



ESTUARIES

OFFSHORE WIND FARM

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10.62 NOTE ON DDCCO DRAFTING – APPLICANT'S POSITION ON PROTECTIVE PROVISIONS

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Revision	Date	Status/Reason for Issue	Originator	Checked	Approved
A	Mar 25	Deadline 7	Burges Salmon	VEOWF	VEOWF

1 PROTECTIVE PROVISIONS DRAFTING

- 1.1 This document sets out the Applicant's understanding of what has, and has not, been agreed on the protective provisions (PPs) included in the dDCO submitted at Deadline 7.
- 1.2 Where the party to be protected has not confirmed whether any drafting is agreed or not, it has been assumed it is not agreed, but the ExA's attention will be drawn to such drafting in each case.
- 1.3 The Applicant is ongoing discussions with the Statutory Undertakers where the PP's are not agreed and proposes to provide a revision of this document at Deadline 8 showing progress.

AGREED AND NO COMMENT PROTECTIVE PROVISIONS

- 1.4 The following are agreed:
- (a) **Cadent:** the protective provisions as included in the dDCO at Deadline 7 are agreed.
 - (b) **North Falls:** the protective provisions as included in the dDCO at Deadline 7 are agreed.
 - (c) **Port of London Authority (onshore):** the protective provisions as included in the dDCO at Deadline 7 are agreed.
- 1.5 The following have no drafting points to raise but are not agreed:

Environment Agency

- 1.6 A draft set of PPs based on recent precedent was sent to the EA in April 2024. Following meetings between the Applicant and the EA, additions were made to the draft PPs to cover monitoring of the sea defence and access. Those updated drafts were provided to the EA legal service but the Applicant has not had any comments on that drafting. We understand the EA legal officer has been unwell and their resource to engage with this had been limited.
- 1.7 EA legal services sent over an updated 'standard' set of PPs to the Applicant in late February 2025. The Applicant has made changes to its drafting to seek to align with that template in so far as possible. That draft has been shared with the EA and comments are awaited. The Applicant will advise on any progress at Deadline 8.

National Grid Electricity

- 1.8 The Applicant, National Grid and North Falls have been working to agree a co-operation agreement. Completion of that agreement is a necessary pre-requisite to the PPs being finally agreed. Excellent progress has been made on that agreement and the Applicant is confident that agreed PPs can be submitted at Deadline 8.

NOT AGREED PROTECTIVE PROVISIONS

- 1.9 The following are currently not agreed and discussions are ongoing to seek a resolution to the points set out below in turn:

2 AFFINITY

- 2.1 The terms of the Protective Provisions for the protection of Affinity Water are under discussion between the Applicant, North Falls and Affinity Water. There are substantial number of points that are outstanding, many of these are minor drafting points which are only outstanding due to timing and the Applicant, North Falls and Affinity are working to resolve these outstanding points. The parties expect that further agreement will be reached prior to close of the Examination, the Applicant will update the Examining Authority at Deadline 8.

2.2 A copy of the Applicant’s draft of the Protective Provisions showing in track the changes made by Affinity is set out in appendix 1.

2.3 **Definition of “specified works” – paragraph 2**

2.4 The Applicant cannot accept the inclusion of “*or any other works in land purchased, held, appropriated*” into the definition of “specified works” since this is not necessary. The definition of “specified works” includes authorised works. Authorised works by definition can only be works that are consented under the Order. Therefore, this change is not needed and is not necessary to prevent a serious detriment arising.

2.5 In relation to sub-paragraph (b)(iv), the Applicant cannot accept the following wording requested by Affinity “*or such other distances as are expressly notified in writing by Affinity to the undertaker from time to time*”—The Applicant has replaced it with “*unless otherwise agreed in writing with Affinity Water (acting reasonably)*”. The Applicant requires certainty on what the relevant distance is in order to ascertain if the works are happening within the restricted distance of Affinity Water’s apparatus. The amendment sought by Affinity is uncertain which is unacceptable where a breach of a DCO is an offence. The Applicant must be able to reasonably establish when the Protective Provisions apply. The Applicant has provided an alternative amendment that provides for any other changes to the distance to be agreed in writing with Affinity. This is reasonable and precedented.

2.6 In relation to sub-paragraph (c), the Applicant cannot accept the following wording included by Affinity “*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 8(2) or otherwise*”. The reasoning for the deletion of this wording is the same as provided at paragraph 2.6. The Applicant requires certainty on what the relevant distance is in order to ascertain if the works are happening within the restricted distance of Affinity Water’s apparatus. The amendment sought by Affinity is uncertain which is unacceptable where a breach of a DCO is an offence. The Applicant must be able to reasonably establish when the Protective Provisions apply.

Affinity’s preferred wording	Applicant’s preferred wording
<p>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—</p> <p>(a) may in any way adversely affect any easement or other property interest held or used Affinity Water</p> <p>(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 8(2) or otherwise—</p> <p>(i) where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres;</p> <p>(ii) where the apparatus is a pipe, 3 metres where the diameter of the pipe is between 150 and 450 millimetres;</p> <p>(iii) where the apparatus is a pipe, 4 metres where the diameter of the pipe exceeds 450 millimetres; and</p> <p>(iv) 4 metres of any other apparatus,</p>	<p>specified works” means any authorised works or used under the Order (including any works of maintenance) that—</p> <p>(a) may in any way adversely affect Affinity Water’s apparatus;</p> <p>(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 8(2) or otherwise—</p> <p>(i) where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres;</p> <p>(ii) where the apparatus is a pipe, 3</p>
	<p>metres where the diameter of the pipe is between 150 and 450 millimetres;</p> <p>(iii) where the apparatus is a pipe, 4 metres where the diameter of the</p>

<p>or such other distances as are expressly notified in writing by Affinity to the undertaker from time to time</p> <p>(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 8(2) or otherwise; and</p>	<p>pipe exceeds 450 millimetres; and</p> <p>(iv) 4 metres of any other apparatus,</p> <p>(v) unless otherwise agreed in writing with Affinity Water (acting reasonably)</p>
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2.7 On street apparatus – paragraph 3

2.8 The Applicant cannot accept the preferred wording requested by Affinity as shown below:

Affinity's preferred wording	Applicant's preferred wording
<p>Except for paragraphs [] (apparatus in stopped up streets), [] (retained apparatus: protection), [] (expenses) and [] (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, 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.</p>	<p>This Part of this Schedule does 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.</p>

2.9 This is because the Protective Provisions should not govern the relations which fall within Part 3 of the 1991 Act. It is not reasonable that Affinity have access to the costs regime under that act and under protective provisions. The PPs should only apply where the Order powers are relied on. Where other powers are relied on, the cost provisions relating to those powers should apply.

2.10 Access – paragraph 5

2.11 The Applicant is seeking rights to use plots 05-004, 05-006, 05-005. These plots currently provides access for Affinity to the East Clacton Reservoir and Pumping Station. The Applicant is not seeking to interfere with, prevent or remove Affinity's right of access, it is simply seeking an additional right of access in common with existing rights. The Applicant cannot agree to the drafting sought by affinity that the CA powers cannot be used over any land in which they have an interest given the need for this access. The Applicant requires to be able to acquire access rights in common with Affinity on these plots.

2.12 Following discussions with Affinity Water in relation to their concerns over access to the East Clacton Reservoir and Pumping Station, the Applicant has provided the following wording:

Access for Affinity Water to the Affinity Water Property over plots 05-004, 05-006, 05-005 must not be unreasonably restricted or delayed by the undertaker during the construction and/or maintenance of the authorised works. Where any part of the access to the Affinity Water Property is restricted or controlled by the undertaker, the undertaker will, on request of Affinity Water, take steps (as soon as reasonably practicable) to allow access to and from the Affinity Water Property through or around that restriction or control.

2.13 This drafting will fully protect Affinity’s statutory undertaking by allowing Affinity access over the relevant plots and the Applicant is committing that such access must not be unreasonably restricted or delayed by the undertaker during the construction and/or maintenance of the works.

2.14 In addition, the Applicant has provided the definition of Affinity's Property as: “Affinity Water Property” means the East Clacton Reservoir and Pumping Station in the vicinity of Plots 05-004, 05-006, 05-005”. This definition provides clarity as to where the access is located which ensures certainty for both Affinity and the Applicant when exercising rights and complying with the access provision above.

2.15 **Protective works for building – paragraph 6**

2.16 The Applicant cannot accept the amendment requested by Affinity in red and requires the wording to be included in blue in paragraph 6 of the Protective Provisions.

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 (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

Affinity’s preferred wording	Applicant’s preferred wording
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	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, any apparatus (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

2.17 The purpose of this article is to prevent the Applicant from exercising its powers in a way that obstructs or renders less convenient access to Affinity’s apparatus (not the ability for Affinity to maintain its apparatus). The Applicant has included wording in blue which captures any access needed for maintenance. This alternative drafting provides more clarity and ensures that access needed for maintenance is not obstructed or rendered less convenient which is what (the Applicant believes) Affinity wishes to achieve with their original drafting.

2.18 **Specified works – paragraph 10**

2.19 Under the Protective Provisions, the Applicant must submit to Affinity a plan of the specified works before such works are executed. The plan must provide various details. The Applicant cannot accept the amendment requested by Affinity in red and requires the wording to be included in blue in paragraph 10 of the Protective Provisions.

all effects expected physical impacts (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

2.20 The Applicant cannot accept that the plan needs to provide “effects” that the works may have on the apparatus since it is not clear what “effects” are. Therefore, the Applicant has proposed “expected physical impacts” which provides clarity as to what the plan that is to

be provided to Affinity must entail. This is reasonable as it provides certainty to the Applicant when submitting the required information to Affinity.

Affinity's preferred wording	Applicant's preferred wording
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,	all expected physical impacts (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,

2.21 The Applicant cannot accept the following provisions being included as new sub-paragraph 10(6) and new sub-paragraph 10(14):

(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) any work of connection to, or disconnection from, Affinity Water's operational network;

(b) 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) any works in relation to any water mains

(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.

2.22 It is standard practice that specified works will be carried out by the Applicant pursuant to the powers under the dDCO. The reason for why the works need to be carried out by the Applicant is because the Applicant need to control how these works are executed as it will be the Applicant will be held liable for any breached under the DCO. Therefore, inclusion of this new wording is not appropriate and not necessary to prevent serious detriment to Affinity.

2.23 Protective works – paragraph 9(10)

2.24 Under the Protective Provisions, Affinity may require any protective works to be carried by itself or by the undertaker to ensure the safety of Affinity's apparatus (whether of a temporary or permanent nature). Affinity needs to give notice of such works. The Applicant requires the following amendments to be included in blue:

Where Affinity requires (acting reasonably) any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity's apparatus (whether of a temporary or permanent nature), Affinity must specify what these protective works are, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, and the protective works must be carried out to Affinity's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement (in writing) for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency) and in that written notice Affinity must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably).

2.25 The Applicant requires that any protective works that are required by Affinity to be carried out by the Applicant, Affinity must provide the notice in writing and such notice must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably). The requirement for the notice to be made in writing is reasonable and ensures that there is certainty when such request is made in order for the Applicant to comply with the provisions of this paragraph. The Applicant also requires Affinity to specify what the protective works are and how these ensure safety of Affinity's apparatus which is also reasonable and provides certainty to the Applicant as to what the relevant works that Affinity requires the Applicant to carry out. In addition, the Applicant requires that the works must be carried out to Affinity's reasonable satisfaction. This is reasonable because the works need to be carried out that are necessary and proportionate in the circumstances.

2.26 In addition, in connection with the above, the Applicant has provided a standard definition of "protective works" to provide both clarity and certainty to Affinity and the Applicant as to what works constitute "protective works" for the purposes of the above provision.

"protective works" means the underpinning, strengthening and any other reasonable works the purpose of which is to prevent damage that may be caused to Affinity's apparatus by the carrying out, maintenance, construction or use of the authorised development.

2.27 New plan – paragraph 9(12)

2.28 The Applicant cannot accept the preferred wording requested by Affinity as shown below:

Affinity's preferred wording	Applicant's preferred wording
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.	Nothing in this paragraph precludes the undertaker from submitting a new plan (which is materially different to the plan previously submitted) instead of the plan previously submitted, and provided that this new plan is submitted at least 28 days before commencing the execution of any works (unless otherwise agreed with Affinity

2.29 The Applicant cannot accept 56 days as a reasonable amount of time for Affinity to review the plan provided to it in connection with paragraph 11 before works may start. 56 days will cause an unnecessary delay to the project. 28 days is sufficient for Affinity to comply with its obligations. The Applicant also requires that any subsequent plan that is submitted under this paragraph is materially different from the previous plan. This is reasonable and ensures that Affinity has an additional 28 days every time a new plan that is materially different from the previous plan is submitted.

2.30 **Acquisition of land – paragraph 7**

2.31 The Applicant requires the following wording in red to be deleted in paragraph 7:

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 any interest in land held by Affinity Water (b) or take temporary possession of any apparatus ~~or interest in land~~ held by Affinity Water or (c) 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. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) 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.

2.32 The Applicant requires deletion of this provision because the Applicant is taking an access right over land that the Applicant understands Affinity to also hold a right in, the appropriate protection is that the Applicant will not extinguish any of Affinity's rights, covered by sub-paragraph (c), and maintain Affinity's access, covered by paragraph 5 of the Protective Provisions. Therefore, it is reasonable and appropriate in the circumstances to delete the wording in red. Inclusion of this drafting is not necessary to prevent a serious detriment arising.

2.33 In addition, the Applicant cannot accept the inclusion by Affinity of the following provision in paragraph 7:

and 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 7(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.

2.34 This is because the appropriate statutory undertaker to request the inclusion of the provisions under Schedule 13 of the Water Industry Act 1991 is the Environment Agency since Schedule 13 applies to the works which are vested or under control of the Environment Agency. The Applicant is providing separate Protective Provisions to the Environment Agency. The Applicant cannot see why Affinity is requesting the insertion of this provision into paragraph 8 of the Protective Provisions and has requested further information from Affinity to be provided.

Affinity's preferred wording	Applicant's preferred wording
<p>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 any interest in land held by Affinity Water, (b) or take temporary possession of any apparatus or interest held by Affinity Water or (c)(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. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) 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 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,</p>	<p>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 any interest in land held by Affinity Water, (b) or take temporary possession of any apparatus held by Affinity Water or (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. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) 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</p>

interference or overriding within sub-paragraph 7(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	
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2.35 Removal of apparatus Access over plots 05-004, 05-006 and 05-005

2.36 The Applicant requires that paragraph 8 which deals with the removal or relocation of the apparatus does not apply to plots 05-004, 05-006, 05-005 where paragraph 5 of the Protective Provisions applies which deals with access (please see above). It is necessary to expressly exclude these plots from the operation of paragraph 8 as these plots will not be relevant or applicable to the provisions of paragraph 8 in connection with the removal of any apparatus.

2.37 Statutory Permits

2.38 The Applicant cannot agree to Affinity requiring the Applicant to grant or transfer 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). This is because the Applicant cannot apply for a permit for another party. The guidance provided by the Environment Agency provides that "Only the person who has control over the operation of a regulated facility may obtain or hold an environmental permit" (Environmental permitting: Core guidance. For the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154). Therefore, it is unreasonable to ask the undertaker to commit to doing something that it is prevented from doing.

2.39 In addition, the Applicant requires that the Applicant is required to grant or transfer any necessary facilities and rights only where the Applicant has a "reasonable" ability to do so. This ensures that the Applicant is not required to make any transfers where it may be prevented from doing so through legislation or other means.

2.40 The Applicant to carry out the works

2.41 The Protective Provisions (as is a standard position) provide for the ability of the Applicant to remove or relocate the apparatus belonging to statutory undertakers over or within any of the Order land is required. The Applicant cannot agree to the principle that where the removal of the apparatus is required pursuant to paragraph 8 of the Protective Provisions, such works must be executed by Affinity. It is standard practice that these works will be carried out by the Applicant pursuant to the powers afforded to it in the dDCO. The reason for why the works need to be carried out by the Applicant is because the Applicant need to control how these works are executed as it will be the Applicant will be held liable for any breached under the DCO.

2.42 In connection with the above, the Applicant cannot accept the inclusion of sub-paragraph (10) in paragraph 8 of the Protective Provisions. This is because the inclusion of these paragraphs is not relevant to the principle outlines above whereby it is the Applicant that will be doing the relevant works as authorised dDCO.

2.43 Please see the Applicant's preferred wording below.

Affinity's preferred wording	Applicant's preferred wording in blue
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<p>.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.</p> <p>(10) (1) 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.</p> <p>(10)(2) Nothing in sub-paragraph (7) authorises the undertaker to:</p> <p>(a) 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</p> <p>(b) carry out any works in relation to any water mains.</p>	<p>Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with sub-paragraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water.</p>
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2.44 Deemed approval – paragraph 8(9)

2.45 Under the Protective Provisions (as is standard) where Affinity fails to either reasonably 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 paragraph 8 within 28 days of receiving a notice of the required works from the undertaker, then such details are deemed to have been approved. The Applicant rejects the amendment in paragraph 8(9) for deemed approval to be deleted. The delivery of an NSIP should not be unduly delayed by Affinity where Affinity do not deal with an application in a timely manner. The sub-paragraph (8) provides for 28 days which is sufficient time for Affinity to review any information supplied.

2.46 The Applicant cannot accept Affinity’s alternative wording that if Affinity does not comply with the 28 day timescales that such matter should go through the arbitration as this will significantly delay the works and the delivery of NSIP. This amendment is not justified and what the Applicant is proposing by deemed approval is precented and reasonable.

2.47 Please see the Applicant’s preferred wording below.

Affinity’s preferred wording	Applicant’s preferred wording
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 48 (arbitration).	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 such details are deemed to have been approved

2.48 In addition, the Applicant cannot accept the preferred wording requested by Affinity as shown below:

Affinity’s preferred wording	Applicant’s preferred wording
Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker <u>shall</u> , before taking or <u>which will trigger the need for those</u> 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.	Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker <u>must</u> , before taking or <u>requiring any further steps in such</u> 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.

2.49 The Applicant cannot accept Affinity’s preferred language because it is not clear what “will trigger” means. The Applicant has proposed alternative wording by requiring “further steps” to be taken which provides greater certainty in connection with the operation of this provision and compliance.

2.50 **Expenses and costs – paragraph 11**

- 2.51 Under the Protective Provisions, the Applicant is required to pay Affinity’s reasonable charges, costs and expenses. The Applicant cannot accept the requirement to pay Affinity’s anticipated costs. This is because the Applicant should be paying costs that have actually been incurred by Affinity. This is reasonable, precedented and justified.
- 2.52 Under the Protective Provisions, the Applicant is required to pay Affinity’s reasonable charges, costs and expenses which include the costs incurred in approving the plans. The Applicant cannot accept that the Applicant is also required to cover the “*costs of external consultants and contractors employed in connection with such activities*”. This is not precedented and the Applicant does not consider this provision to be reasonable and superfluous to the obligation already included in the Protective Provisions for the Applicant to cover the costs of Affinity in approving the plans. To extent this financial obligation to Affinity’s external consultants etc is reasonable and is not necessary.
- 2.53 Please see the Applicant’s preferred wording below.

Affinity’s preferred wording	Applicant’s preferred wording
<p>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 incurred by Affinity Water in, or in connection with</p> <p>(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):</p> <p>(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</p>	<p>Subject to the following provisions of this paragraph, the undertaker must pay to Affinity Water within 30 days of receipt of an itemised invoice or claim from Affinity Water all reasonable charges, costs and expenses reasonably and properly incurred by Affinity Water in, or in connection with—</p> <p>(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 (but always excluding any consequential loss or indirect loss suffered by Affinity Water):</p>

2.54 **Indemnity – paragraph 12**

2.55 ***Payments to third parties – paragraph 12(1)***

2.56 The Applicant cannot accept the inclusion of an obligation for the Applicant to pay “any amount to any third party”. The purpose of the indemnity is to cover any costs, losses etc incurred or suffered by Affinity in connection with the works carried out by the Applicant which includes damage to the apparatus or Affinity’s property or any interruption to the service provided. The indemnity is not being provided for any costs incurred as a result of Affinity becoming liable to pay third party costs. This is not what the indemnity is for. Paragraphs 12(4) and 12(5) already deals with any third party claims and how these should be dealt with.

