement settled, subject to sub-paragraphs (2) and (3) in accordance with article 47 (arbitration).

(2) In settling those terms and conditions in respect of alternative apparatus to be constructed in the land of the undertaker, any arbitrator or expert will—

- (a) give effect to all reasonable requirements of the undertaker for ensuring the safety and efficient operation of the authorised works and for securing any subsequent alterations or adaptations of the alternative apparatus which may be required to prevent interference with the proposed works of the undertaker; 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 for which the alternative apparatus is to be substituted.

(3) If the facilities and rights to be afforded by the undertaker 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 or expert less favourable on the whole to Affinity Water 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 or expert must make such provision for the payment

of compensation by the undertaker to Affinity Water as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Specified works

9.—(1) Not less than 56 days before commencement of any specified works, the undertaker must submit to Affinity Water a plan in respect of the specified works to be executed.

(2) The plan must provide details of—

- (a) the exact position, including level, of the specified works and of all apparatus;
- (b) a method statement describing the manner of their construction or renewal including details of excavation and positioning of plant;
- (c) detailed drawings showing every alteration proposed to be made to or close to any such apparatus;
- (d) all effects (including but not limited to electromagnetic or high voltage effects) that the construction, maintenance or operation of the specified works may have on any apparatus, the removal of which has not been required by the undertaker under paragraph 8(2) or otherwise; and
- (e) any intended maintenance regimes.

(3) The undertaker must not commence any specified works until the plan has been approved by Affinity Water.

(4) Any approval of Affinity Water given under sub-paragraph (3)—

- (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraph (7)(a); and
- (b) must not be unreasonably withheld or delayed.

(5) Affinity Water may require—

- (a) such modifications to be made to the plan as may be reasonably necessary for the purpose of securing its apparatus against interference or risk of damage or for the provision of protective works or for the purpose of providing or securing reasonable means of access to its apparatus; and
- (b) the undertaker to re-submit the plan as modified, for approval to Affinity Water, and Affinity Water must advise the undertaker within 14 days of submission of the revised plan whether it is approved.

(6) Affinity Water may as part of giving its approval under sub-paragraph (3) require that any part of specified works comprising of the matters listed below is carried out by Affinity Water, not the undertaker:

- (a) the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any excavation and filling around any apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or
- (b) any works in relation to any water mains.

(7) If the revised plan is not approved within 14 days, the undertaker may require a meeting to be held between the chief engineers of the undertaker and Affinity Water to agree the plan.

(8) If the undertaker and Affinity Water fail to reach an agreement on the plan, the dispute shall be settled by arbitration in accordance with article 47 (arbitration).

(9) Specified works must only be executed in accordance with—

- (a) the plan submitted under sub-paragraph (1), as approved or as amended from time to time by agreement between the undertaker and Affinity; and
- (b) all conditions imposed under sub-paragraph (5)(a),

and Affinity will be entitled to supervise and inspect the execution of those works where reasonably practicable to do so and in accordance with any relevant health and safety legislation.

(10) Where Affinity requires any protective works to be carried out by itself or by the undertaker (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 Affinity's satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency).

(11) If Affinity in accordance with this paragraph 9 and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 7 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 8(2).

(12) Nothing in this paragraph precludes the undertaker from submitting a new plan instead of the plan previously submitted, and provided that the new plan is submitted at least 56 days before commencing the execution of any works (unless otherwise agreed with Affinity Water), the provisions of this paragraph apply to and in respect of the new plan.

(13) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency works, but in that case must give to Affinity Water notice as soon as is reasonably practicable and a plan of those works as soon as reasonably practicable subsequently and must comply with any reasonable requirements of Affinity in so far as is reasonably practicable in the circumstances.

(14) Nothing in sub-paragraph (13) authorises the undertaker to carry out the works comprising of the matters listed in sub-paragraph (6) and should any such works need to be undertaken they will be undertaken by Affinity Water, not the undertaker.

(15) In this paragraph, "emergency works" means works which, at the time when they are executed are required in order to put an end to, or to prevent the occurrence of, existing or imminent circumstances (or which the person responsible for the works believes on reasonable grounds to be existing or imminent) which are likely to cause danger to persons or property.

(16) As soon as reasonably practicable after any ground subsidence event attributable to the authorised works the undertaker shall implement an appropriate ground mitigation scheme save that Affinity Water retains the right to carry out any further necessary protective works for the safeguarding of its apparatus and can recover any such costs in line with paragraph 10 (expenses and costs).

Expenses and costs

10.—(1) Subject to the following provisions of this paragraph, the undertaker must pay to Affinity within 30 days of receipt of an itemised invoice or claim from Affinity all charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by Affinity Water in, or in connection with—

- (a) the supervision, inspection, removal, relaying, replacing, alteration or protection of any apparatus or the supervision, inspection, adoption and construction of any new apparatus or alternative apparatus which may be required in connection with the authorised works; and
- (b) the consideration and approval of any plan as required by this Schedule, including the costs of external consultants and contractors employed in connection with such activities

(2) The costs as referred to in sub-paragraphs (1)(a) and (1)(b) are to include but not be limited to:

- (a) any costs reasonably incurred by or compensation properly paid by Affinity Water in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by Affinity Water as a consequence of Affinity Water;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 8(3); or
 - (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting Affinity Water;
- (b) in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus, where no written diversion agreement is otherwise in place;
- (c) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;
- (d) the approval of plans;

- (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (f) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works; and
- (g) any costs reasonably necessary in consequence of the execution of any such works as are referred to in this Part of this Schedule.