2.57 ***Indemnity – paragraph 12(1)(b)***

2.58 The Applicant cannot accept Affinity’s preferred wording as shown below. The Applicant requires the wording as shown in the table.

Affinity's preferred wording	Applicant's preferred wording
indemnify Affinity 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	make reasonable compensation to Affinity Water for any other expenses, loss, damages, penalty or costs incurred by Affinity Water

2.59 The Applicant cannot agree to Affinity replacing “*the undertaker must make reasonable compensation*” with “*the undertaker must indemnify*”. The requirement on the Applicant to provide reasonable compensation is precedented and it is not unreasonable to ensure that any claim made by Affinity must be reasonable. This is because any claim for compensation under the indemnity provided at paragraph 12 of the Protective Provisions should be relevant and reasonable to the damage, costs etc incurred. This is precedented and it is not unreasonable to include this.

2.60 ***Exclusion of consequential and indirect loss - paragraph 12(1)***

2.61 The Applicant requires consequential and indirect loss to be carved out from the indemnity provided to Affinity. The purpose of the indemnity is to cover any costs, losses etc incurred or suffered by Affinity in connection with the works carried out by the Applicant. Indemnity should not cover consequential or indirect losses as such losses do not naturally result from the beach (ie works causing any damage to the highway) but include those losses that arise from special circumstances which are only in the knowledge of one party and not the other. This means that the Applicant would not be able to foresee or contemplate these losses arising. Inclusion of indirect and consequential losses is not reasonable and not necessary to prevent a serious detriment arising.

2.62 ***Unlawful or unreasonable act***

2.63 The Applicant cannot agree to the removal of the following wording from paragraph 12(3) of the Protective Provisions:

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 ~~unlawful or unreasonable act~~, neglect or default of Affinity Water, its officers, servants, contractors or agents.

2.64 This is because the Applicant cannot be held liable for any damage which has been caused by “unlawful or unreasonable” act by the Affinity. It is a matter of law to exclude these breaches which is reasonable and well-precedented. The Applicant has provided precedents to Affinity for their attention.

2.65 ***Claims and settlements – paragraph 12(4)***

2.66 Under the Protective Provisions, Affinity Water must give the undertaker reasonable notice of any claim or demand made in connection with the indemnity provision contained at paragraph 13 of the Protective Provisions and, unless payment is required in connection with a statutory compensation scheme, no settlement or compromise is to be made.

2.67 The Applicant cannot accept Affinity's preferred wording as shown below. The Applicant requires the wording in blue as shown in the table. The Applicant requires that Affinity seeks consent from the Applicant before settling any claim. This is reasonable because it prevents Affinity from settling any claim without the Applicant's approval. Applicant's consent is necessary in order for the Applicant to consider whether the claim may be challenged using any of the grounds provided in paragraph 12 of the Protective Provisions, for example, on the grounds that the claim includes indirect or consequential losses or that the claim has not been mitigated. It is reasonable for the Applicant to review and challenge any claim in this way before the claim is settled. This is because if the claim falls within the indemnity provisions (under paragraph 12 of the Protective Provisions) then it is the Applicant that will

bear the costs and not Affinity. In these circumstances, it is not unreasonable to require Affinity to seek consent from the Applicant. This wording is precedented.

Affinity's preferred wording	Applicant's preferred wording
<p>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, <u>without first consulting the undertaker and considering their representations</u></p>	<p>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, <u>without the consent of the undertaker (such consent not to be unreasonably withheld or delayed) who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.</u></p>

2.68 Indemnity cap - paragraph 12(7)

2.69 The Applicant cannot agree to an unlimited indemnity requested by Affinity Water as unlimited indemnity is not necessary or justified by the interaction of this project with Affinity's assets. Inclusion of uncapped indemnity creates an unjustified risk to the Applicant and it is not necessary to prevent a serious detriment arising. Following a careful assessment of assets and potential liability arising in connection with Affinity Water's Protective Provisions, the Applicant has included a £30 million indemnity cap which is more than sufficient to cover any loss arising.

2.70 Expert determination – paragraph 17

2.71 Affinity requested that any disagreement under paragraph 9 of the Protective Provisions will be dealt with by way of an expert determination. The Applicant has agreed to this and has provided some drafting which is standard and well-precedented.

~~2.72~~—The Applicant has provided the following wording to Affinity but has not yet received response therefore it is considered not agreed.

3 ANGLIAN

3.1 The terms of the Protective Provisions for the protection of Anglian Water are under discussion between the Applicant, North Falls and Anglian Water. There are some points that are outstanding. The Applicant has not yet had comments back from Anglian Water on some of these outstanding points. Where any further agreement is reached prior to close of the Examination, the Applicant will update the Examining Authority at Deadline 8.

3.2 The outstanding points are set out below.

3.3 Stopping up distances

3.4 The draft PPs, as is common practice, specify that works within the 'stand-off' distances from the apparatus, will be controlled by the Protective Provisions. Anglian is however seeking to amend this to [to be "agreed on a case-by-case basis] for [a pipe exceeding 400 millimetres]. The Applicant requires certainty on what the relevant distance is in order to ascertain if the works are happening within the restricted distance of Anglian Water's apparatus. The amendment sought by Anglian is uncertain which is unacceptable where a breach of a DCO is an offence. The Applicant must be able to reasonably establish when the Protective Provisions apply. The Applicant has provided a distance of 6 metres (which

follows precedents including Hornsea 3 and East Anglia 2]] and is therefore submitted to be reasonable to secure the protection of apparatus.

Anglian's preferred wording in blue	Applicant's preferred wording
a distance to be agreed on a case by case basis and before the submission of the Plan under sub-paragraph (1) is submitted6	6 meters where the diameter of the pipe exceeds 400 millimetres

3.5 Access provisions

3.6 The Applicant is seeking rights to use plot [01-002] (Manor Way) in order to take access to the beach/intertidal area. This plot currently provides access to Clacton-Holland Haven Water Recycling Centre on Manor Way. The Applicant is not seeking to interfere with, prevent or remove Anglian's right of access, it is simply seeking an additional right of access in common with existing rights. Following discussions with Anglian Water in relation to their concerns over access to Clacton-Holland Haven Water Recycling Centre, the Applicant has provided the following wording:

- (a) *Access for Anglian Water or any person acting under its instruction, including access for vehicles and plant, to the Anglian Water Property over Plot [01-002] and to any apparatus utilities and services will not extinguished or prevented and must not be unreasonably restricted or delayed by the undertaker during the construction, operation, maintenance or decommissioning of the Authorised Development in accordance with sub-paragraphs (2) and (3).*
- (b) *Unreasonable delay or restriction in subparagraph (1) will not prevent the temporary restriction of access for other users (including access by the public) or the control or marshalling of access to facilitate the safe movement of large vehicles or plant or the carrying out of works to the access route by the undertaker, subject to the provisions of sub-paragraph (2) and (3) of this paragraph [17].*
- (c) *Where any part of the access to the Anglian Water Property is restricted or controlled by the undertaker, any physical measures must be agreed by the Anglian Water (acting reasonably) prior to the implementation. The undertaker must provide access to the Anglian Water Property on request from Anglian Water or any person acting under its instruction and take steps (as soon as reasonably practicable) to allow access to and from the Anglian Water Property through or around that restriction or physical measure*

3.7 This drafting will fully protect Anglian's statutory undertaking by allowing Anglian access for vehicles and plant to the over Plot [01-002] and the Applicant is committing that such access will not be extinguished, prevented and must not be unreasonably restricted or delayed by the undertaker during the construction, operation, maintenance or decommissioning of the Authorised Development in accordance with this provision.

3.8 The Applicant provided this wording to Anglian but has never received a response and it is therefore not agreed.

3.9 Costs and expenses

3.10 Under the Protective Provisions, the Applicant is required to pay to Anglian the costs and expenses reasonably incurred by Anglian Water in connection with the works. The Applicant cannot agree to the removal of the following paragraph 25(5):

- (a) *"An amount which apart from this sub-paragraph would be payable to Anglian 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 Anglian 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."*

3.11 This paragraph provides that Anglian cannot financially benefit from any new apparatus that is installed by the Applicant. The purpose of protective provisions to ensure that the statutory undertaker does not suffer detriment, it is therefore reasonable that where the Applicant in effect provides better (newer, or upgraded apparatus which saves the statutory undertaker the cost of upgrading the old apparatus at end of life and reduces maintenance costs) than the undertaker had, that betterment is offset against the costs due to the undertaker so that the overall cost position is neutral. This is a reasonable provision, reflects the statutory position under other legalisation and is precedented. It is not unreasonable to require Anglian to accept this provision which causes no detriment to them.

3.12 **Approval by Anglin to be subject to reasonableness**

3.13 The Applicant requires that whenever Anglian 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. The Applicant cannot agree to Anglian Water removing this provision as this will cause undue delay to the project. The removal is not justified and no reason for the removal has been provided by Anglian. The inclusion of this provision is not controversial and has been included in recent precedents which have been provided to Anglian Water.

3.14 **Retained apparatus**

3.15 Under the Protective Provisions, the Applicant is required (when carrying out any emergency works) to keep the impact of those emergency works on Anglian’s apparatus, on the operation of its water and sewerage network and on end-users of the services Anglian Water provides to a minimum. The Applicant cannot accept that when complying with this obligation, the Applicant must use “best” endeavours. The Applicant has proposed using “reasonable” endeavours which ensures that the Applicant takes actions which are appropriate and proportionate to keep impact on Anglian’s property at the minimum when responding to emergency. This is well-precedented and reasonable.

Anglian’s preferred wording	Applicant’s preferred wording
<p>The undertaker is not required to comply with sub-paragraph (1) in a case of emergency but in that case must give to Anglian Water notice as soon as is reasonably practicable and a plan 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, using its best endeavours to keep the impact of those emergency works on Anglian Water’s apparatus, on the operation of its water and sewerage network and on end-users of the services Anglian Water provides to a minimum.</p>	<p>The undertaker is not required to comply with sub-paragraph (1) in a case of emergency but in that case must give to Anglian Water notice as soon as is reasonably practicable and a plan 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, using its reasonable endeavours to keep the impact of those emergency works on Anglian Water’s apparatus, on the operation of its water and sewerage network and on end-users of the services Anglian Water provides to a minimum.</p>

3.16 **Cap**

3.17 The Applicant cannot agree to an unlimited indemnity requested by Anglian Water as unlimited indemnity is not necessary or justified by the interaction of this project with Anglian’s assets which are affected only by the proposed use of the existing access at Manor Way. Inclusion of uncapped indemnity creates an unjustified risk to the Applicant and it is not necessary to prevent a serious detriment arising. Following a careful assessment of assets and potential liability arising in connection with Anglian Water’s Protective Provisions, the Applicant has included a £30 million indemnity cap which is more than sufficient to cover any loss arising.

4 DRAINAGE

4.1 The terms of the Protective Provisions for the protection of Essex CC as the drainage authority are under discussion between the Applicant, North Falls and Essex CC. There are some points that are outstanding. The Applicant has is awaiting comments back from Essex CC on these outstanding points, however, these points have been discussed and the Applicant believes that what the Applicant has included in the latest draft of the Protective Provisions will be acceptable to Essex CC. Where any further agreement is reached prior to close of the Examination, the Applicant will update the Examining Authority at Deadline 8.

4.2 The outstanding points are set out below.

4.3 Definition of reasonableness

4.4 Essex CC have requested a definition of “reasonableness” to be included in the Protective Provisions. The Applicant has proposed the following drafting:

- (a) “reasonable” in this paragraph means appropriate in the circumstances and, for avoidance of doubt any recommendation or requirement from the drainage authority relating to health and safety shall be considered reasonable;

4.5 The Applicant provided this wording to Essex CC but is awaiting a response and it is therefore not agreed.

4.6 Exclusion of consequential and indirect loss

4.7 The Applicant requires consequential and indirect loss to be carved out from the indemnity provided to Essex CC. The purpose of the indemnity is to cover any costs, losses etc incurred or suffered by Essex CC in connection with the works carried out by the Applicant. This indemnity should not cover consequential or indirect losses as such losses do not naturally result from the breach and are not reasonably foreseeable. Inclusion of indirect and consequential losses is not reasonable and not necessary to prevent a serious detriment arising. Essex CC have provided no examples of when they would be liable to such losses as a drainage authority.

4.8 Duty to mitigate

4.9 Following a request from Essex CC and discussions between the parties, the Applicant has amended the requirement for Essex to take reasonable steps to mitigate and minimise any loss suffered as follows:

- (a) *The drainage authority must take such steps as are reasonable in the circumstances to mitigate in whole or in part and to minimise any costs, expenses, loss, claims, damages, demands, proceedings and penalties to which the indemnity under paragraph 10 applies where it is within the drainage authority’s reasonable gift and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of the drainage authority’s control. If reasonably requested to do so by the undertaker, the drainage authority must provide a written explanation of how any claim has been mitigated or minimised or where mitigation or minimisation is not possible an explanation as to why.*

4.10 This wording is based on the standard legal position that any party making a claim under an indemnity must act reasonably to mitigate its own loss. This is not a novel or controversial position, and the same principle applies across payments under this and any other DCO, including for example compensation payments where a claimant must also act reasonably to mitigate their own losses. The Applicant provided this wording to Essex CC but is awaiting a response and it is therefore not agreed.

5 NETWORK RAIL

5.1 The terms of the Protective Provisions for the protection of Network Rail are under discussion between the Applicant, North Falls and Network Rail. There are some points that

are outstanding. The Applicant has not yet had comments back from Network Rail on some of these outstanding points. Where any further agreement is reached prior to close of the Examination, the Applicant will update the Examining Authority at Deadline 8.

5.2 The outstanding points are set out below.

5.3 **Compulsory acquisition powers**

5.4 The Applicant cannot agree to the disapplication of the CA powers and other powers in the absence of a suitable voluntary land rights agreement. That a voluntary agreement has not yet been concluded demonstrates why these powers are required to ensure delivery of the NSIP.

5.5 Network Rail is looking to include the following provision:

— (1) *The undertaker must not exercise the powers conferred by—*

- (a) *article 19 (authority to survey and investigate the land);*
- (b) *article 22 (compulsory acquisition of land);*
- (c) *article 24 (compulsory acquisition of rights and restrictive covenants);*
- (d) *article 26 (private rights)*
- (e) *article 28 (acquisition of subsoil or airspace only);*
- (f) *article 31 (temporary use of land for carrying out the authorised development);*
- (g) *article 32 (temporary use of land for maintaining the authorised development);*
- (h) *article 33 (statutory undertakers);*
- (i) *the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;*

in respect of any railway property unless the exercise of such powers is with the consent of Network Rail, such consent not to be unreasonably withheld.

The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third-party property, except with the consent of Network Rail.

5.6 The Applicant objects to this inclusion because in the absence of a suitable land rights agreement, seeking disapplication of CA powers at this stage will place the Applicant in a ransom position on the voluntary land agreement which the Applicant has been seeking to negotiate with Network Rail for a considerable period of time. Network Rail has declined to engage in this negotiation pending technical approval despite the Applicant seeking to progress. Not having access to compulsory powers could impede the timeous delivery of the authorised development).

5.7 The disapplication of CA powers in this context is not appropriate and it is not in line with the guidance that states that Protective Provisions “*should also not simply negate other provisions of the DCO, particularly concerning proposed compulsory acquisition of statutory undertakers’ land*” (Paragraph 12 of Planning Act 2008: Content of a Development Consent Order required for Nationally Significant Infrastructure Projects).

5.8 Disapplication of CA powers is not necessary to prevent serious detriment as the technical approval of all the works to protect the railway will still be required from Network Rail and the Applicant has agreed to Protective Provisions further securing the need for approval of works outside the separate technical approval process.

5.9 The Applicant cannot include the following amendment in blue in paragraph 4(4):

(2)(4) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, or article 33 (statutory undertakers), [\[article x\] \(power to override easements and other rights or private rights of way\)](#) or article 26 (private rights), 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.

5.10 The Applicant cannot agree to include the wording in blue because the dDCO does include this article. The reference to this article has been included in the Network Rail's standard template and is not relevant to this dDCO. This has been noted to Network Rail but they are still seeking the insertion. Therefore, the reference to this article needs to be deleted as this reference is redundant.

5.11 **Construction of specified works**

5.12 Under the Protective Provisions, the Applicant must, 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. The Applicant cannot accept the following amendment shown blue being included by Network Rail as it is not necessary and does not add anything by way of clarification to the assessment of "reasonableness". Inclusion of this amendment is not necessary to prevent a serious detriment arising.

When signifying their approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in their reasonable opinion [\(such level of reasonableness being that of a prudent railway statutory undertaker\)](#) 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 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 must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the reasonable expense of the undertaker in either case without unreasonable delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to their reasonable satisfaction.

5.13 In addition, under the Protective Provisions, Network Rail may give notice to the undertaker 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. The Applicant requires that before such works are commenced, the Applicant gives consent for such works (acting reasonably). Simply notification of the works is not appropriate or sufficient. The Applicant requires approval in order to know such works are and exercise control over the works and ensure that the works are carried out in accordance with various obligations under the dDCO.

5.14 **Exclusion of consequential and indirect loss**

5.15 The Applicant requires consequential and indirect loss to be carved out from the indemnity provided to Network Rail. The purpose of the indemnity is to cover any costs and losses incurred or suffered by Network Rail in connection with the works carried out by the Applicant. This indemnity should not cover consequential or indirect losses as such losses do not naturally result from the breach and are not reasonably foreseeable. Inclusion of indirect and consequential losses is not reasonable and not necessary to prevent a serious detriment arising.

5.16 In addition, the Applicant cannot accept that the requirement for any consequential or indirect losses to be excluded must be made only in reference to paragraphs 14(4), (5), (6) and (7) of the Protective Provisions:

(a) *(4) The sums payable by the undertaker under sub-paragraph (1) shall if relevant include a sum equivalent to the relevant costs.*

- (b) (5) 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 must 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.
- (c) (6) 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).
- (d) (7) In this paragraph—

“the relevant costs” means the costs, losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any specified work including but not limited to any restriction of the use of Network Rail’s railway network as a direct result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (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 the Railways Act 1993.

5.17 This is because limiting the application of the principle of the exclusion of any indirect or consequential costs to those paragraphs is not appropriate without further information being provided by Network Rail as to what liability Network Rail would suffer (being the relevant costs incurred) in order for the Applicant to assess the risk. Paragraphs 14(4), (5), (6) and (7) deal with relevant costs and paragraph 14(6) provides the definition of “the relevant costs”. The Applicant needs to be certain what the total amount of costs that Network Rail will be liable for before excluding the operation of the indirect and consequential costs principle from applying to relevant costs. However, given the challenges of quantifying future risk and liability, the Applicant does not think that it is reasonable or appropriate in the circumstances to carve out the principle of consequential losses from applying to “relevant costs”.

5.18 As explained in the paragraph above, the purpose of the indemnity is to cover any costs and losses incurred or suffered by Network Rail in connection with the works carried out by the Applicant. This indemnity should not cover consequential or indirect losses as such losses do not naturally result from the breach and are not reasonably foreseeable. Inclusion of indirect and consequential losses is not reasonable and not necessary to prevent a serious detriment arising.

5.19 **Costs and expenses**

5.20 The Applicant cannot accept the following amendment proposed by Network Rail.

- (a) *“the relevant costs” means the costs, losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any specified work including but not limited to any restriction of the use of Network Rail’s railway network as a direct result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and*

5.21 The Applicant cannot accept this amendment because the costs need to relate to the restriction of the use of railway network as a direct result of the specified works. The definition of “the relevant costs” without this amendment being included is well-precedented and Network Rail was made aware of these precedents. Inclusion of this amendment is not relevant and it is not necessary to prevent a serious detriment arising. The Applicant provided these comments to Network Rail but has never received a response and they are therefore not agreed.

6 ESSEX HIGHWAYS

6.1 The terms of the Protective Provisions for the protection of Essex CC as the highway authority are under discussion between the Applicant, North Falls and Essex CC.

- 6.2 Essex CC have advised that the agreement of the whole of the PPs in their favour is subject to the Applicant entering into a Framework Highways Agreement. A copy of the template agreement was very belatedly supplied to the Applicant on 14 February 2025.
- 6.3 The Applicant will not agree to enter that agreement at this time. The template provided is unacceptable because the Framework Agreement duplicates the provisions included in the DCO and Protective Provisions, and in many cases would cut directly across the drafting of the DCO. For example, the Framework Agreement contains provisions governing approvals, submissions of detailed information and management plans, road safety audits, inspection of the works, remedying any defect in the works, AILs and other provisions which are already covered by the PPs and the DCO (and other documents like the Construction Traffic Management Plan).
- 6.4 Framework Agreement duplicates the provisions included in the Protective Provisions and, as a result, provide a parallel, and in places conflicting, mechanism that govern the exercise of powers included in the DCO which is not appropriate. Protective provisions are designed to govern the exercise of powers under the DCO. They also provide a means for the statutory undertaker concerned to have a role in the approval of the detail of works which interact with their assets under the DCO and provide the in-principle consent for those works granted by the DCO.
- 6.5 Given the duplication, the Framework Highways Agreement would not serve any useful purpose. Therefore, the Applicant cannot agree to enter into a Framework Highways Agreement which looks to undermine and in cases disapply the powers of the DCO and would negate the justification for the Protective Provisions. The Application also objects to ECC's provision of this so late in Examination despite having had, and commented on, the draft protective provisions for a considerable period of time. There has been no attempt by the Council in responding to those PPs to note or seek to remove areas of duplication with the Framework Highways Agreement. The Council has been submitting to the Examination that it would seek such an agreement for a number of deadlines but an incomplete template was only sent to the Applicant a month before close of that Examination. That is not reasonable behaviour on the part of the Council.
- 6.6 The Applicant continues to dispute the necessity of the Framework Highways Agreement and having seen the template, considers that this is unnecessary and has failed to have any regard to the drafting of the DCO or the PPs. This template reads as if it has been drafted to be entered under s278 of the Highways Act for a planning permission. It has no regard to the powers that are included in the DCO which could not be included in such a permission or the existence of the PPs. The seeking of such an agreement is contrary to the ethos of the Planning Act regime that the need for other consent and agreement should be secured through inclusion of all matters in the DCO that can reasonably be so included. That Essex consider this agreement to be their 'normal' approach is irrelevant (this is not a TCPA planning permission application) and not a valid reason to cut across the DCO regime.
- 6.7 Separate to the point of principle on the lack of need for a Framework Highways Agreement, there are some points on the drafting of the PPs which are outstanding. The Applicant has not yet had comments back from Essex CC on these outstanding points. Where any further agreement is reached prior to close of the Examination, the Applicant will update the Examining Authority at Deadline 8.
- 6.8 **Deadline to provide comments for detailed design**
- 6.1 The draft Protective Provisions (as is standard practice) provide for an appropriately qualified person or a person duly appointed by the local highway authority (a "nominated officer") to participate in the design process for the detailed design for the works.
- 6.2 There are two stages of approvals to this process
- (a) The Applicant will provide the nominated officer with information that is reasonably required to allow the nominated officer to provide an informed response on the detailed design proposals. Such information may include drawings, cross/long

sections and design proposals. The PPs prescribe a period of time that the nominated officer has to provide comments.

- (b) The Applicant will provide the nominated officer with detailed information relating to a specific part of the works. The PPs prescribe a period of time that the nominated officer has to provide representations on such detailed design.

6.3 Essex CC have requested a period of 55 working days (which is 11 weeks) for the nominated officer to provide comments under stages (a) and (b). However, this time period is not precedent and not reasonable. The Applicant cannot accept this period as it will cause an undue delay to the project. The Applicant has proposed a period of 10 working days (a period of 2 weeks).

6.4 The Applicant's drafting will fully protect Essex CC's statutory undertaking by allowing sufficient time for the nominated officer to review the information provided by the Applicant and provide comments at both stages of the process.

6.5 **Comments, recommendation or representations to be reasonable**

6.6 The Applicant requires that any comments, recommendation or representations made by the nominated officer which need to be incorporated by the Applicant must be reasonable. The Applicant cannot accept the deletion of "reasonable" by Essex CC because this ensures that any recommendations are necessary, relevant and proportionate in the circumstances. No reasons have been provided by Essex CC to justify this deletion and it should not be unacceptable to require them act reasonably.

6.7 **Road Safety Audits**

6.8 Under the Protective Provisions, the Applicant is required to carry out, at its own expense and to the reasonable satisfaction of the local highway authority, measures identified as part of stages 1, 2, 3 and 4 road safety audit. The Applicant requires that measures that recommendations that are made under stages 1 and 2 are "reasonable". The Applicant requires that measures that are undertaken as part of stages 3 and 4 are measures that "*the undertaker considers necessary (acting reasonably and for the avoidance of doubt any matters related to the health and safety will be considered as reasonable)*". The Applicant cannot accept the deletion of this language which has been included to ensure that only reasonable recommendations (necessary, relevant and proportionate in the circumstances) must be implemented by the Applicant. The Applicant is entirely willing in principle to carry out any other reasonable measures by agreement, but cannot be required to do so with no recourse to challenge those.

6.9 In addition, the Applicant requires that the following amendments in blue are included in paragraph 7(1)

The undertaker must procure that an appropriately qualified RSA team (as defined in HPN039 or DMRB Volume 5 Section 2 Part 2 (GG 119), as advised by the local highway authority ([acting reasonably](#)), or any replacement or modification of that standard) undertakes road safety audit in accordance with the standard set out in HPN039 DMRB standard GG 119, as advised by the local highway authority ([acting reasonably](#)), for works which involve creation, alteration, expansion or other modifications of the local highway but not for works which consist only of trenchless installation beneath highways, and must provide copies of the reports of such audits to the local highway authority within 10 business days of their receipt by the undertaker

6.10 These changes ensure that Essex CC is acting reasonably when advising the Applicant on the appointment of qualified RSA team to carry out the relevant audits. These changes ensure that any advice as to who should be appointed is relevant and appropriate.

6.11 **Inspection of materials**

6.12 Under the Protective Provisions, Essex CC may test any materials used or proposed to be used in any works and the Applicant is required to provide such information including any

test certificates. The Applicant cannot accept the following deletion of “written” from paragraph 6(4):

The undertaker must, as soon as is reasonably practicable and in any event within 10 business days, provide the local highway authority with a copy of all available test certificates and results relevant to the works that the local highway authority has requested ~~in writing~~ under paragraph (3).

6.13 This is because the request from the Essex CC to be a writing is reasonable and provides certainty to the Applicant that such request has been made. It is not unreasonable for the Essex CC to be required to provide such requests in writing.

6.14 **Maintenance**

6.15 The Applicant does not accept changes to paragraph 10 of the Protective Provisions:

(a) *Subject to sub-paragraph (2), the undertaker must maintain the works throughout the maintenance period to a standard appropriate to their use by the public in accordance with the DMRB.*

(b) *makes the undertaker responsible for the maintenance of any street works or maintenance works undertaken by any person other than the undertaker including a person on behalf of the undertaker or which does not form part of the authorised development during the maintenance period.*

6.16 The Applicant considers that this change achieves the opposite to what Essex CC intended. Essex CC’s objective is to define undertaker as including a person acting on the Applicant’s behalf, however, this amendment would exclude that. Under the dDCO, all liabilities are enforceable against the undertaker regardless of who the undertaker contracts to do the works. Therefore, the amend does not achieve the purpose sought.

6.17 The Applicant has provided this explanation to Essex CC but has not received a response and it is therefore not agreed.

7 **LONDON GATEWAY PORT**

7.1 London Gateway Port at Deadline 6 has sought amends to the dDCO and the protective provisions [REP6-080]. The Applicant had not been made aware before this was submitted that LGP was seeking such amends. As far as the Applicant was aware before this deadline, LGP were satisfied with the protective provisions set out in the Application.

7.2 The Applicant wishes to be very clear that the PPs were first proposed to protect the ability of LGP in the future to dredge the Sunk deep water route to a depth not currently allowed only. The Applicant does not and has never accepted that there is any other potential impact on the port which could cause serious detriment and which requires to be addressed through PPs.

7.3 The dDCO does not (and does not seek or purport to) disapply any existing control of the harbour empowerment order in place for the port. The inclusion of any such provision would require the consent of LGP under section 145 of the Planning Act 2008. No such provision is included.

7.4 The current harbour empowerment order allows dredging to 17m. The future ambition to dredge to 22m to accommodate potentially larger vessels in the future has been allowed for by the Applicant, and as at Deadline 6, has been secured in the dDCO as a requirement in the offshore parameters. Given that, the Applicant does not agree that any of the other provisions sought, including the creation of a new requirement 3A which would unnecessarily duplicate controls already secured, are necessary or justified

7.5 The Applicant objects to the proposed new requirement 3A set out in REP6-080 regarding the securing of cable burial levels in the offshore parameters. The Applicant provided LGP for its proposed requirement wording before submission of the dDCO at deadline 6 [REP6-009] but never received any comment on that from LGP. The LGP drafting is unnecessary

given the addition made to requirements to secure the cable level. The LGP drafting would require the unnecessary creation of new definitions.

7.6 The Applicant rejects the suggestion made by LGP that the offshore works plans should be amended to try and show the deep water routes. That is not the purpose of the works plans. In addition, the deep water route area are referenced in the DML and in other documents and it makes sense to have one plan showing this restriction in the context of those multiple references than to try and make a plan which has another purpose add this detail.

7.7 The addition of sub-paragraph 3 of the LGP proposed requirement 3A:

(3) The undertaker must not relocate any boulders or archaeological finds to the Deep Water Routes or the Deep Water Routes Buffer.

is entirely unnecessary and demonstrates that LGP has not properly accounted for the commitments already made elsewhere in the Application in proposing this drafting. The Applicant has already committed to not relocating archaeological finds in the deep water routes in the outline WSI (not that it ever had intention of doing so). It has also committed to not relocating boulders into these routes in the CSIP (again not that there was ever any intention to do so). These commitments are in addition to committing to not reducing under keel clearance in these areas in the DML which would also preclude such relocation.

7.8 The Applicant accepts the changes sought to the definition of 'London Gateway' in REP6-080:

"London Gateway" means London Gateway Port Limited, Company No. 04341592 as ~~Port Authority~~ harbour authority for the London Gateway Port, ~~forming part of the Port of London and pursuant to the London Gateway HEO situated at Corringham, Stanford-le-hope, SS17 9DY;~~

7.9 The Applicant does not accept that changes sought to paragraphs 3 and 4, not the insertion of new paragraph 5:

Approvals

3. The undertaker will obtain the approval in writing of London Gateway of ~~the~~ a draft cable specification and installation plan and a draft operation and maintenance plan (in so far as that either of those plans relates to any area or areas of Work No.2 which are within the ~~jurisdiction-limits of deviation for dredging as defined by~~ of the London Gateway HEO) before any application for approval of ~~that~~ those plans is submitted by the undertaker in compliance with conditions 4 or 13 of the deemed marine licence for the transmission assets in Schedule 11.

4. The draft cable specification and installation plan referred to in paragraph 3 must be in accordance with requirement 3A and set out for Work No.2;

(a) the proposed cable burial depth(s);

(b) the proposed cable burial methods;

(c) any cable protection proposed including type, volume and anticipated locations; and

(d) the proposed programme of work for cable burial; and

(e) details of how any impacts on shipping to and from London Gateway Port will be minimised so far as reasonably practicable during the carrying out of the works covered by the draft cable specification and installation plan.

5. The draft operation and maintenance plan referred to in paragraph 3 must, so far as it involves any operations within sub-paragraphs (d), (e) or (f) of condition 4(2) of the deemed marine licence for the transmission assets in Schedule 11, be in accordance with requirement 3A and set out the relevant items listed at paragraph 4(a) to (e) above.

- 7.10 The operation and maintenance plan (O&M plan) will not specify cable repair or replacement operations. It will focus more on the things like routine turbine maintenance. The Applicant amended the DML drafting to provide that in so far as they are relevant, the principles secured in the outline cable installation and specification plan (CSIP) must be applied in the O&M plan in order to ensure that the commitments made in the outline CSIP are still applicable.
- 7.11 There is no planned maintenance on the export cable. The outline O&M plan makes it clear that it will only cover activities as far as they have been assessed in the ES. The ES does not assess cable replacement, only cable repair (and in that case limited by the MDS) and even then will not specify the methods, locations of any cable repair because this will not be known. A new marine licence would be required for cable replacement and LGP would have the opportunity to make representations on the application for that in the normal way.
- 7.12 The O&M plan must accord with the cable level commitments in the outline CSIP. Operation would not cause the cable to interfere with LGP and they do not require to control that activity. The offshore requirement parameters will also still apply to any maintenance works. It is not possible for the maintenance of the cables to reduce the cable burial level. It is not necessary or appropriate for LGP to seek to control maintenance activities given the level commitment is already made.
- 7.13 The Applicant objects to the change from ‘within the jurisdiction’ to ‘within the limits of deviation for dredging’ as defined by of the London Gateway HEO. The harbour limits are the extent of the jurisdiction of LGP and are known and understood. They are the appropriate definition of the area for these purposes.
- 7.14 The Applicant strongly objects to insertion of sub-paragraph (e):
- (e) details of how any impacts on shipping to and from London Gateway Port will be minimised so far as reasonably practicable during the carrying out of the works covered by the draft cable specification and installation plan.*
- 7.15 It is not appropriate or reasonable for the impact on LGP to be given priority over all other impacts. The delivery of the authorised development will require the balancing of impacts across parties and receptors and LGP cannot be given under priority in that balance. This insertion demonstrates why the Applicant is very uncomfortable having multiple parties who are not the regulator seeking to approve a plan as, with each looking only to their own interests, it becomes impossible for the Applicant to accommodate conflicting requests. The Applicant cannot minimise impacts on LGP to the unfair detriment of other sea users, including other Ports, a reasonable balance must be struck. The Applicant also cannot minimise impacts on LGP by increasing impacts on other environmental receptors, a subtle balance must always be found. It is unclear to the Applicant how the issue would be resolved if minimising impacts on LGP meant increasing impacts on another port and that port objected eg if the PLA was also given approval as it seeks and felt that the impacts were too balanced against it.
- 7.16 New paragraph 10, amends to paragraphs 11 and 12
- 10. Where the draft plan is refused, the undertaker must consider the reasons for refusal and redraft the draft plan accordingly, before re-submitting it to London Gateway. The provisions of paragraphs 5 to 8 will then apply to that re-submitted plan.*
- 11 Where no decision is issued within the 28 day period set out in paragraph 5, the draft plan submitted will be deemed to be ~~approved~~ refused by London Gateway.*
- 12. Any difference or dispute arising between the undertaker and London Gateway must, unless otherwise agreed in writing between the undertaker and London Gateway, be determined by arbitration in accordance with article 48 (arbitration) of this Order. The undertaker may not refer any dispute in relation to the refusal of a draft plan to arbitration under article 48 until it has redrafted and resubmitted the draft plan in accordance with paragraph 9 above at least once.*

- 7.17 The Applicant considers the changes sought unnecessarily restrictive and liable to cause delay in circumstances where the dispute between the parties is fundamental and cannot be resolved by amending the plan. In such circumstances there would no utility in resubmitting an amended plan for a second refusal and the delay caused by that is unnecessary. The Applicant accordingly rejects the amendments to paragraph 10 and 12.
- 7.18 The Applicant rejects the amendment in paragraph 11 from deemed approval to deemed refusal. As with discharge of requirements, delivery of a CNP NSIP should not be delayed by deemed refusal simply because the LGP do not deal with an application timeously given that the cable burial level is already secured and the subject matter of the CSIP should not therefore be contentious.

- 7.19 New paragraph 13:

Protection of London Gateway powers

13. Nothing in this Order affects or restricts the exercise by London Gateway of any powers under the London Gateway HEO nor imposes any liability on London Gateway in respect of any loss or damage that may be caused to any part of the authorised development by virtue of the exercise of any powers under the London Gateway HEO.

- 7.20 This insertion is entirely unnecessary and serves no useful purpose. In stating what is already the position it is only liable to cause confusion that there is some provision in the dDCO which could be read as having some effect on the HEO, there is no such provision. The dDCO does not (and does not seek or purport to) disapply any existing control of the harbour empowerment order in place for the port. The inclusion of any such provision would require the consent of LGP under section 145 of the Planning Act 2008, that consent has not been sought as there is no provision which would trigger requiring it. The Applicant rejects the amendment.

8 NATIONAL HIGHWAYS

- 8.1 The Protective Provisions are in agreed form save for one provision set out below.
- 8.2 The Applicant cannot agree to the disapplication of the CA powers and other powers in the absence of a suitable voluntary land rights agreement. That a voluntary agreement has not yet been concluded demonstrates why these powers are required to ensure delivery of the NSIP.
- 8.3 National Highways is seeking the inclusion of the following provisions in the Protective Provisions:
- (a) *The undertaker must not under the powers of this Order:*
 - (b) *acquire or use land forming part of;*
 - (c) *acquire new or existing rights over; or*
 - (d) *seek to impose or extinguish any restrictive covenants over;*
 - (e) *any of the strategic road network or land owned by National Highways, or extinguish any existing rights of or interfere with apparatus of National Highways in respect of any third party property.*
 - (f) *except with the consent of National Highways by written request to National Highways, Bridge House, 1 Walnut Tree Close, Guildford, Surrey GU1 4LZ or by email to legalservicesinbox@nationalhighways.co.uk*
- 8.4 The Applicant objects to this. By seeking disapplication of CA powers at this stage, in the absence of a suitable land rights agreement, National Highways would restrict the acquisition of their land by the Applicant without National Highways consent. Not having access to compulsory powers could impede the timeous delivery of the authorised development). National Highways would have a provision restricting the acquisition of their

land by the Applicant without National Highways consent, creating a de-facto veto on compulsory acquisition which the Applicant considers amounts to effective ransom which goes beyond the protections and allowances provided by the 2008 Act.

- 8.5 In order for this not to happen, the Applicant needs a voluntary land agreement in place which the Applicant has been seeking to negotiate with National Highways for a considerable period of time but with which National Highways has not engaged. The Applicant cannot force National Highways to engage with it and this failure should not be allowed to prevent delivery of a CNP NSIP. Not having access to compulsory powers could therefore impede the timely delivery of the authorised development). The disapplication of CA powers in this context is not appropriate and it is not in line with the guidance that states that Protective Provisions “*should also not simply negate other provisions of the DCO, particularly concerning proposed compulsory acquisition of statutory undertakers’ land*” (Paragraph 12 of Planning Act 2008: Content of a Development Consent Order required for Nationally Significant Infrastructure Projects).
- 8.6 Disapplication of CA powers is not necessary to prevent serious detriment because until the technical approvals of all the works to protect the highway are agreed this is only about land rights not any issue relating to highway design, operation, maintenance or safety.

9 PLA (OFFSHORE)

- 9.1 No part of the authorised development is within the PLA jurisdiction. The cable works in the deep water routes are ‘at sea’ and the PLA is not the regulator for any activity in that area. The MMO is the appropriate regulator and enforcement authority in this area. The PLA argue that they require to ‘control’ approaches to the Port, that is not the view of Parliament or the Port of London Act would give them jurisdiction in this area; that act does not give them such jurisdiction. If the Applicant were seeking a marine licence directly from the MMO rather than deemed through the DML, the PLA would not have any approval or control over any aspect of the works under that licence. That underlying position is not changed by the licence being deemed, the PLA is seeking to control works outside their jurisdiction and outside their statutory undertaking.
- 9.2 There can be no serious detriment to the PLA statutory undertaking from work carried on outside its jurisdiction, controlled by another regime, enforced by another regulator and over which the PLA would normally have no control or responsibility. The PLA have provided the London Gateway Harbour Empowerment Order (HEO) as the sole example of protective provisions for approvals to support its request for approval outside its area of jurisdiction, however London Gateway port is within the PLAs statutory harbour limits and the PLA has not provided any examples of approvals given outside its jurisdiction.
- 9.3 Any works within London Gateway port affecting the works within the river would necessarily be within PLAs jurisdiction, and works outside (i.e. works onshore adjacent to the) could reasonably directly impact the river which is within the PLAs jurisdiction. Crucially the part of the HEO which extends out from the area around London Gateway port and outside of the PLAs jurisdiction (and overlaps with the export cable corridor for this development) is the line permitting maintenance dredging. Maintenance dredging is excluded from the PLAs right of approval. **The example therefore does not provide the precedent claimed by the PLA as marine works outside their jurisdiction are not subject to the PLA’s approval.**
- 9.4 The Applicant does not accept that the PLA have liability for the ‘approaches’ to the Port. The PLA cannot have liability for something over which they have no power or control, that is clearly an unsustainable position which lacks credibility.
- 9.5 The Applicant understands that the PLA is interested in the works in this area and that is reasonable and collaborative for them to be consulted and notified of such works, but it fundamentally disagrees that the PLA in any way needs a right of approval over such works. The Applicant submits that in line with general DCO drafting guidance, the ExA should be satisfied that regulators will do their jobs competently in this case the MMO as the regulator of the DML will undertake that role competently. That role includes determining approvals of the plans to be submitted under the DML conditions.