(3) The value of any apparatus that is removed and re-used by Affinity Water, or any value recovered by Affinity Water from the scrapping of any apparatus removed and not re-used, under the provisions of this Part of this Schedule must be deducted from any sum payable under sub-paragraph (1), that value being calculated after removal.

(4) If in accordance with the provisions of this Part 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 the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 47 (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 Affinity Water by virtue of sub-paragraph (1) must be reduced by the amount of that excess.

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

- (a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus;
- (b) where it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or to place it at the existing depth, the capacity, dimensions and depth of the apparatus is to be treated as if it has been agreed or so determined; and
- (c) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of an inspection chamber is to be treated as if it also had been agreed or had been so determined.

(6) An amount which apart from this sub-paragraph would be payable to Affinity Water in respect of works by virtue of 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 Affinity Water 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.

(7) The amount of the reduction under sub-paragraph (6) must be calculated using the methodology set out in paragraph 29 of HAUC Advice Note and—

- (a) the 1991 Act and any regulations made under that Act (including the cost-sharing regulations made under section 85 (Sharing of cost of necessary measures) of that Act), and
- (b) any other codes of practice or guidance issued under the 1991 Act or regulations made under that Act,

do not apply in respect of any such calculation under sub-paragraph (6).

Indemnity

11.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, operation or maintenance of any of the authorised works or any such works referred to in paragraphs 8(1) or 8(2), or by reason of any subsidence resulting from such development or 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 property of Affinity Water, or there is any interruption in any service provided, or in the supply of any goods, by Affinity Water, or Affinity Water becomes liable to pay any amount to any third party, the undertaker must—

- (a) bear and pay the cost reasonably incurred by Affinity Water, accompanied by an invoice, in making good such damage or restoring the supply; and
- (b) indemnify Affinity Water against all liabilities, claims, demands, losses, damages, proceedings, penalty or costs which may be made or taken against or recovered from or incurred by Affinity Water,

by reason or in consequence of any such damage or interruption.

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

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

(4) Affinity Water must give the undertaker reasonable notice of any such claim or demand and, unless payment is required in connection with a statutory compensation scheme, no settlement or compromise is to be made without first consulting the undertaker and considering their representations.

(5) Affinity Water must, in respect of any matter covered by the indemnity given by the undertaker in this paragraph, at all times act reasonably and in the same manner as it would as if settling third party claims on its own behalf from its own funds.

(6) Affinity Water must use reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands and penalties to which the indemnity under this paragraph applies where it is within Affinity Water's reasonable ability and control to do so but those endeavours expressly exclude any obligation to mitigate liability arising from third parties which is outside of Affinity Water's control. If reasonably requested to do so by the undertaker Affinity Water must provide an explanation of its reasonable endeavours to mitigate, where relevant.

(7) In sub-paragraph (1)-

- (a) "costs" includes—
 - (i) expenses and charges;
 - (ii) staff costs and overheads; and
 - (iii) legal costs;
- (b) "losses" includes physical damage;
- (c) "claims" and "demands" include as applicable—
 - (i) costs incurred in connection with any claim or demand; and
 - (ii) any interest element of sums claimed or demanded; and
- (d) "liabilities" includes—
 - (i) contractual liabilities;
 - (ii) tortious liabilities (including liabilities for negligence or nuisance);
 - (iii) liabilities to pay statutory compensation or for breach of statutory duty; and
 - (iv) liabilities to pay statutory penalties.

Cooperation

12.—(1) Where in consequence of the proposed construction of any part of the authorised works, the undertaker or Affinity Water requires the removal of apparatus under paragraph 8(2) or Affinity Water makes requirements for the protection or alteration of apparatus under paragraph 9, the undertaker must use all reasonable endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised works and taking into account the need to ensure the safe and efficient operation of Affinity Water's undertaking, using existing processes where requested by

Affinity Water, provided it is appropriate to do so, and Affinity Water must use all reasonable endeavours to co-operate with the undertaker for that purpose.

(2) For the avoidance of doubt whenever Affinity Water's consent, agreement or approval 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.

13. Where the undertaker identifies any apparatus which may belong to or be maintainable by Affinity Water but which has not previously been indicated by Affinity Water as being apparatus belonging to it, the undertaker shall inform Affinity Water of the existence and location of the apparatus as soon as reasonably practicable. If Affinity Water confirms that it owns or maintains the apparatus, that apparatus shall then be afforded the same protection under this Part of this Schedule as other apparatus belonging to Affinity Water.

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

15. The undertaker and Affinity Water may by written agreement substitute any periods of time set out in this Part of this Schedule for any other period of time.

Access

16. If in consequence of any agreement reached in accordance with paragraph 6 or the powers conferred by this Order, the access to any of Affinity's apparatus is obstructed, prior to obstructing such access, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Affinity to maintain or use the apparatus no less effectively than was possible before such obstruction.