- 9.6 The Applicant objects to the addition of an unnecessary layer of approval outside of a statutory body's jurisdiction and with no mean of resolving any dispute should the PLA seek something that the MMO will not approve. There are clear disadvantages and uncertainties created by having multiple approvers of documents, particularly where there is a clear regulator.
- 9.7 The Applicant wishes to note that original basis on which protective provisions were being discussed was that the PLA wished to ensure that the offshore cable would not impeded future (not planned or consented) dredging ambitions in the deep water routes to allow use by vessels of 20m draught. That cable level commitment has been made in the CSIP for some time and is also included the dDCO as a parameter in the requirements. The core issue which was the original trigger for discussing PPs is therefore now secured elsewhere in the dDCO.
- 9.8 The offshore protective provisions are not agreed on the following points

Consultation and notice

- 9.9 The multiple addition to the scope of the PPs sought through the addition of "within or may affect the Area of Interest" are rejected. The drafting is too uncertain and subjective. What 'may affect' the Area of Interest may be very different in the view of the Applicant and the PLA. The Applicant requires certainty over when the PPs will apply and this addition would materially undermine that certainty.
- 9.10 The PLA has sought to insert a new definition to extend the scope of the PPs to include the operation and maintenance plan (O&M plan) and the added drafting seeking approval of that plan to paragraph 3. The Applicant rejects this extension. The O&M Plan will not specify cable repair or replacement operations (which is the issue the PLA have advised they are interested in). It will focus more on the things like routine turbine maintenance. The Applicant amended the DML drafting to provide that in so far as they are relevant, the principles secured in the outline cable installation and specification plan (CSIP) must be applied in the O&M plan in order to ensure that the commitments made in the outline CSIP are still applicable.
- 9.11 There is no planned maintenance on the export cable. The outline O&M plan makes it clear that it will only cover activities as far as they have been assessed in the ES. The ES does not assess cable replacement, only cable repair (and in that case limited by the MDS) and even then will not specify the methods, locations of any cable repair because this will not be known. As has been repeatedly explained to the PLA, a new marine licence would be required for cable replacement and they would have the opportunity to make representations on the application for that in the normal way.
- 9.12 Further the drafting proposed in paragraph 3 would require the approval (which is objected to as a principle) of the O&M plan prior to commencement of the cable installation, however that plan will not be available at that time. It is required to be submitted to the MMO 6 months prior to operation, not commencement. Preventing commencement due to wanting to approve a plan which will not yet exist is not reasonable.
- 9.13 The addition of the O&M plan to paragraph 8 is also rejected.
- 9.14 The PLA is seeking a right of approval of the cable installation and specification plan (CSIP). This plan is secured by the DML and will be approved by the MMO.
- 9.15 The final CSIP will set out:
- (a) The technical specification of the cables;
 - (b) A detailed cable laying plan;
 - (c) Proposals for the volume and area of cable protection; and
 - (d) Proposals for monitoring the offshore cables.

- 9.16 The PLA are not cable installation specialists and, with respect, do not have the expertise or qualifications to approve or refuse to approve the technical detail of this plan.
- 9.17 The PLA is not the regulator for works in the cable corridor, they are not the SNCB; they are simply interested in when and how the works will be carried out and that this will not preclude future dredging ambitions (which is already secured through the requirement and the outline CSIP). None of those matters requires them to have approval of this plan. The Applicant agrees to provisions to ensure that suitable notice is given to shipping interests of works in the deep water routes but that is not a matter for this plan.

The PLA continues to seek a right of approval of the Navigation Installation Plan (NIP).

- 9.18 Matters of safety for shipping are dealt with through the Navigational Risk Assessment (NRA) not this plan. The PLA have agreed with the NRA undertaken for this stage. The carrying out of a NRA requires the involvement of all the ports. The NIP sets out the mechanism for managing concurrent working involving the Applicant's vessels and to minimise impacts on shipping and navigation in the deep water routes and around the sunk precautionary areas and pilot boarding station. The PLA is not responsible for regulating shipping in these areas and is therefore not responsible for the matters regulated by this plan.

Cable Specification and Installation Plan

- 9.19 The PLA has added a new item to paragraph 4(a)

and in all cases (i) to (iii) makes allowance for an 'over-dredge' tolerance of 0.5 metres in addition to the stated depths attributable to standard dredging methodology.

- 9.20 This has already been accounted for the previous items the drafting of which reflects the DCO parameter. It had been explicitly agreed with the PLA not to add this detail here given that the parameter itself is the key restriction and this detail is properly considered in the outline CSIP not a PP. The Applicant is therefore very disappointed to see this drafting included without any discussion. The Applicant does not agree that this addition is necessary or helpful.

- 9.21 The Applicant also notes as a point of principle that the correct reference for the cable burial is 'level' not 'depth'. This is an important distinction for the cable as the level is the agreed parameter, not a depth.

- 9.22 The addition sought to paragraph 4(c) is also rejected.

Any Additional cable burial depths required or any other forms of cable protection proposed including type, volume and locations;

- 9.23 This wording simply does not make any sense. The Applicant's engineering and offshore consenting specialists both advise that they do not understand what it is seeking or what the additional wording means. It is not reasonable to seek to the Applicant to a non-sensical obligation. The insertion has accordingly been rejected.

- 9.24 The addition sought to paragraph 4(c) is also rejected on the grounds of lacking intelligibility.

(f) The programme and methodologies for monitoring and the arrangements for and the results of these surveys or other construction evidence being made available to the PLA within 10 business days of the undertaker receiving reports of the survey results or evidence to demonstrate compliance with the depths referred to in sub paragraph a) of this paragraph

- 9.25 The insertions sought make no sense and the Applicant cannot accept it. It would have been of assistance if the PLA had proposed such wording before this drafting was issued on 26 February as this could have been discussed. In the circumstances the Applicant is unclear what the PLA consider this to achieve.

Monitoring

- 9.26 The addition sought to paragraph 5 is rejected.

If following the results of any geophysical surveys carried out using multi-beam echo sounder survey (MBES), it is confirmed that cable exposure or reduction in navigable depth has occurred within the Area of Interest, the undertaker will notify the PLA as soon as reasonably practicable and in any event no later than 2 business days after the undertaker confirms any exposure has occurred.

- 9.27 A reduction in navigable depth could be caused by any number of factor not the cables and the Applicant cannot be made responsible for it. Navigable depth will reduce after cable installation, because the cables re installed at a level below existing seabed, which will backfill and therefore 'navigable depth' will reduce. It is the Ports role to manage this, i.e. through dredging. A reduction in navigable depth from that at the completion of installation is therefore to be expected following cable installation and is not a matter which is to be reported or remediated. The parameter that the cables must be at the level which allows the future dredging ambition is the appropriate control on the cable level, not this drafting.

Indemnity

- 9.28 The PLA is seeking a very wide indemnity including:

all financial costs, charges, damages losses or expenses which may be incurred reasonably or suffered by the PLA by reason of—

- (a) *the construction or operation of Work no 2(c), any specified work or its failure or a failure to adhere to the requirements of the provisions in this part[] of schedule [];*
- (b) *any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged on the construction or operation of a specified work or Work no 2(c) or with any failure, and the undertaker must indemnify the PLA from and against all claims and demands arising out of or in connection with a specified work, Work no 2(c) or any such failure, act or omission or any failure to adhere to the requirements of the provisions in this part[] of schedule [].*

- 9.29 The works authorised by the Order are entirely outside the Port. There can be no direct damage to any port asset from such works.

- 9.30 The Applicant has repeatedly asked, given that the works are outside the Port of London and some distance away from any asset of the Port's, what this indemnity is needed to cover. The PLA has been unable to provide a realistic and credible answer, the answers received are 'claims regarding interruption to shipping' and an example where an authority was allegedly¹ held liable for the negligent actions of pilots they had trained.

- 9.31 The Port has provided absolutely no legal basis for any person being able to claim against it for a loss arising from interruption to shipping due to the Applicant's works and the Applicant submits that is because no such basis exists. The use of the sea for navigation is a public right, not a facility the PLA is providing. There is no reasonable path of causation for a claim arising which would be payable by the PLA and which should be recouped from the Applicant. That the Port Marine Safety Code puts duties (not responsibilities) on ports which may extend to an extent outside of their statutory harbour limits does not mean they have regulatory responsibility or liability for what happens in those waters. In the area around the Deep Water Routes and the Sunk pilot boarding station many ports would also have those duties, not only the PLA and an argument that they are somehow liable for shipping delays in this areas is not supported by the code.

- 9.32 An indemnity would not provide recompense where a Port, or its employees or agents were negligent and it would not be reasonable or justifiable for the PLA to seek payment in such circumstances. In the example given to the Port to the Applicant where a pilot, who would not be employed or contracted by the Applicant, acted negligently, it is entirely correct that the person employing or contracting that person is liable, not the Applicant. It is not a reasonable position to claim that an indemnity is necessary to protect against the negligent actions of a person not employed, contracted or under the control of the Applicant. The Applicant would not agree to pay an indemnity in such circumstances as the loss would not be attributable to its action, works or failure. That the indemnity would not even cover the

¹ The Applicant has no knowledge of this case and cannot comment on the facts and circumstances.

example of when the PLA claim it would be needed demonstrates the lack of necessity for it.

- 9.33 The PLA has also, for the first time shortly before deadline 7 and without discussion, sought to extend the indemnity drafting in the offshore PPs to apply to the onshore PPs. That drafting is entirely inappropriate and is rejected by the Applicant. The onshore PPs have been agreed for some time and there is no indemnity in those. Seeking to create an indemnity in a separate set of PPs for separate interests is unreasonable. That the PLA agreed the onshore PPs with no indemnity properly reflects the interaction of the authorised development and the PLA, where there is no direct interaction with PLA assets and therefore no reasonable pathway for them to suffer loss.
- 9.34 The differences in drafting sought by the PLA are shown as tracked changes in the attached appendix. The Applicant does not agree that any of the changes shown are necessary or justified and objects to the inclusion of all of them.

Affinity Water

Affinity

The drafting below shows the Applicant's preferred drafting with changes by Affinity in track and drafting which is not agreed or rejected in a box.

SCHEDULE 9 PART

[TBC]

FOR THE PROTECTION OF AFFINITY WATER LIMITED

1 APPLICATION

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

2 INTERPRETATION

2.1 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⁽²⁾);

“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;

~~“Affinity Water Property” means the East Clacton Reservoir and Pumping Station at [TBC] in the vicinity of Plots 05-004, 05-006, 05-005~~

“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⁽³⁾

“authorised development” has the same meaning as is given to the term “authorised development” in article 2 of the Order

“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;

⁽²⁾ 2006 c.46

⁽³⁾ 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)

“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/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;

~~“protective works” means the underpinning, strengthening and any other reasonable works the purpose of which is to prevent damage that may be caused to Affinity’s apparatus by the carrying out, maintenance, construction or use of the authorised development.~~

“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’s ~~apparatus~~;
- (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 8(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 ~~unless otherwise agreed in writing with Affinity Water (acting reasonably) such other distances as are expressly notified in writing by Affinity to the undertaker from time to time~~

(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 8(2) or otherwise; and

“water main” has the meaning given in the Water Industry Act 1991.

2.2 Affinity’s preferred wording	2.3 Applicant’s preferred wording
<p>“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—</p> <p>(a) may in any way adversely affect any easement or other property interest held or used Affinity Water</p>	<p>“specified works” means any authorised works or used under the Order (including any works of maintenance) that—</p> <p>may in any way adversely affect Affinity Water’s apparatus;</p> <p>(i) 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</p>

<p>(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 8(2) or otherwise—</p> <p>(i) where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres;</p> <p>(ii) where the apparatus is a pipe, 3 metres where the diameter of the pipe is between 150 and 450 millimetres;</p> <p>(iii) where the apparatus is a pipe, 4 metres where the diameter of the pipe exceeds 450 millimetres; and</p> <p>(iv) 4 metres of any other apparatus,</p> <p>or such other distances as are expressly notified in writing by Affinity to the undertaker from time to time</p> <p>(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 8(2) or otherwise; and</p>	<p>required by the undertaker under paragraph 8(2) or otherwise—</p> <p>(i) where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres;</p> <p>(ii) where the</p>
	<p>apparatus is a pipe, 3 metres where the diameter of the pipe is between 150 and 450 millimetres;</p> <p>(iii) where the apparatus is a pipe, 4 metres where the diameter of the pipe exceeds 450 millimetres; and</p> <p>(iv) 4 metres of any other apparatus,</p> <p>unless otherwise agreed in writing with Affinity Water (acting reasonably)</p>

3 ON STREET APPARATUS

3.1 ~~This Part of this Schedule does~~ Except for paragraphs [] (*apparatus in stopped up streets*), [] (*retained apparatus: protection*), [] (*expenses*) and [] (*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, 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.

Affinity's preferred wording	Applicant's preferred wording
<p>Except for paragraphs [] (<i>apparatus in stopped up streets</i>), [] (<i>retained apparatus: protection</i>), [] (<i>expenses</i>) and [] (<i>indemnity</i>) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights</p>	<p>This Part of this Schedule does do not apply to apparatus in respect of which the relations between the undertaker and Affinity Water are regulated by the</p>

and apparatus of Affinity, 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.	provisions of Part 3 (street works in England and Wales) of the 1991 Act.
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4 APPARATUS IN STOPPED UP STREETS

4.1 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.

5 ACCESS

<i>Please note that as noted above this has been included for the benefit of Affinity</i>
<p>Access</p> <p>5. Access for Affinity Water to the Affinity Water Property over plots 05-004, 05-006, 05-005 must not be unreasonably restricted or delayed by the undertaker during the construction and/or maintenance of the authorised works. Where any part of the access to the Affinity Water Property is restricted or controlled by the undertaker, the undertaker will, on request of Affinity Water, take steps (as soon as reasonably practicable) to allow access to and from the Affinity Water Property through or around that restriction or control.</p>

6 PROTECTIVE WORKS TO BUILDINGS

6.1 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 ~~(including access required for maintenance)~~ unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

Affinity's preferred wording	Applicant's preferred wording
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	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, any apparatus (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

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7 ACQUISITION OF LAND

7.1 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 any interest in land held by Affinity Water, ~~(b) or~~ take temporary possession of any apparatus or interest held by Affinity Water or ~~(c) 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. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) 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 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 7(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

Affinity's preferred wording	Applicant's preferred wording
<p>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 any interest in land held by Affinity Water, (b) or take temporary possession of any apparatus or interest held by Affinity Water or (c)(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. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) 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 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 7(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</p>	<p>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 any interest in land held by Affinity Water, (b) or take temporary possession of any apparatus held by Affinity Water or (c)(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. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) 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</p>

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	
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8 REMOVAL OF APPARATUS

8.1 ~~Except in relation to plots 05-004, 05-006, 05-005 where paragraph 5 applies, 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 ~~or 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 ~~(facilities and rights for alternative apparatus)~~.

8.2 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 28~~ 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 ~~reasonably~~ 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.~~

Affinity's preferred wording in blue	Applicant's preferred wording in blue
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 <u>56</u> days' written notice of that requirement	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 <u>28</u> days' written notice of that requirement

8.3 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 will, on receipt of a written notice to that effect from the undertaker, ~~as soon as reasonably practicable take reasonable steps use its reasonable~~

~~endeavours~~ 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.

Affinity's preferred wording in blue	Applicant's preferred wording in blue
Affinity Water will, on receipt of a written notice to that effect from the undertaker <u>take reasonable steps</u> 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.	Affinity Water will, on receipt of a written notice to that effect from the undertaker, <u>as soon as reasonably practicable use its reasonable endeavours</u> 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.

8.4 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).

8.5 Any alternative apparatus to be constructed in land of 1 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 48 (arbitration).

8.6 Affinity Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 48 (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 48 (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.

8.7 ~~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 48 (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.~~

8.8. ~~Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with sub-paragraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water.~~

Affinity's preferred wording in blue	Applicant's preferred wording in blue
Regardless of anything in sub-paragraph (5) but subject to sub-paragraph (10), if the undertaker gives notice in writing to Affinity	Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the

<p>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.</p> <p>(10) 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.</p> <p>(2) Nothing in sub-paragraph (7) authorises the undertaker to:</p> <p>(a) execute any work of connection to, or disconnection from, Affinity Water's operational network;</p> <p>(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</p> <p>(c) carry out any works in relation to any water mains.</p>	<p>undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with sub-paragraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water.</p>
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8.9 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 such details are ~~deemed to have been approved~~undertaker shall have recourse to arbitration in accordance with article 48 (arbitration).

Affinity's preferred wording	Applicant's preferred wording
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 48 (arbitration).	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 such details are deemed to have been approved

8.10 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.

(2) 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.

8.11 Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker ~~must shall~~, before taking or ~~requiring any further steps in such 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.

Affinity's preferred wording in blue	Applicant's preferred wording in blue
Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker <u>shall</u> , before taking or <u>which will trigger the need for those</u> 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:	Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker <u>must</u> , before taking or <u>requiring any further steps in such</u> 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	(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.	(b) bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question.

9 FACILITIES AND RIGHTS FOR ALTERNATIVE APPARATUS

9.1 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 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 by expert determination in accordance with sub-paragraph 17 (expert determination).

9.2 In settling those terms and conditions in respect of alternative apparatus to be constructed in the land of the undertaker, any 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.

9.3 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 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 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.

10 SPECIFIED WORKS

10.1. 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.

10.2 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 expected physical impacts~~ (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,

Affinity's preferred wording	Applicant's preferred wording
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,	All expected physical impacts (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.

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

10.4 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.

10.5 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.

10.6 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) any work of connection to, or disconnection from, Affinity Water's operational network
- (b) 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) any works in relation to any water mains.

10.7 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.

10.8 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 48 (arbitration).

10.9 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 (4)(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.

10.10 Where Affinity requires ~~(acting reasonably)~~ any protective works to be carried out by itself or by the undertaker ~~to ensure the safety of Affinity's apparatus~~ (whether of a temporary or permanent nature), ~~Affinity must specify what these~~ protective works ~~are~~, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, ~~and the protective works~~ must be carried out to Affinity's ~~reasonable~~ satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement ~~(in writing)~~ for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency) ~~and in that written notice Affinity must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably).~~

10.11 If Affinity Water in accordance with this paragraph 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).

10.12 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.

~~4. Nothing in this paragraph precludes the undertaker from submitting a new plan (which is materially different to the plan previously submitted) instead of the plan previously submitted, and provided that this new plan is submitted at least 28 days before commencing the execution of any works (unless otherwise agreed with Affinity~~

Affinity's preferred wording	Applicant's preferred wording
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.	Nothing in this paragraph precludes the undertaker from submitting a new plan (which is materially different to the plan previously submitted) instead of the plan previously submitted, and provided that this new plan is submitted at least 28 days before commencing the execution of any works (unless otherwise agreed with Affinity

10.13 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.

10.14 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.

10.15 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.

10.16 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 11 (expenses and costs).

11 EXPENSES AND COSTS

11.1 Subject to the following provisions of this paragraph, the undertaker must pay to Affinity ~~Water~~ within 30 days of receipt of an itemised invoice or claim from Affinity ~~Water~~ all ~~reasonable~~ 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 ~~(but always excluding any consequential loss or indirect loss suffered by Affinity Water); 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

Affinity's preferred wording	Applicant's preferred wording
<p>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 incurred by Affinity Water in, or in connection with</p> <p>(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):</p> <p>(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</p>	<p>Subject to the following provisions of this paragraph, the undertaker must pay to Affinity Water within 30 days of receipt of an itemised invoice or claim from Affinity Water all reasonable charges, costs and expenses reasonably and properly incurred by Affinity Water in, or in connection with—</p> <p>(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 (but always excluding any consequential loss or indirect loss suffered by Affinity Water):</p>

11.2 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 as referred to in this Part of this Schedule; 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.

11.3 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.

11.4 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 48 (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.

11.5 For the purposes of sub-paragraph 0—

- (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.

11.6 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.

11.7 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).

12 INDEMNITY

~~(1)~~ 12.1 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 9(1) or 9(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) make reasonable compensation to Affinity Water for any other expenses, loss, damages, penalty or costs incurred by Affinity Water, indemnify Affinity 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,~~

Affinity's preferred wording	Applicant's preferred wording
indemnify Affinity 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	make reasonable compensation to Affinity Water for any other expenses, loss, damages, penalty or costs incurred by Affinity Water

~~by reason or in consequence of any such damage or interruption (but always excluding any consequential loss or indirect loss suffered by Affinity Water);~~

12.2 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.

12.3 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 ~~unlawful or unreasonable act,~~ neglect or default of Affinity Water, its officers, servants, contractors or agents.

12.4 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 the consent of the undertaker (such consent not to be unreasonably withheld or delayed) who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand without first consulting the undertaker and considering their representations.~~

Affinity's preferred wording in blue	Applicant's preferred wording in blue
<p>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, <u>without first consulting the undertaker and considering their representations</u></p>	<p>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, <u>without the consent of the undertaker (such consent not to be unreasonably withheld or delayed) who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.</u></p>

12.5 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.

12.6 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 how the claim has been mitigated, where relevant.

~~12.7 The total amount which would be payable to Affinity Water arising out of or in connection with this Part of the Schedule in relation to any costs, compensation, expenses, losses, damages, penalties or any other liabilities is subject to the total liability cap of £30,000.~~

13 COOPERATION

~~(1)~~ 13.1 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.

13.2 ~~(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.

14. 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.

15 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.

16 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.

17 EXPERT DETERMINATION

Please note that as noted above this paragraph has been included for the benefit of Affinity following their request that expert determination applies to the provisions of paragraph 9.

Expert Determination

- 17. (1) Article 48 (*arbitration*) of the Order does not apply to paragraph 9 (facilities and rights for alternative apparatus) of this Part of this Schedule.
- (2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers
- (3) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.
- a. All parties involved in settling any difference must use best endeavours to do so within 21 days from the date that an expert is appointed.
- (4) The expert must—
- (i) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert's appointment;
- (ii) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;
- (iii) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and
- (iv) give reasons for the decision.
- (5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 48 (*arbitration*).
- (6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.

18 ACCESS

18.1 If in consequence of any agreement reached in accordance with paragraph 7 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.

Anglian water

The drafting below shows the Applicant's preferred drafting with changes by Anglian in track, and drafting which is not agreed or rejected in a box.

PART [TBC]

FOR THE PROTECTION OF ANGLIAN WATER SERVICES LIMITED

Application

1. For the protection of Anglian Water the following provisions have effect, unless otherwise agreed in writing between the undertaker and Anglian Water.

Interpretation

2. In this Part of this Schedule—

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

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

“Anglian Water” means Anglian Water Services Limited (company number 02366656) whose registered office is at Lancaster House, Lancaster Way, Ermine Business Park, Huntington, Cambridgeshire PE29 6XU;

“Anglian Water Property” means the Clacton-Holland Haven Water Recycling Centre, Essex, CO15 5TZ in the vicinity of Plot 01-002 and north of Plot 01-003

“apparatus” means:

- (a) works, mains, pipes or other apparatus belonging to or maintained by Anglian Water for the purposes of water supply and sewerage;
- (b) any drain or works vested in Anglian Water under the Water Industry Act 1991;
- (c) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4) of that Act or an agreement to adopt made under section 104 of that Act;
- (d) any drainage system constructed for the purpose of reducing the volume of surface water entering any public sewer belonging to Anglian Water; and
- (e) includes a sludge main, disposal main or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works, and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

and for the purpose of this definition, where words are defined by section 219 of that Act, they must be taken to have the same meaning;

“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

“plan” includes all sections, drawings, specifications and method statements.

Access

Please note that following wording has been provided at the request of Anglian but no response on it has yet been received.

3. (1) Access for Anglian Water or any person acting under its instruction, including access for vehicles and plant, to the Anglian Water Property over Plot [01-002] and to any apparatus utilities and services will not be extinguished or prevented and must not be unreasonably restricted or delayed by the undertaker during the construction, operation, maintenance or decommissioning of the Authorised Development in accordance with sub-paragraphs (2) and (3).

(2) Unreasonable delay or restriction in subparagraph (1) will not prevent the temporary restriction of access for other users (including access by the public) or the control or marshalling of access to facilitate the safe movement of large vehicles or plant or the carrying out of works to the access route by the undertaker, subject to the provisions of sub-paragraph (2) and (3) of this paragraph.

(3) Where any part of the access to the Anglian Water Property is restricted or controlled by the undertaker, any physical measures must be agreed by the Anglian Water (acting reasonably) prior to the implementation. The undertaker must provide access to the Anglian Water Property on request from Anglian Water or any person acting under its instruction and take steps (as soon as reasonably practicable) to allow access to and from the Anglian Water Property through or around that restriction or physical measure

On street apparatus

4. This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and Anglian Water are regulated by the provisions of Part 3 of the 1991 Act.

Apparatus in stopped up streets

5. Regardless of the temporary stopping up or diversion of any highway under the powers conferred by article 14 (temporary restriction of use of streets), Anglian Water is at liberty at all times to take all necessary access across any such stopped up highway and 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

6. The undertaker, in the case 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 any apparatus without the written consent of Anglian Water ~~(such agreement not to be unreasonably withheld)~~.

Acquisition of land

7. Regardless of any provision in this Order or anything shown on the land plans, the undertaker must not acquire any apparatus otherwise than by agreement ~~(such agreement not to be unreasonably withheld)~~.

Removal of apparatus

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

- (a) alternative apparatus has been constructed and is in operation to the reasonable satisfaction of Anglian Water in accordance with sub-paragraphs (2) to (8); and
- (b) facilities and rights have been secured for that alternative apparatus in accordance with paragraph 23.

(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 Anglian Water 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 and in that case (or if in consequence of the exercise of any of the powers conferred by this Order an undertaker reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to Anglian Water the necessary facilities and rights for the construction of alternative apparatus in other land of the undertaker and subsequently for the maintenance of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of 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 Anglian Water must, on receipt of a written notice to that effect from the undertaker, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(4) 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 such line or situation as may be agreed between Anglian Water and the undertaker or in default of agreement settled by arbitration in accordance with article 48 (arbitration).

(5) Anglian Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 48 (arbitration), and after the grant to Anglian Water of any such facilities and rights as are referred to in sub-paragraphs (2) or (3), proceed without unnecessary delay 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.

(6) Regardless of anything in sub-paragraph (5), if Anglian Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Anglian Water fails to proceed with that work in accordance with sub-paragraph (5) or the undertaker and Anglian Water otherwise agree, that work, instead of being executed by Anglian Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Anglian Water.

(7) If Anglian 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 such details are deemed to have been approved. For the avoidance of doubt, any such “deemed consent” does not extend to the actual undertaking of the removal works, which must-shall remain the sole responsibility of Anglian Water or its contractors . unless these works are to be carried out by the undertaker in accordance with sub-paragraph (6).

(8) Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker -mustshall, before taking or requiring any further step in such substitution works, use best endeavours to comply with Anglian Water’s reasonable requests for a reasonable period of time to enable Anglian 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

9.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to Anglian Water facilities and rights for the construction and maintenance in land of the undertaker 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 the undertaker and Anglian Water or in default of agreement settled by arbitration in accordance with article 48 (arbitration).

(2) 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 less favourable on the whole to Anglian 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 must make such provision for the payment of compensation by the undertaker to Anglian Water as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

(3) Such facilities and rights as are set out in this paragraph are deemed to include any statutory permits granted to Anglian Water in respect of the apparatus in question, whether under the Environmental Permitting (England and Wales) Regulations 2010 or other legislation.

Retained apparatus

10.—(1) Not less than 28 days before starting the execution of any works in, on or under any land purchased, held, appropriated or used under this Order that are near to, or will or may affect, any apparatus (or any means of access to it) the removal of which has not been required by the undertaker under paragraph (2), the undertaker must submit to Anglian Water a plan, section and description of the works to be executed.

(2) Those works must be executed only in accordance with the plan, section and description submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by Anglian Water for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and Anglian Water is entitled to watch and inspect the execution of those works.

(3) Any requirements made by Anglian Water under sub-paragraph (2) must be made within a period of 21 days beginning with the date on which a plan, section and description— under sub-paragraph (1) is submitted to it.

(4) If Anglian Water in accordance with sub-paragraph (2) 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 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 22(2).

(5) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 28 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.

(6) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency but in that case must give to Anglian Water notice as soon as is reasonably practicable and a plan 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, using its [best reasonable](#) endeavours to keep the impact of those emergency works on Anglian Water's apparatus, on the operation of its water and sewerage network and on end-users of the services Anglian Water provides to a minimum.

(7) For the purposes of sub-paragraph (1) and without prejudice to the generality of the principles set out in that sub-paragraph, works are deemed to be in land near Anglian Water's apparatus (where it is a pipe) if those works fall within the following distances measured from the medial line of such apparatus:

- (a) 4 metres where the diameter of the pipe is less than 250 millimetres;
- (b) 5 metres where the diameter of the pipe is between 250 and 400 millimetres, and
- (c) [6 metres where the diameter of the pipe exceeds 400 millimetres a distance to be agreed on a case by case basis and before the submission of the Plan under sub-paragraph \(1\) is submitted.](#)

Expenses and costs

11.— (1) Subject to the following provisions of this paragraph, the undertaker must repay to Anglian Water all expenses reasonably incurred by Anglian Water in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus which may be required in consequence of the execution of any such works as are referred to in this Part of this Schedule but always excluding any consequential loss or indirect loss suffered by Anglian Water.

(2) There must be deducted from any sum payable under subparagraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule that value being calculated after removal.

(3) 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 48 (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 Anglian Water by virtue of subparagraph (1) must be reduced by the amount of that excess.

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

- (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; and
- (b) 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 a manhole is to be treated as if it also had been agreed or had been so determined.

~~— An amount which apart from this sub-paragraph would be payable to Anglian 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 Anglian 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.~~

12.(1) Subject to ~~the following provisions of this paragraph~~ sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works referred to in paragraphs s 22(1) or 22(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 Anglian Water, or there is any interruption in any service provided, or in the supply of any goods, by Anglian Water, the undertaker must—

- (a) bear and pay the cost reasonably incurred by Anglian Water, accompanied by an invoice or claim from Anglian Water, in making good such damage or restoring the supply; and
- (b) make reasonable compensation to Anglian Water for any other expenses, loss, damages, penalty or costs incurred by Anglian Water,

by reason or in consequence of any such damage or interruption but always excluding any consequential loss or indirect loss arising from such damage or interruption.

(2) The fact that any act or thing may have been done by Anglian Water on behalf of the undertaker or in accordance with a plan approved by Anglian Water or in accordance with any requirement of Anglian 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 Anglian

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 with respect to any damage or interruption to the extent that it is attributable to the unlawful or unreasonable act, neglect or default of Anglian Water, its officers, servants, contractors or agents.

(4) Anglian Water must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made, without the consent of the undertaker (such consent not to be unreasonably withheld or delayed) who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

(5) Anglian 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 undertaker must bear and pay the costs for.

~~—The total amount which would be payable to Anglian Water arising out of or in connection with this Part of the Schedule in relation to any costs, compensation, expenses, losses, damages, penalties or any other liabilities is subject to the total liability cap of £30,000,000 (thirty million pounds).~~

Cooperation

~~13. For the avoidance of doubt whenever Anglian 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.~~

14. Where in consequence of the proposed construction of any of the authorised development, the undertaker or Anglian Water requires the removal of apparatus under paragraph 8(2) or Anglian 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 development and taking into account the need to ensure the safe and efficient operation of Anglian Water's undertaking, using existing processes where requested by Anglian Water, provided it is appropriate to do so, and Anglian Water must use all reasonable endeavours to co-operate with the undertaker for that purpose.

15. Where the undertaker identifies any apparatus which may belong to or be maintainable by Anglian Water but which does not appear on any statutory map kept for the purpose by Anglian Water, it must inform Anglian Water of the existence and location of the apparatus as soon as reasonably practicable.

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

17. The undertaker and Anglian Water may by written agreement substitute any period of time for those periods set out in this Part of this Schedule.

Note: the main provisions of the DCO may provide the undertaker with a right to connect to a public sewer. If so, although the connection may only be made with the consent of Anglian Water, such consent may not be unreasonably withheld. Disputes as to reasonableness are dealt with as disputes under section 106 of the Water Industry Act 1991 which preclude the issue of capacity being raised. Therefore, Anglian Water should be named as a consultee in respect of the drainage strategy that the development must follow, which will usually be found in the Schedule concerning "Requirements". This will put Anglian Water in the same position as it would be in connection with a non-DCO development seeking connection under section 106 above.

Network Rail

The drafting below shows the Applicant's preferred drafting with changes by Network Rail in track.

PART [TBC]

For the protection of Network Rail Infrastructure Limited

1. The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 14, of this Part of this Schedule any other person on whom rights or obligations are conferred by that paragraph.

2. In this Part of this Schedule—

“asset protection agreement” means an agreement to regulate the construction and maintenance of the specified work in a form prescribed from time to time by Network Rail;

“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 Infrastructure Limited by the Secretary of State in exercise of their powers under section 8(1)(licences) of the Railways Act 1993;

“Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) 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 1159 of the Companies Act 2006) 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 and any successor to Network Rail Infrastructure Limited's railway undertaking;

“plans” includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

“protective works” means the underpinning, strengthening and any other works the purpose of which is to prevent damage that may be caused by the carrying out, maintenance or ;

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

“railway property” means any railway belonging to Network Rail and-

(a) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and

(b) any easement or other property interest held or used by Network Rail or a tenant or licensee of Network Rail for the purposes of such railway or works, apparatus or equipment;

“regulatory consents” means any consent or approval required under:

(c) the Railways Act 1993;

(d) the network licence; and/or

(e) any other relevant statutory or regulatory provisions;

by either the Office of Rail and Road or the Secretary of State for Transport or any other competent body including change procedures and any other consents, approvals of any access or beneficiary that may be required in relation to the authorised development;

“specified work” means so much of any of the authorised development as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property, and for the avoidance of doubt, includes the maintenance of such works under the powers conferred by article 6 (power to maintain the authorised development) in respect of such works.

3.— (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 and any obligations under its network licence or under statute.

(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 must—

- (a) co-operate with the undertaker 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 development pursuant to this Order.

(3) The undertaker must not exercise the powers conferred by—

(a) article 19 (authority to survey and investigate the land);

(b) article 22 (compulsory acquisition of land);

(c) article 24 (compulsory acquisition of rights and restrictive covenants);

(d) article 26 (private rights)

(e) article 28 (acquisition of subsoil or airspace only);

(f) article 31 (temporary use of land for carrying out the authorised development);

(g) article 32 (temporary use of land for maintaining the authorised development);

(h) article 33 (statutory undertakers);

(i) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;

in respect of any railway property unless the exercise of such powers is with the consent of Network Rail, such consent not to be unreasonably withheld.

~~(3)~~(4) The undertaker must 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.

~~(4)~~(5) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 33 (statutory undertakers), article [x] (power to override easements and other rights or private rights of way), or article 26 (private rights), 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.

(6) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

~~(5)~~(7) The undertaker must not under the powers of this Order do anything which would directly result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

~~(6)~~(8) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it ~~must~~ shall never be unreasonable to withhold consent for reasons of operational or railway safety or

impose conditions necessary to ensure operational or railway safety (such matters to be in Network Rail's absolute discretion).

~~(7)~~(9) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

4.—(1) The undertaker must 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 the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 48 (arbitration).

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated their disapproval of those plans and the grounds of their disapproval, the undertaker may serve upon the engineer written notice requiring the engineer to intimate their approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated their approval or disapproval, they ~~shall~~ must be deemed to have approved the plans as submitted.

(3) ~~(3)~~ If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker 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, ~~subject to Network Rail seeking consent from the undertaker (undertaker acting reasonably)~~ if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unreasonable delay on behalf of and to the reasonable satisfaction of the undertaker 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 undertaker.

(4) ~~(4)~~ When signifying their approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in their reasonable opinion (such level of reasonableness being that of a prudent railway statutory undertaker) 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 operators using the same (including any relocation de-commissioning 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 must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the reasonable expense of the undertaker in either case without unreasonable delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to their reasonable satisfaction.

(5) The undertaker ~~shall~~ must not be required to comply with sub-paragraph (1) in a case of emergency but in that case it ~~must~~ shall give to Network Rail notice as soon as is reasonably practicable, and in addition to that notice ~~must~~ shall provide a plan, section and description of those works as soon as reasonably practicable subsequently.

5.—(1) Any specified work and any protective works to be constructed by virtue of paragraph 4(4) must, when commenced, be constructed—

- (a) without unreasonable delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;
- (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
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and reasonable compensation for any loss which it may sustain by reason of any such damage, interference or obstruction but always excluding any consequential loss or indirect loss [other than as provided in paragraphs 14\(4\), \(5\), \(6\) and \(7\)](#).

(3) Nothing in this Part of this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its employees, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or its employees, contractors or agents.

6. The undertaker must-

- (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 they may reasonably require with regard to a specified work or the method of constructing it.

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

8.—(1) If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction of a specified work, in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker 56 days' written notice (or in the event of an emergency or safety critical issue such notice as is reasonable in the circumstances) of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must 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 of the 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 during the construction of a specified work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work is to be constructed, ~~and provides its consent (acting reasonably),~~ Network Rail must assume construction of that part of the specified work and the undertaker must, notwithstanding any such approval of a specified work under paragraph 5(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and reasonable compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work provided that at all times Network Rail will be under an obligation to take reasonable steps to mitigate its loss and always excluding any consequential loss or indirect loss- [other than as provided in paragraphs 14\(4\), \(5\), \(6\) and \(7\)](#).

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph [10](a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.

9. The undertaker must 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 undertaker as provided by paragraph 4 (3) or in constructing any protective works under the provisions of paragraph 4 (4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by them of the construction of a specified work;
- (c) in respect of the employment or procurement of the services of any inspectors, signallers, guards and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, 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.

10.(1) In this paragraph-

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development 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 development) 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 applies 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 development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

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

(4) In order to facilitate the undertaker’s compliance with sub-paragraph (3)-

(a) the undertaker must 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 must 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 must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail’s apparatus identified pursuant to sub-paragraph (a); and

(c) Network Rail must allow the undertaker 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 must not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 5(1) has effect subject to the sub-paragraph.

(6) Prior to the commencement of operation of the authorised development the undertaker shall test the use of the authorised development in a manner that shall first have been agreed with Network Rail and if, notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing of the authorised development causes EMI then the undertaker must 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 undertaker'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 undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI;

(c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI; and

(d) the undertaker shall not allow the use or operation of the authorised development in a manner that has caused or will cause EMI until measures have been taken in accordance with this paragraph to prevent EMI occurring.

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

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

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

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) applies 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 47 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Engineering and Technology.

11. 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 undertaker informing it that the state of maintenance of any part of the specified work appears to be such as that it adversely affects the operation of railway property, the undertaker must, 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.

12. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

13. 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 must, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to Network Rail.

14.(1)The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses ~~(but always excluding any consequential or indirect loss (other than as provided in paragraphs 15(4), (5), (6) and (7))~~not otherwise provided for in this Part of this Schedule (subject to article 46 (no double recovery)) which may be occasioned to or reasonably incurred by Network Rail—

- (a) by reason of the undertaker's construction , maintenance or operation of a specified work or the failure thereof; or
- (b) by reason of any act or omission of the undertaker or of any person in its employment or of its contractors or others whilst engaged upon a specified work;
- (c) by reason of any act or omission of the undertaker or any person in its employment or of its contractors or others whilst accessing to or egressing from the authorised development;
- (d) in respect of any damage caused to or additional maintenance required to, railway property or any such interference or obstruction or delay to the operation of the railway as a result of access to or egress from the authorised development by the undertaker or any person in its employ or of its contractors or others; and
- (e) in respect of costs incurred by Network Rail in complying with any railway operational procedures or obtaining any regulatory consents which procedures are required to be followed or consents obtained to facilitate the construction or operation of the authorised development;

and the undertaker must indemnify and keep indemnified 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, provided Network Rail will be under an obligation to take reasonable steps to mitigate its loss and always excluding any consequential loss or indirect loss.

(2) The fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under their supervision ~~must 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 undertaker from any liability under this Part.

(3) Network Rail must give the undertaker reasonable written notice of any such claim or demand and no settlement or compromise of such a claim or demand ~~shall must~~ be made without the prior consent of the undertaker. Network Rail must take such steps as are within its control and are reasonable in the circumstances to mitigate any liabilities relating to such claims or demands

(4) The sums payable by the undertaker under sub-paragraph (1) ~~shall must~~ if relevant include a sum equivalent to the relevant costs.

(5) 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 must 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.

(6) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs ~~shall must~~, 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).

(7) In this paragraph—

“the relevant costs” means the costs, losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of ~~any specified work including but not limited to~~ any-restriction of the use of Network Rail's railway network as a direct result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (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 the Railways Act 1993.

15. Network Rail must, on receipt of a request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part of this Schedule (including the amount of the relevant costs reasonably incurred and mentioned in paragraph 14) and with

such information as may reasonably enable the undertaker 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).

16. In the assessment of any sums payable to Network Rail under this Part of this Schedule there must 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 undertaker under this Part of this Schedule or increasing the sums so payable.

17. The undertaker 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 undertaker of—

- (a) any railway property shown on the works and land 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 or any lands, works or other property referred to in this paragraph.

18. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.

19. The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's consent, under article 7 (benefit of Order) of this Order and any such notice must be given no later than 28 days before any such application is made and must describe or give (as appropriate)—

- (a) the nature of the application to be made;
- (b) the extent of the geographical area to which the application relates; and
- (c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

20. The undertaker must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 44 (certification of plans, etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in a format specified by Network Rail (acting reasonably) .

21. In relation to any dispute arising under this Part of this Schedule the provisions of article 48 (arbitration) do not apply and any such dispute, unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.

National Highways

The below shows the Applicant's drafting in plain text with the National Highways' amends sought shown as tracked changes.

PART []

For the protection of National Highways

Application etc.,

1. The provisions of this Part of this Schedule apply for the protection of National Highways and have effect unless otherwise agreed in writing between the undertaker and National Highways.

Interpretation

2. (1) Where the terms defined in article 2 (*interpretation*) of this Order are inconsistent with subparagraph (2) the latter prevail.

(2) Where any provision of this Part of this Schedule requires National Highways to act reasonably, then for the avoidance of doubt, any recommendation, request for information or condition for approval that relates to health and safety of the highway network within National Highways' jurisdiction will be considered reasonable.

(3) In this Part of this Schedule—

“as built information” means one electronic copy of the following information (in so far as it is relevant to the works concerned) —

- (a) as constructed drawings in both PDF and AutoCAD DWG formats for any SRN work designed by the undertaker; in compliance with Interim Advice Note 184 or any successor document, and for the cable works, showing the location and depth of the cable as installed and any ancillary or protective measures installed within the strategic road network;
- (b) list of suppliers and materials used, as well as any relevant test results and CCTV surveys (if required to comply with DMRB standards);
- (c) product data sheets and technical specifications for all materials used;
- (d) as constructed information for any utilities discovered or moved during the works;
- (e) method statements for the works carried out;
- (f) in relation to road lighting, signs, and traffic signals any information required by Series 1300 and 1400 of the Specification for Highway Works or any replacement or modification of it;
- (g) organisation and methods manuals for all products used;
- (h) as constructed programme;
- (i) test results and records as required by the detailed design information and during construction phase of the project;
- (j) a stage 3 road safety audit subject to any exceptions to the road safety audit standard as agreed by the undertaker and National Highways;
- (k) the health and safety file; and
- (l) such other information as is reasonably required by National Highways to be used to update all relevant databases and to ensure compliance with National Highway's *Asset Data Management Manual* as is in operation at the relevant time.

“the bond sum” means the sum equal to 200% of the cost of the carrying out the SRN works (to include all costs) plus 100% of the commuted sum or such other sum as is agreed;

“cable works” means any works under this Order which consist of the installation of cables, cable ducts, tunnels for cables and cable ducts and related or associated works to those operations, all under the strategic road network, and to be installed through the use of trenchless installation techniques where no works are required to or on the operational carriageway;

“cash surety” means the sum equal to 200% of the cost of the carrying out the SRN works (to include all costs) or such other sum as is agreed

“condition survey” means a survey of the condition of National Highways structures and assets within the Order limits that may be affected by the SRN works and cable works;

“the commuted sum” means the sum agreed as being the necessary contribution by the undertaker to the increase in costs incurred by National Highways of maintaining new strategic highway assets constructed as SRN works under this Order for ten years from the issue of the final certificate;

“contractor” means any contractor or subcontractor appointed by the undertaker to carry out the works;

“defects period” means the period from the date of the provisional certificate to the date of the final certificate which may be no less than 12 months from the date of the provisional certificate;

“detailed design information” means such of the following drawings specifications and calculations as are relevant:

for the SRN works -

- (a) site clearance details;
 - (b) boundary, environmental and mitigation fencing;
 - (c) road restraints systems and supporting road restraint risk appraisal process assessment;
 - (d) drainage and ducting as required by DMRB CD 535 Drainage asset data and risk management and DMRB CS551 Drainage surveys – standards for Highways;
 - (e) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
 - (f) pavement, pavement foundations, kerbs, footways and paved areas;
 - (g) traffic signs and road markings;
 - (h) traffic signal equipment and associated signal phasing and timing detail;
 - (i) road lighting (including columns and brackets);
 - (j) regime of California Bearing Ratio testing;
 - (k) electrical work for road lighting, traffic signs and signals;
 - (l) motorway communications as required by DMRB;
 - (m) highway structures and any required structural approval in principle;
 - (n) landscaping;
 - (o) proposed departures from DMRB standards;
 - (p) walking, cycling and horse riding assessment and review report;
 - (q) stage 1 and stage 2 road safety audits and exceptions agreed;
 - (r) utilities diversions;
 - (s) topographical survey;
 - (t) maintenance and repair strategy in accordance with DMRB GD304 Designing health and safety into maintenance or any replacement or modification of it; or
- for the cable works;
- (a) earthworks including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification;
 - (b) health and safety information including any asbestos survey required by GG105 or any successor document; and
 - (c) other such information that may be required by National Highways to be used to inform the detailed design of the cable works;

“DMRB” means the Design Manual for Roads and Bridges or any replacement or modification of it; “final certificate” means the certificate relating to those aspects of the SRN works that have resulted in any alteration to the strategic road network to be issued by National Highways pursuant to paragraph [15];

“the health and safety file” means the file or other permanent record containing the relevant health and safety information for the authorised development required by the Construction Design and Management Regulations 2015 (or such updated or revised regulations as may come into force from time to time);

“highway operations and maintenance contractor” means the contractor appointed by National Highways under the DBFO contract;

“nominated persons” means the undertaker’s representatives or the contractor’s representatives on site during the carrying out of the cable works or SRN works as notified to National Highways from time to time;

“programme of works” means a document setting out the sequence and timetabling of the cable works or SRN works;

“provisional certificate” means the certificate of provisional completion relating to those aspects of either the cable works or the SRN works that have resulted in any alteration to the strategic road network to be issued by National Highways in accordance with paragraphs 10 or 11 as appropriate when it considers the SRN works or cable works are substantially complete;

“road safety audit” means an audit carried out in accordance with the road safety audit standard;

“road safety audit standard” means DMRB Standard HD GG119 or any replacement or modification of it;

“road space booking” means road space bookings in accordance with National Highways’ Asset Management Operational Requirements (AMOR) including Network Occupancy Management System (NOMS) used to manage road space bookings and network occupancy;

“SRN works” means so much of any work authorised by this Order which involve works to the carriageway or verge of any part of the strategic road network, or to operational assets ancillary thereto including highway drainage, and specifically including the alteration of a junction as authorised as part of Work No. [], and including any maintenance of that work, as is on, in, or over the strategic road network for which National Highways is the highway authority;

“Specification for Highways Works” means the specification for highways works forming part of the manual of contract documents for highway works published by National Highways and setting out the requirements and approvals procedures for work, goods or materials used in the construction, improvement or maintenance of the strategic road network;

“strategic road network” means any part of the road network including trunk roads, special roads or streets for which National Highways is the highway authority including drainage infrastructure, street furniture, verges and vegetation and all other land, apparatus and rights located in, on, over or under the highway;

“utilities” means any pipes wires cables or equipment belonging to any person or body having power or consent to undertake street works under the New Roads and Street Works Act 1991; and

“winter maintenance” means maintenance of the road surface to deal with snow and ice.

General

3. No works in carrying out, maintaining or diverting the cable works may be carried out under the strategic road network at a distance within 4 metres of the lowest point of the ground.

4. In respect that is managed under a DBFO contract both National Highways and the highway operations and maintenance contractor shall have the benefit of this Part of Schedule [] but for the purposes of any approvals required under this Part of Schedule [] the undertaker shall liaise directly with National Highways.

5. References to any standards, manuals, contracts, regulations and directives including to specific standards forming part of the DMRB are, for the purposes of this Part of this Schedule, to be construed

as a reference to the same as amended, substituted or replaced, and with such modifications as are required in those circumstances.

Works outside the Order limits

6. If the undertaker proposes to carry out works to the strategic road network that are outside of the Order Limits in connection with the authorised development, the undertaker must enter into an agreement with National Highways in respect of the carrying out of those works prior to the commencement of those works.

Prior approvals

7.— (1) The SRN works must not commence until—

- (a) a stage 1 and stage 2 road safety audit has been carried out and all recommendations raised by them or any exceptions are approved by National Highways (acting reasonably);
- (b) the programme of works has been approved by National Highways (acting reasonably);
- (c) the detailed design of the SRN works comprising of the following details, insofar as considered relevant by National Highways, has been submitted to and approved by National Highways (acting reasonably)—
 - (i) the detailed design information, incorporating all recommendations and any exceptions approved by National Highways under sub-paragraph (a)
 - (ii) details of the proposed road space bookings;
 - (iii) the identity and suitability of the contractor and nominated persons; and
 - (iv) a process for stakeholder liaison, with key stakeholders to be identified and agreed between National Highways and the undertaker.
- (d) (v) information demonstrating that the process undertaken by the undertaker in relation to the SRN works has been adhered to in accordance with DMRB GG142 – Designing for walking, cycling and horse riding; a scheme of traffic management has been submitted by the undertaker and approved by National Highways such scheme to be capable of amendment by agreement between the undertaker and National Highways from time to time;
- (e) stakeholder liaison has taken place in accordance with the process for such liaison agreed between the undertaker and National Highways under sub-paragraph (c)(iv) above;
- (f) National Highways has approved the audit brief and CVs for all road safety audits and exceptions to items raised in accordance with the road safety audit standard;
- (g) the undertaker has agreed the estimate of the commuted sum with National Highways;
- (h) the scope of all maintenance operations (routine inspections, incident management, reactive and third party damage) to be carried out by the undertaker during the construction of the SRN works (which may include winter maintenance if relevant) has been agreed in writing by National Highways;
- (i) the undertaker has procured to National Highways collateral warranties in a form approved by National Highways (acting reasonably) from the contractor and designer of the SRN works in favour of National Highways to include covenants requiring the contractor and designer to exercise all reasonable skill care and diligence in designing and constructing the SRN works, including in the selection of materials, goods, equipment and plant; and
- (j) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways reasonably considers will be affected by the SRN works, has been agreed in writing by National Highways.

(2) The cable works must not commence until—

- (a) the detailed design of the cable works including supporting geotechnical assessments required by DMRB CD622 Managing geotechnical risk and any required strengthened earthworks appraisal form certification, has been submitted to and approved by National Highways; and

- (b) a condition survey and regime of monitoring of any National Highways assets or structures that National Highways reasonably considers will be affected by the SRN works, has been agreed in writing by National Highways.

(3) National Highways must, prior to the commencement of the cable works and SRN works, inform the undertaker of the identity of the person who will act as a point of contact on behalf of National Highways for consideration of the information required under sub-paragraph (1) .

(4) Any approval of National Highways required under this paragraph-

- (a) must not be unreasonably withheld;
- (b) must be given in writing;
- (c) shall be deemed to have been refused if neither given nor refused within 2 months of the receipt of the information for approval or, where further particulars are requested by National Highways within 2 months of receipt of the information to which the request for further particulars relates; and
- (d) may be subject to any conditions as National Highways acting reasonably considers necessary.

(5) Any change to the identity of the contractor and/or designer of the SRN works will be notified to National Highways and details of their suitability to deliver the SRN works will be provided on request along with collateral warranties in a form agreed by National Highways.

(6) Any change to the detailed design of the SRN works must be approved by National Highways in accordance with paragraph 7(4) of this Part.

Construction of the cable works and SRN works

8.—(1) The undertaker must give National Highways 14 days' notice in writing of the date on which the cable works and/or SRN works will start unless otherwise agreed by National Highways.

(2) The undertaker must comply with National Highways' road space booking procedures prior to and during the carrying out the SRN works, and no SRN works for which a road space booking is required may commence without a road space booking having first been secured from National Highways.

(3) The cable works and SRN works must be carried out by the undertaker to the reasonable satisfaction of National Highways in accordance with—

- (a) the relevant detailed design information and programme of works approved pursuant to paragraph 7(1) or (2) above or as subsequently varied by agreement between the undertaker and National Highways;
- (b) the DMRB, the Manual of Contract Documents for Highway Works, including the Specification for Highway Works, together with all other relevant standards as required by National Highways to include, inter alia; all relevant interim advice notes, the Traffic Signs Manual and the Traffic Signs Regulations and General Directions 2016 save to the extent that exceptions from those standards apply which have been approved by National Highways; and
- (c) all aspects of the Construction (Design and Management) Regulations 2015 or any statutory amendment or variation of the same.

(4) The undertaker must permit and must require the contractor to permit at all reasonable times persons authorised by National Highways (whose identity must have been previously notified to the undertaker by National Highways) to gain access to the cable works and SRN works for the purposes of inspection and supervision of those works.

(5) If any part of the cable works or SRN works is constructed-

- (a) other than in accordance with the requirements of this Part of this Schedule; or
- (b) in a way that causes damage to the highway, highway structure or asset or any other land of National Highways,

National Highways may by notice in writing require the undertaker, at the undertaker's own expense, to comply promptly with the requirements of this Part of this Schedule or remedy any damage notified to the undertaker under this Part of this Schedule, to the reasonable satisfaction of National Highways.

(6) If during the carrying out of the authorised development the undertaker or its appointed contractors or agents causes damage to the strategic road network then National Highways may by notice in writing require the undertaker, at its own expense, to remedy the damage.

(7) In constructing the cable works and SRN works, the undertaker must, at its own expense, divert or protect all utilities and all agreed alterations and reinstatement of highway over existing utilities must be constructed to the reasonable satisfaction of National Highways.

(8) The undertaker must notify National Highways if it fails to complete the SRN works in accordance with the agreed programme pursuant to paragraph 7(1)(b) of this Part or suspends the carrying out of any road work beyond 14 days, and National Highways reserves the right to withdraw any road space booking granted to the undertaker to ensure compliance with its network occupancy requirements.

Payments

9.—(1) The undertaker must pay to National Highways a sum equal to the whole of any reasonable costs and expenses which National Highways reasonably incurs (including costs and expenses for using internal or external staff) in relation to the cable works and SRN works and in relation to any approvals sought under this Order, or otherwise incurred under this Part, including—

- (a) the checking and approval of the information required under paragraphs 7(1) and (2)
- (b) the supervision of the cable works and SRN works;
- (c) the checking and approval of the information required to determine approvals under this Order;
- (d) costs in relation to the transfer of any land required for the SRN works and cable works;
- (e) all legal and administrative costs and disbursements reasonably incurred by National Highways in connection with sub-paragraphs (a)-(d) of this sub-paragraph; and
- (f) any value added tax which is payable by National Highways only in respect of such costs and expenses arising under this paragraph and for which it cannot obtain reinstatement from HM Revenue and Customs,

together comprising “the NH costs”.

(3) National Highways must provide the undertaker with a schedule showing its estimate of the NH costs prior to the commencement of the SRN works and cable works. Where the undertaker accepts that the estimate of costs is reasonable, the undertaker must pay to National Highways the estimate of the NH costs prior to commencing the SRN works or cable works. Where the undertaker does not accept that the estimate of costs is reasonable, escalation under sub-paragraph 4 will apply.

If at any time after the payment referred to in this sub-paragraph has become payable, National Highways reasonably believes that the NH costs will exceed the estimated NH costs it may give notice to the undertaker of the amount that it believes the NH costs will exceed the estimate of the NH costs (the excess). Where the undertaker accepts that the estimate of the excess is reasonable, the undertaker must pay to National Highways the estimate of the excess to National Highways within 30 days of the date of receipt of a properly issued VAT invoice from National Highways addressed to the undertaker for the excess the notice a sum equal to the excess. Where the undertaker does not accept that the estimate of the excess is reasonable, escalation under sub-paragraph (4) will apply.

(3) National Highways must give the undertaker a final account of the NH costs referred to in sub-paragraph (1) above within 30 days of the issue of the provisional certificate issued pursuant to paragraphs 10(4) or 11(3).

(4) Within 30 days of the issue of the final account:

- (a) if the final account shows a further sum as due to National Highways the undertaker must pay to National Highways the sum shown due to it; and
- (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by National Highways, National Highways must refund the difference to the undertaker.

(5) Where the undertaker does not agree that an estimate provided by National Highways under this paragraph is reasonable, the undertaker must notify National Highways of that within 15 days of receiving the estimate. The undertaker and National Highways will escalate the estimate internally and will each nominate a senior officer to attend a discussion on the estimate. Where the parties fail to reach agreement following such discussion, any difference or dispute over reasonableness of any excess sum shall be determined by expert determination in accordance with paragraph 20.

Provisional Certificate for SRN works

10.— (1) Following any closure or partial closure of any of the strategic road network for the purposes of carrying out the SRN works, National Highways will carry out a site inspection to satisfy itself that the strategic road network is, in its opinion, safe for traffic, and the undertaker must comply with any requirements of National Highways prior to reopening the strategic road network.

(2) As soon as the undertaker considers that the provisional certificate may be properly issued it must apply to National Highways for the provisional certificate.

(3) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable:

- (a) inspect the SRN works; and
- (b) provide the undertaker with a written list of works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(4) When—

- (a) a stage 3 road safety audit for the SRN works has been carried out and all recommendations raised including remedial works have (subject to any exceptions agreed) been approved by National Highways;
- (b) the SRN works incorporating the approved remedial works under sub-paragraph (4)(a) and any further works notified to the undertaker pursuant to sub-paragraph 10(3)(b) have been completed to the reasonable satisfaction of National Highways; and
- (c) the as built information has been provided to National Highways,
- (d) the undertaker has paid the commuted sum to National Highways,

National Highways must issue the provisional certificate.

(5) On the issue of the provisional certificate the bond sum shall be reduced to 20% of the total bond sum save insofar as any claim or claims have been made against the bond before that date in which case National Highways will retain a sufficient sum to ensure it does not have to meet any costs for or arising from the SRN works. (5) The undertaker must submit a stage 4 road safety audit as required by and in line with the timescales stipulated in the road safety audit standard. The undertaker must comply with the findings of the stage 4 road safety audit and must pay all costs of and incidental to such and provide updated as-built information to National Highways.

(6) In this paragraph, 'reasonable satisfaction' mean fair, proper and moderate under the circumstances, having regard to the details approved under paragraph 7.

Provisional Certificate for cable works

11.—(1) As soon as the undertaker considers that the provisional certificate for the cable works may be properly issued it must apply to National Highways for the provisional certificate.

(2) Following an application for a provisional certificate, National Highways must as soon as reasonably practicable:

- (a) inspect the area of the highway within the strategic road network over the route of the cable works; and
- (b) provide the undertaker with a written list of works that are required for the provisional certificate to be issued or confirmation that no further works are required for this purpose.

(3) When the cable works incorporating any further works notified to the undertaker pursuant to sub-paragraph 11(2)(b) have been completed to the reasonable satisfaction of National Highways, National Highways must issue the provisional certificate.

Opening

12. The undertaker must notify National Highways not less than 14 days in advance of the intended date of opening to the public of the strategic road network and the undertaker must notify National Highways of the actual date the strategic road network will be opened to the public within 14 days of that date.

Final condition survey

13.—(1) The undertaker must, as soon as reasonably practicable after making its application for a provisional certificate pursuant to paragraph 9(2) or 10(1), arrange for any highways structures and assets that were the subject of the condition survey to be re-surveyed and must submit the re-survey to National Highways for its approval. The re-survey will include a renewed geotechnical assessment required by DMRB CD622 for the cable works and SRN works and any other works beneath the strategic road network.

(2) If the re-surveys carried out pursuant to paragraph 13(1) indicates that any damage has been caused to a structure or asset, the undertaker must submit a scheme for remedial works in writing to National Highways for its approval (acting reasonably) in writing and the undertaker must carry out the remedial works at its own cost and in accordance with the scheme submitted.

(3) If the undertaker fails to carry out the remedial work in accordance with the approved scheme, National Highways may carry out the steps required of the undertaker and may recover any expenditure it reasonably incurs in so doing.

(4) National Highways may, at its discretion, at the same time as giving its approval to the re-surveys pursuant to paragraph 13(1) give notice in writing that National Highways will remedy any damage identified in the re-surveys and National Highways may recover any expenditure it reasonably incurs in so doing.

(5) The undertaker must make available to National Highways upon request copies of any survey or inspection reports produced pursuant to any inspection or survey of any cable work or SRN work following its completion that the undertaker may from time to time carry out.

Defects Period

14.—(1) The undertaker must at its own expense remedy any defects in the strategic road network resulting from the carrying out of the SRN works as are reasonably required by National Highways to be remedied during the defects period. All identified defects must be remedied in accordance with the following timescales—

- (a) in respect of matters of urgency, within 24 hours of receiving notification for the same (urgency to be determined at the absolute discretion of National Highways);
- (b) in respect of matters which National Highways considers to be serious defects or faults, within 14 days of receiving notification of the same; and
- (c) in respect of all other defects notified to the undertaker, within 4 weeks of receiving notification of the same.

(2) Following the expiry of the defects period National Highways has responsibility for routine maintenance of the strategic road network save for any soft landscaping works which must be established and which must thereafter be maintained for a period of 3 years by and at the expense of the undertaker.

Final Certificate

15.—(1) The undertaker must apply to National Highways for the final certificate no sooner than 12 months from the date of the provisional certificate for the SRN works pursuant to paragraph 10(2) and provisional certificate for the cable works pursuant to the paragraph 11(1).

(2) Following receipt of the application for the final certificate, National Highways must as soon as reasonably practicable:

- (a) inspect the strategic road network; and
- (b) provide the undertaker with a written list of any further works required to remedy or make good any defect or damage in the strategic road network or confirmation that no such works are required for this purpose.

(3) The undertaker must carry out such works notified to it pursuant to sub-paragraph 15(2).

(4) When National Highways is satisfied that:

- (a) any defects or damage arising from defects during the defects period and any defects notified to the undertaker pursuant to sub-paragraph 15(2) and any remedial works required

as a result of any relevant stage 4 road safety audit have been made good to the reasonable satisfaction of National Highways; and

(b) the NH costs have been paid to National Highways in full;

National Highways must issue the final certificate after which the bond shall be released in full.

(5) The undertaker must pay to National Highways within 30 days of the date of receipt of a properly issued VAT invoice from National Highways addressed to the undertaker, the costs reasonably incurred by National Highways in identifying the defects and supervising and inspecting the undertaker's work to remedy the defects that it is required to remedy pursuant to these provisions.

Security

16. (1) The SRN works may not commence until

(a) the undertaker procures that the SRN works are secured by a bond from a bondsman first approved by National Highways in the agreed form between the undertaker and National Highways to indemnify National Highways against all losses, damages, costs or expenses arising from any breach of any one or more of the obligations of the undertaker in respect of the SRN works provided that the maximum liability of the bond must not exceed the bond sum; or

(b) the undertaker has provided the cash surety which may be utilised by National Highways in the event of the undertaker failing to meet its obligations to make payments under paragraph [] or to carry out works the need for which arises from a breach of one or more of the obligations of the undertaker under the provisions of this Part; or

(c) a combination of a bond and cash surety together totalling 200% of the projected costs of the SRN works.

Commutated sums

17. National Highways must provide to the undertaker an estimate of the commuted sum, calculated in accordance with FS Guidance S278 Commuted Lump Sum Calculation Method dated 18 January 2010 or any successor guidance, prior to the issue of the provisional certificate for the SRN works.

Insurance

18. Prior to the commencement of the SRN works or cable works the undertaker or its contractor must effect public liability insurance with an insurer in the minimum sum of £10,000,000.00 (ten million pounds) in respect of any one claim against any legal liability for damage loss or injury to any property or any person as a direct result of the execution of the cable works or SRN works by the undertaker.

Indemnity

19.—(1) The undertaker indemnifies National Highways from and against all costs, claims, expenses, damages, losses and liabilities suffered by National Highways arising from the construction of the SRN works or maintenance of the SRN works undertaken (but always excluding any consequential loss or indirect loss suffered by National Highways) before the issue of the final certificate for the SRN works, or any construction, maintenance or decommissioning of the cable works, or exercise of or failure to exercise any power under this Order within 30 days of an itemised demand subject to sub-paragraphs (2) to (5).

(1) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect of-

- a) any damage to the extent that it is attributable to the neglect or default of National Highways, its officers, servants, contractors or agents;
- b) any SRN works carried out by National Highways as an assignee, transferee or lessee of the undertaker with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article 7 (consent to transfer benefit of Order);

(2) National Highways must give the undertaker reasonable notice of any such third party claim or demand and no settlement, admission of liability or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(3) National Highways 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.

(4) National Highways must use its reasonable endeavours to mitigate and to minimise any costs, claims, expenses, damages, losses and to which the indemnity under this paragraph applies where it is within National Highways' reasonable ability and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties outside of National highways' control and if reasonably requested to do so by the undertaker National Highways must provide an explanation of how the claim has been minimised, where relevant.

Maintenance of the authorised development

20.—(1) The undertaker must, prior to the commencement of any works of maintenance to the cable works, give National Highways 28 days' notice in writing of the date on which those works will start unless otherwise agreed by National Highways, acting reasonably.

(2) If, for the purposes of maintaining the SRN works or cable works the undertaker needs to occupy any road space, the undertaker must comply with National Highways' road space booking requirements and no maintenance of any works for which a road space booking is required may commence without a road space booking having first been secured.

(3) The undertaker must comply with any requirements that National Highways may notify to the undertaker, such requirements to be notified to the undertaker not less than 7 days' in advance of the planned commencement date of the maintenance works.

(4) The provisions of paragraph 12 shall apply to the opening of any part of the strategic road network following occupation of any road space under this paragraph.

Land

21.—(1) Following the issue of the final certificate pursuant to paragraph 15(4) National Highways may serve notice on the undertaker that it wishes to take a freehold transfer of land within the extent of strategic road network boundary which is not in the ownership of National Highways but has been acquired by the undertaker for the purposes of carrying out the SRN works.

(2) If the undertaker receives notice under sub-paragraph (1) then the undertaker must effect a freehold transfer of the land which is the subject of the notice and complete such transfer as soon as reasonably practicable at no cost to National Highways.

(3) The undertaker must not under the powers of this Order:

(a) acquire or use land forming part of;

(b) acquire new or existing rights over; or

(c) seek to impose or extinguish any restrictive covenants over;

any of the strategic road network or land owned by National Highways, or extinguish any existing rights of or interfere with apparatus of National Highways in respect of any third party property, except with the consent of National Highways by written request to National Highways, Bridge House, 1 Walnut Tree Close, Guildford, Surrey GU1 4LZ or by email to

legalservicesinbox@nationalhighways.co.uk

Expert Determination

22.—(1) Article 48 (*arbitration*) of the Order does not apply to this Part of this Schedule.

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.

(3) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.

(4) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date that an expert is appointed.

(5) The expert must—

- (a) invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert's appointment;
- (b) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission;
- (c) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and
- (d) give reasons for the decision.

(6) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article 48 (*arbitration*).

(7) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.

Local highways authority

The below shows the agreed drafting in plain text with the local highway authority's amendments sought shown as tracked changes.

PART [TBC]

For the protection of Essex County Council as local highway authority

Application

1. The provisions of this Part of this Schedule have effect in relation to the works (as defined under paragraph 2) unless otherwise agreed in writing between the undertaker and Essex County Council in its capacity as the local highway authority.

Definitions

2. In this Part of this Schedule—

“as built drawings” means—

- (a) drawings showing the as constructed local highways in an appropriate format (including digital storage media);
- (b) drawings showing the location for utilities installed in the local highway; and
- (c) specifications for materials used for the constructed local highway;

“construction period” means for each work, from commencement of the relevant work forming part of authorised development under this Order until the issue of the final certificate for that work.

“detailed design” means drawings and other information comprising the detailed design for the alteration and improvement of local highways comprised in the authorised development;

“detailed information” means drawings, specifications and other information relating to the local highway, as relevant to the works in question (insofar as both parties agree (acting reasonably) are relevant and not already provided for in any document that the undertaker is required to produce under Schedule 2 to the Order) which must be in accordance with the detailed design and include:

- (d) information and assessment required to demonstrate compliance of any trenchless crossing works with DMRB Volume 4 section 1 CD 622 (*Managing geotechnical risk*);
- (e) long and cross sectional drawings;
- (f) traffic signs and road markings;
- (g) landscaping, planting and any boundary features which will form part of the local highway;
- (h) a schedule of timings for the works, including dates and durations for any temporary closures of any part of the local highway;
- (i) traffic management proposals including any diversionary routes; and
- (j) a schedule of the existing local highway condition prior to commencement of construction related activities;
- (k) folio drawings in line with the Essex Standard Drawings, or such replacement or modification of the design standards applied to the construction of new roads and alternations to existing roads across the County of Essex.

“DMRB” means the Design Manual for Roads and Bridges published by National Highways. Or any replacement or modification of that standard for the time being in force;

“DCM” means the Development Construction Manual published by Essex County Council, or any replacement or modification of that manual for the time being in force.

“final certificate” means the final certificate issued by the local highway authority under paragraph 11 of this Part;

“HPN039” means Highways Practice Note 039 Procedure for Road Safety Audit as published by Essex County Council. Or any replacement or modification of that standard for the time being in force.

“local highway” means any public highway including any public right of way which is maintainable, or is intended at the completion of the works in relation thereto to be maintainable, by a local highway authority;

“local highway authority” means Essex County Council;

“maintenance period” means 12 months from the date of the provisional certificate being served under paragraph 9 of this Part unless otherwise agreed in writing between the parties;

“provisional certificate” means the certificate served under paragraph 9 of this Part;

“senior representatives” means the nominated senior representative on behalf of the undertaker and persons notified to the undertaker by the relevant local highway authority as being their senior representatives; and

“works” means any works authorised by the Order undertaken on, to or under any part of the local highway.

Design input and commencement

3.—(1) The undertaker must allow and facilitate an appropriately qualified person or persons duly appointed by the local highway authority (each being a “nominated officer”) to participate in the design process for the detailed design for the works. The undertaker agrees to incorporate ~~any reasonable~~ representations of the nominated officer in finalising its detailed design proposal, subject to the undertaker able to refuse implementation of any representation which would cause a breach of this Order, conflict with a permit issued under a permit scheme operated by the local highway authority or would entail materially new or materially different environmental effects from those reported in the environmental statement).

(2) Participation under sub-paragraph (1) will be in the form of invitations (given at least 20 business days in advance and sent by email to [] headed [] and marked ‘urgent’) to attend design meetings relating to relevant works and the provision to the nominated officer of such drawings, cross/long sections, design proposals and other information as is reasonably required to allow the nominated officer to provide an informed response on the detailed design proposals to the undertaker.

(3) The nominated officer will have no less than ~~5540~~ business days from the date on which the undertaker supplies information pursuant to sub-paragraph (2) to provide the undertaker with any comments upon any information provided to that officer pursuant to sub-paragraph (2).

(4) No part of the works may commence until the undertaker has provided to the local highway authority the detailed information relating to that part of the works (without prejudice to the undertaker providing parts of the detailed information insofar as it relates to the operation of the local highway at a later date, provided the provision of that information is subject to this sub-paragraph and sub-paragraphs (5) to (7)).

(5) The undertaker will give the local highway authority at least ~~5540~~ business days to comment and provide representations by email on the detailed information provided to it under sub-paragraph (4).

(6) The undertaker will incorporate any ~~reasonable~~ comments, representations and recommendations made by the local highway authority (acting reasonably) under sub-paragraph (5) (and, without limitation, the undertaker is able to refuse implementation of any representation or recommendation which would cause a breach of this Order, conflict with a permit issued under a permit scheme operated by the local highway authority or would entail materially new or materially different environmental effects from those reported in the environmental statement) and will provide the local highway authority with reasons for non-acceptance of any representation or recommendation as soon as reasonably practicable upon

receipt of a request from the local highway authority in writing within 10 business days of its decision.

(7) The works must not be carried out except in accordance with the detailed information (but subject to the process in sub-paragraphs (4) and (5) or as otherwise may be agreed prior to the date of commencement of the relevant works between the undertaker and the local highway authority.

(8) This paragraph does not apply to the works to the extent that would cause an inconsistency with any provision of this Order.

4.—(1) Before commencing the construction of, or the carrying out of any work authorised by this Order which involves works to a local highway the undertaker must use reasonable endeavours to agree with the local highway authority (acting reasonably) a local operating agreement covering the following as relevant to the works in question—

- (a) communications and customer care arrangements for communication with stakeholders and the local community including—
 - (i) the identity of the party responsible for each activity;
 - (ii) the identity of the representative of the undertaker or the undertaker's contractor responsible for stakeholder engagement and communication;
 - (iii) defined timescales for contractor responses to responses to communications;
 - (iv) the form of documentation required under paragraph 3 immediately above;
 - (v) the relevant email details from time to time under paragraph 3 immediately above;
 - (vi) road safety audit invitation process under paragraph 7 below; and
 - (vii) the senior representation process under paragraph 14 below.
- (b) definition of the extents for the works areas between the highway boundary, the traffic management lead in tapers, the longitudinal coning and the end of the lead out tapers, zone of influence (being the area which is reasonably affected by those work areas), traffic management and diversion requirements and free recovery areas (as appropriate);
- (c) arrangements for the submission to the local highway authority of digital copies (including digital storage media) of all as-built drawings for the relevant work area including identification of any new limits of highway maintainable by the local highway authority in accordance with paragraph 11 of this Schedule;
- (d) where applicable, winter maintenance including anticipated winter treatments and severe weather arrangements to apply during the construction period and the maintenance period;
- (e) repair arrangements in relation to local highways directly affected by the construction of the authorised development;
- (f) where applicable, continuity of technology arrangements to apply during the construction period and the maintenance period;
- (g) arrangements for dealing with and recording incidents during the construction period and the maintenance period including appropriate provision of recovery vehicles; and
- (h) traffic management: during relevant works.

(2) Any agreement completed under sub-paragraph (1) must be complied with by the undertaker and continue in force until such time as a final certificate has been issued in respect of the relevant works.

Survey reinstatement

5. The undertaker must reinstate to the reasonable satisfaction of the local highway authority any part of the local highway which has been temporarily used for survey or investigation by the undertaker pursuant to article 19 (protective work to buildings), article 30 (temporary use of land for carrying out the authorised development) of this Order or any other power in this Order to the condition it was in on the date on which the survey or investigation began or such other condition as may be agreed in writing by the local highway authority.

Inspections and testing of materials

6.—(1) The undertaker must allow and facilitate any person acting on behalf of the local highway authority to access and inspect at all reasonable times any part of the works during their construction and before a final certificate has been issued in respect of the relevant works as is reasonably necessary to ensure that the works have been or are being carried out in accordance with the detailed design and to the appropriate standard.

(2) The undertaker must allow any person duly appointed by the local highway authority to enter upon and inspect any part of the works which are in, over, under, or adjacent to any local highway or may affect any highway or any property of the local highway authority, during the carrying out of the works, and the undertaker must give to such officer reasonable facilities for such inspection.

(3) Any testing reasonably requested by the local highway authority of materials used in any works must be carried out at the undertaker's expense and in accordance with the latest version of the Manual of Contract Documents for Highway Works (or any other testing specification agreed by the undertaker and the local highway authority acting reasonably).

(4) The local highway authority (and its contractor or its agent) may test (at the cost of the undertaker) all or any materials used or proposed to be used in any works and the undertaker must provide such information access and materials as is reasonably necessary to facilitate such testing.

(5) The undertaker must, as soon as is reasonably practicable and in any event within 10 business days, provide the local highway authority with a copy of all available test certificates and results relevant to the works that the local highway authority has requested ~~in writing~~ under paragraph (3).

(6) The local highway authority must as soon as is reasonably practicable and in any event within 10 business days, provide the undertaker with a copy of all available test results and certificates relevant to the works carried out under paragraph (4) that the undertaker has requested in writing.

Road Safety Audits

7.—(1) The undertaker must procure that an appropriately qualified RSA team (as defined in HPN039 or DMRB Volume 5 Section 2 Part 2 (GG 119), as advised by the local highway authority ~~(acting reasonably)~~, or any replacement or modification of that standard) undertakes road safety audit in accordance with the standard set out in HPN039 DMRB standard GG 119, as advised by the local highway authority ~~(acting reasonably)~~, for works which involve creation, alteration, expansion or other modifications of the local highway but not for works which consist only of trenchless installation beneath highways, and must provide copies of the reports of such audits to the local highway authority within 10 business days of their receipt by the undertaker.

(2) The local highway authority must be invited to participate in the road safety audit conducted under sub-paragraph (1).

(3) No works on a local highway must be commenced until a satisfactory Stage 1 and Stage 2 Road Safety Audit has been carried out and all ~~reasonable~~ recommendations raised by them or any exceptions are approved by the local highways authority (acting reasonably);

(4) Where the report of the stage 3 and 4 road safety audit identifies any recommended measures in respect of the local highway, the undertaker must carry out, at its own expense and to the reasonable satisfaction of the local highway authority, those measures identified as part of stage 3 and 4 audit ~~which the undertaker considers necessary (acting reasonably and for the avoidance of doubt any matters related to the health and safety will be considered as reasonable)~~ and which do not give rise to any new or materially different environmental effects in comparison with those identified in the environmental statement.

Defects in local highways constructed by the undertaker

8.—Until such time as a final certificate has been issued in respect of any works, the undertaker must make good any defects in the works constructed by the undertaker to the reasonable satisfaction of the local highway authority.

(1) The undertaker must submit to the local highway authority such details and information relating to making good any defects under sub-paragraph (1) as the local highway authority and the undertaker agree is reasonable in the circumstances.

Provisional Certificate

9.— Subject to sub-paragraph (2), when the undertaker considers that the works have reached completion so that they are available and safe for use by the public it must serve a provisional certificate on the local highway authority and must allow the local highway authority the opportunity to inspect the works to identify any defects or incomplete works (and the undertaker must give proper consideration to any representations and recommendations made by the local highway authority and make good such defects pursuant to paragraph 8 or complete incomplete works).

(1) The undertaker must not serve a provisional certificate on the local highway authority under sub-paragraph (1) until either—

- (a) a stage 3 road safety audit has been carried out in respect of the works in question in accordance with HPN039 or GG19 of DMRB, as advised by the local highway authority (~~acting reasonably~~), and in the opinion of the local highway authority any ~~reasonable~~ recommended measures identified in the audit and which the local highway authority considers to be necessary, have been completed; or
- (b) the local highway authority has been provided an opportunity to inspect the works and the undertaker has, in its opinion, completed any further works or measures required to address any safety deficiencies or defects identified as a result of the inspection.

(2) The local highway authority must issue to the undertaker, on request from the undertaker a counter-signed provisional certificate in relation to any part of the works, after completion of that part of the works once a stage 3 safety audit has been carried out in accordance with sub-paragraph (2).

(3) The undertaker will agree with the local highway authority (such agreement not to be unreasonably withheld or delayed) the date of opening of the works to the public and take appropriate steps to officially record the same.

Maintenance

10.— Subject to sub-paragraph (2), the undertaker must maintain the works throughout the maintenance period to a standard appropriate to their use by the public in accordance with the DMRB.

(1) Nothing in sub-paragraph (1) makes the undertaker responsible for the maintenance of any street works or maintenance works undertaken by any person other than the undertaker including a person on behalf of the undertaker or which does not form part of the authorised development during the maintenance period.

Final Certificate

11. The local highway authority must as soon as reasonably practicable and in any event within 25 business days of the last of sub-paragraph (a) to (f) of this sub-paragraph being satisfied issue a final certificate in respect of the works where—

- (a) the maintenance period has passed;
- (b) all incomplete works and identified defects requiring remediation under sub-paragraph 8(1) have been remedied to the local highway authority's reasonable satisfaction;
- (c) the undertaker has given the local highway authority a reasonable opportunity to inspect the relevant works in readiness for the issue of a final certificate and has given due consideration and acted accordingly in respect of any representations and recommendations made by the local highway authority in respect of the works;
- (d) the undertaker has provided the local highway authority with a health and safety file in respect of the relevant works conforming in all respects to the Construction (Design

and Management) Regulations 2015 to the local highway authority's reasonable satisfaction;

- (e) the undertaker has provided the local highway authority with traffic signal information (in so far as is relevant);
- (f) the undertaker has provided the local highway authority with street lighting information (in so far as is relevant);
- (g) in relation to any permanent works only (which for the avoidance of doubt will exclude any maintenance of the street works or maintenance works) :
 - (i) the undertaker has provided the local highway authority with records of earthworks including source and description of fill material description of sub grades in cut areas and test results;
 - (ii) the undertaker has provided the local highway authority with the structural maintenance manual to include soil reports records of materials tested and revised forms TA1 and design certificates;
 - (iii) the undertaker has provided the local highway authority with the appropriate maintenance manual or manuals ;
 - (iv) the undertaker has provided the local highway authority with as built drawings and such detailed information as the local highway authority has requested (acting reasonably) in relation to the relevant works as built;
 - (v) where there are structures required as part of the works the undertaker has provided the local highway authority with the appropriate construction compliance certificate or certificates;
 - (vi) the undertaker has provided the local highway authority with a complete set of hard copies and a digital copy containing a complete set of as-built drawings for the whole of the Works showing (inter alia) undertakers' plant and equipment such drawings to be to such scale or scales as the local highway authority may reasonably require for the purpose of subsequent maintenance and further works
 - (vii) the undertaker has provided the local highway authority with a plan showing edged red the land added to the local highway as public highway and
 - (viii) any drains which the local highways authority consider should be constructed to dispose of soil and surface water drainage in connection with the relevant works and in order to make them appropriate for public use have been constructed.

(2) The issue of a final certificate by the local highway authority amounts to an acknowledgment by the relevant local highway authority that the construction, alteration or diversion of a highway has been completed to its reasonable satisfaction for the purposes of article 12 (construction and maintenance of new or altered highway) of this Order.

Emergency Work

12. Nothing in this Part of this Schedule prevents the local highway authority from carrying out any work or taking such action as deemed appropriate forthwith without prior notice to the undertaker in the event of an emergency or danger to the public.

Land interests

13. Following the issuing of the final certificate under paragraph 11 in respect of any part of the local highway, the undertaker must, if requested by the local highway authority, in respect of a local highway which is to be maintainable by the local highway authority following, and as a result of, the completion of those works execute and complete a transfer to the local highway authority at nil consideration and at the cost of the undertaker of any land and rights which have been compulsorily acquired or voluntarily acquired (following a written request by the local highway authority) under this Order and which are necessary for the maintenance and operation of a local highway.

Disputes

14.—(1) In the event of any disagreement between the undertaker and the local highway authority arising out of or in connection with this Part of this Schedule which requires the agreement of the undertaker and the local highway authority jointly or the approval of the local highway authority and which cannot be resolved within 10 business days of the disagreement arising under clauses 3, 4, 5, 6 and 8, either party may request a review of the issue in disagreement by the parties giving notice in writing to their senior representatives.

(2) The senior representatives will consider any such request and use all reasonable endeavours in good faith to reach agreement to resolve any disagreement.

(3) Where agreement is not reached by the senior representatives within 20 business days of a request being made under sub-paragraph (1), the disagreement may be determined by arbitration in accordance with article 48 (arbitration) of this Order.

Drainage Authorities

The below shows the agreed drafting in plain text with the authority's amends sought shown as tracked changes. The text in a box has been sent to the authority but comments have not yet been received.

PART [TBC]

For the protection of drainage authorities

1. The provisions of this Part have effect for the protection of the drainage authority unless otherwise agreed in writing between the undertaker and the drainage authority.

2. In this Part of this Schedule—

“construction” includes execution, placing, altering, replacing, relaying and removal and excavation and “construct” and “constructed” is to be construed accordingly;

“drainage authority” means in relation to an ordinary watercourse, the drainage board concerned within the meaning of section 23 (prohibition on obstructions etc. in watercourses) of the Land Drainage Act 1991⁽⁴⁾;

“drainage work” means any ordinary watercourse and includes any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage or flood defence in connection with an ordinary watercourse within the jurisdiction of the drainage authority;

“emergency” means a situation where, if the relevant action is not taken, there will be adverse health, safety, security or environmental consequences;

“independent review” means a review carried out by a third party confirming the findings of the undertaker in the assessment of the impact of the proposed specified work on flood risk;

“ordinary watercourse” has the meaning given by section 72 (interpretation) of the Land Drainage Act 1991;

“plans” includes any information reasonably required by the drainage authority including location details, grid references, sections, drawings, specifications, assessments and method statements; and

“specified work” means so much of any work or operation authorised by this Order as is in, on, under over or within 9 metres of a drainage work and which comprises any of the following works carried out in relation to or which may affect any ordinary watercourse—

- (a) the erection of any mill, dam, weir, or other similar obstruction to the flow of an ordinary watercourse, or raising or otherwise altering any such obstruction;
- (b) the construction or installation of a bridge or other structure;
- (c) the erection of a culvert in an ordinary watercourse;
- (d) the alteration of an ordinary watercourse or a culvert or other form of drainage infrastructure in a manner that would be likely to affect the flow of an ordinary watercourse

3.—(1) Before commencing construction of a specified work, the undertaker must submit to the drainage authority plans of the specified work, including an independent review and such further particulars available to it as the drainage authority may within 21 days of the submission of the plans reasonably request.

(2) The undertaker must not commence construction of the specified work until approval, unconditionally or conditionally, has been given as provided in this paragraph.

(3) A specified work must not be constructed except in accordance with such plans as may be approved in writing by the drainage authority or determined under paragraph 12.

⁽⁴⁾ 1991 c. 59.

- (4) Any approval of the drainage authority required under this paragraph—
- (a) must not be unreasonably withheld or delayed;
 - (b) is deemed to have been given if it is neither given nor refused within 56 days of the submission of the plans for approval, or submission of further particulars (where required by the drainage authority under sub-paragraph (1)) whichever is the later; and
 - (c) may be given subject to such reasonable requirements as the drainage authority may make for the protection of any drainage work, for the protection of any ordinary watercourse or for the prevention of flooding.
- (5) Any refusal under this paragraph must be accompanied by a statement of the reasons for refusal.

(6) “reasonable” in this paragraph means appropriate in the circumstances and, for avoidance of doubt any recommendation or requirement from the drainage authority relating to health and safety shall be considered reasonable;

4. Without limiting paragraph 3, the requirements which the drainage authority may make under that paragraph include conditions requiring the undertaker at its own expense to construct such protective works, whether temporary or permanent, during the construction of the specified work (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 by reason of any specified work; or
- (b) to secure that the efficiency of any drainage work for flood defence and land drainage purposes is not impaired, and that the risk of flooding is not otherwise increased, by reason of any specified work.

5.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the drainage authority under paragraph 4, must be constructed—

- (a) without unreasonable delay 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 drainage authority, and an officer of the drainage authority is entitled to watch and inspect the construction of such works.

(2) The undertaker must give to the drainage authority—

- (a) not less than 14 days’ notice in writing of its intention to commence construction of any specified work; and
- (b) notice in writing of its completion not later than 7 days after the date of completion.

(3) If the drainage authority reasonably requires, the undertaker must construct all or part of the protective works so that they are in place before the construction of the specified work to which the protective works relate.

(4) If any part of a specified work or any protective work required by the drainage authority is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the drainage authority may by notice in writing require the undertaker at the undertaker’s expense to comply with the requirements of this Part of this Schedule or (if the undertaker so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is agreed, to restore the site to its former condition to such extent and within such limits as the drainage authority reasonably requires.

(5) Subject to sub-paragraph (6) and paragraphs 9 and 10, if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (4) is served on the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and subsequently to make reasonably expeditious progress towards their implementation, the drainage authority may execute the works specified in the notice and any reasonable expenditure incurred by it in so doing is recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the drainage authority must not except in an emergency exercise the

powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 12.

6.—(1) Subject to sub-paragraph (5), the undertaker must from the commencement of the construction of the specified work maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation on land held by the undertaker for the purpose of or in connection with the specified work, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the drainage authority, the drainage authority may by notice in writing require the undertaker to repair and restore the work, or any part of the work, or (if the undertaker so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the specified work and restore the site to its former condition, to such extent and within such limits as the drainage authority reasonably requires.

(3) Subject to sub-paragraph (4) and paragraphs 9 and 10, if, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the drainage authority may do what is reasonably necessary for such compliance and may recover any reasonable expenditure reasonably incurred by it in so doing from the undertaker.

(4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the drainage authority must not except in a case of emergency exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined in accordance with paragraph 12.

(5) This paragraph does not apply to—

- (a) drainage works which are vested in the drainage authority, or which the drainage authority or another person is liable to maintain and is not prevented by this Order from so doing; and
- (b) any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule provided that any obstruction is removed as soon as reasonably practicable.

7. Subject to paragraphs 9 and 10 and paragraph 6(5)(b), 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 or land drainage is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by the undertaker to the reasonable satisfaction of the drainage authority and, if the undertaker fails to do so, the drainage authority may make good the impairment or damage and recover from the undertaker any expenditure incurred by the drainage authority in so doing from the undertaker.

8. If by reason of the construction of the specified work the drainage authority's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the undertaker must provide such alternative means of access that will allow the drainage authority to maintain the flood defence or use the equipment no less effectively than was possible before the obstruction within 24 hours of the undertaker becoming aware of such obstruction.

9. The undertaker must make reasonable compensation for costs, charges and expenses which the drainage authority may reasonably incur—

- (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 drainage authority under this Part of this Schedule; and
- (c) in the carrying out of any surveys or tests by the drainage authority which are reasonably required in connection with the construction of the specified works.

10.—(1) Without limiting the other provisions of this Part, the undertaker must make reasonable compensation to the drainage authority from costs and losses, which may be reasonably incurred or suffered by the drainage authority (~~but always excluding any consequential loss or indirect loss suffered by the drainage authority~~) by reason of—

- (a) any damage to any drainage work;
- (b) any raising or lowering of the water table in land adjoining the authorised development or any sewers, drains and watercourses; or
- (c) any flooding or increased flooding of any such lands,
caused by the construction of any specified work or any act or omission of the undertaker, its contractors, agents or employees whilst engaged upon the construction of the specified work.

11. The drainage authority must give to the undertaker reasonable notice of any such claim or demand. The undertaker may at its own expense conduct all negotiations for the settlement of the same and any litigation that may arise therefrom. No settlement or compromise may be made to such claim or any admission made which might be prejudicial to the claim without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.

12. The drainage authority must take such steps as are reasonable in the circumstances to mitigate in whole or in part and to minimise any costs, expenses, loss, claims, damages, demands, proceedings and penalties to which the indemnity under paragraph 10 applies where it is within the drainage authority's reasonable gift and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of the drainage authority's control. If reasonably requested to do so by the undertaker, the drainage authority must provide a written explanation of how any claim has been mitigated or minimised or where mitigation or minimisation is not possible an explanation as to why.

13. The drainage authority must, at the request of the undertaker, afford all reasonable assistance for the purpose of contesting any such claim or action and is entitled to be repaid its reasonable expenses reasonably incurred in so doing.

14. The fact that any act or thing may have been done by the drainage authority on behalf of the undertaker or in accordance with a plan approved or deemed to have been approved by the drainage authority or in accordance with any requirement of the drainage authority or under its supervision does not, subject to paragraph 15, excuse the undertaker from liability under the provisions of sub-paragraph (1) of paragraph 10 unless the drainage authority 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.

15. Nothing in sub-paragraph (1) of paragraph 10 imposes any liability on the undertaker with respect to any damage or loss to the extent that it is attributable to the act, neglect or default of the drainage authority, its officers, servants, contractors or agents.

16. The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved or deemed to be approved by the drainage authority, or to its satisfaction, or in accordance with any directions or award of an arbitrator, does not relieve the undertaker from any liability under this Part of this Schedule.

17. Any dispute arising between the undertaker and the drainage authority under this Part of this Schedule, if the parties agree, is to be determined by arbitration under article 48 (arbitration), but otherwise is to be determined by the Secretary of State for Energy Security and Net Zero on a reference to them by the undertaker or the drainage authority, after notice in writing by one to the other.

Port of London Authority

The below shows the Applicant's drafting in plain text with the PLA amends sought shown as tracked changes.

PART [TBC]

For the protection of the Port of London Authority

1. In this Part

"Area of Interest means the area shown shaded in yellow on the Deep Water Route Cable Installation Area (Future Dredging depths) plan encompassing the Deep Water Routes;

"cable burial risk assessment" means the cable burial risk assessment appended to the cable specification and installation plan;

"cable specification and installation plan" means the cable specification and installation plan together with the cable burial risk assessment to be approved under condition 13(1)(g) of the deemed marine licence for the transmission assets in Schedule 11;

"construction" includes execution, placing, altering, replacing, relaying, removal, renewal works of maintenance and decommissioning, in its application to a specified work which includes or comprises any operation, means the carrying out of that operation, and "construct" and "constructed" are to be construed accordingly;

"commencement" for the purpose of this Part of Schedule 9 means the carrying out of any authorised development and monitoring activities;

"Deep Water Routes" mean the Sunk and Trinity deep water routes;

"installation" has the same meaning as construction and installed is to be construed accordingly

"maintain" has the same meaning as in Article 2 save that it includes monitoring within the Area of Influence and maintenance shall be construed accordingly;

"navigation and installation plan" means the navigation and installation plan to be approved under condition 13(1)(j) of the deemed marine licence for the transmission assets in Schedule 11;

"operation and maintenance plan" means the operation and maintenance plan to be approved under condition 4 of the deemed marine licence for the transmission assets in Schedule 11;

"plans" includes navigational risk assessments, plans, sections, elevations, drawings, specifications, programmes, construction methods and descriptions including, where applicable, relevant hydraulic information as may be reasonably requested by the PLA;

"specified work" means Work No, 2(c), and any other part of the offshore works forming part of the authorised development (which for this purpose includes the maintenance and decommissioning of any part of the authorised development); and,

"PLA" means the Port of London Authority.

Application

2 The following provisions, unless otherwise agreed in writing between the undertaker and the PLA, have effect, for the protection of the PLA in relation to the construction of Work No.2(c) to be constructed and operated as part of the authorised development [and any other specified work](#).

Consultation and notice

3 (1) The undertaker will ~~consult~~ [prior to commencement of Work no 2\(c\), obtain the approval in writing of](#) the PLA on:

- (a) the cable specification and installation plan (in so far as that plan relates to any specified work within [or which may affect](#) the Area of Interest) before any application for approval of that plan may be submitted by the undertaker in compliance with condition 13 of the deemed marine licence for the transmission assets in Schedule 11 and any revisions arising from such application; and
- (b) a navigation and installation plan (in so far as that plan relates to any specified work within [or which may affect](#) the Area of Interest) before any application for approval of that plan may be submitted by the undertaker in compliance with condition 13 of the deemed marine licence for the transmission assets in Schedule 11 and any revisions arising from such application; ~~and~~
- [\(c\) the operation and maintenance plan \(in so far as that plan relates to any specified work within or which may affect the Area of Interest\) before any application for approval of that plan may be submitted by the undertaker in compliance with condition 4 of the deemed marine licence for the transmission assets in Schedule 11 and any revisions arising from such application](#)

(2) The undertaker will consult the PLA on the proposed activities and programme for any pre-construction monitoring, construction monitoring, post construction monitoring and related reporting within the Area of Interest no less than 20 business days before such survey work is programmed to commence. The undertaker must have regard to any request made by the PLA for reasonable amendment to the [proposed activities](#) or programme, which request must be made to the undertaker within 5 business days of receipt of the details of the proposed activities and programme.

(3) The undertaker must notify the PLA of the final planned programme for any ~~survey work to be undertaken under this Order~~ [pre-construction monitoring, construction monitoring, postconstruction monitoring](#) within the Area of Interest no less than 5 business days before such survey work is programmed to begin.

(4) The undertaker will consult the PLA on any application for marine licensing for the ~~disposal~~ [clearance](#) of unexploded ~~ordnance~~ [ordnance](#) within [or which may affect](#) the Area of Interest before such applications are submitted to the MMO. The undertaker must have regard to any request made by the PLA for reasonable amendment to the proposed application, which request must be made to the undertaker within 10 business days of receipt of the details of the proposed application.

(5) The undertaker must notify the PLA of the final programme for any clearance of unexploded ordnance to be undertaken within the Area of Interest no less than 20 business days before such disposal is programmed to begin.

(6) The undertaker will consult the PLA on the activities and programme for any specified work to be undertaken under this Order which is not covered by the cable specification and installation plan and which is within [or may affect](#) the Area of Interest no less than 20 business days before such specified work is programmed to commence. The undertaker must have regard to any request made by the PLA for reasonable amendment to the activities or programme.

(7) The undertaker must notify the PLA of the final method statement and programme for any for any specified work to be undertaken under this Order which is not covered by the cable specification and installation plan and which is within [or may affect](#) the Area of Interest no less than 5 business days before such work is programmed to begin.

Cable Specification and Installation Plan

4. The cable specification and installation plan referred to in paragraph 3 must be informed by a cable burial risk assessment, and set out for Work No.2(c), in so far as it applies to the Deep Water Routes:

- (a) that any part of Work No.2(c), any associated development or ancillary works located within the ~~Area of Interest~~ [Sunk and Trinity Deep Water Routes](#), as shown shaded yellow on the

Deep Water Route Cable Installation Area (Future Dredging depths) plan must be installed ~~at or~~ placed and thereafter maintained, operated and decommissioned to a level which would not impede the dredging of those parts of the Sunk and Trinity Deep Water Routes:

- (i) shown shaded in yellow and outlined in a bold black line (and labelled Sunk Area A (22m CD)) to a level of 22 metres below Chart Datum;
- (ii) shown shaded in yellow and outlined in a blue dotted line (and labelled Trinity (22m CD)) to a level of 22 metres below Chart Datum; and
- (iii) shown shaded in yellow and cross hatched in orange (and labelled Sunk Area B (19m CD)) to a level of 19 metres below Chart Datum.;
- (iv) and in all cases (i) to (iii) makes allowance for an 'over-dredge' tolerance of 0.5 metres in addition to the stated depths attributable to standard dredging methodology.
- (b) The proposed cable installation methods and measures for management of construction risks;
- (c) ~~Any~~Additional cable burial depths required or any other forms of cable protection proposed including type, volume and locations;
- (d) During construction of the cables and cable protection in the Area of Interest arrangements for the consultation of the PLA in a timely manner, on such matters regarding those works as the PLA may reasonably request including arrangements for providing the PLA with a point of contact for continuing liaison and co-ordination throughout the construction of these works.
- (e) The proposed programme of work for cable installation and arrangements for notification of any changes to the programme to the PLA;
- (f) Monitoring The programme and methodologies for monitoring and the arrangements ~~and for~~ the results of these surveys or other construction evidence being made available to the PLA within 10 business days of the undertaker receiving reports of the survey results; ~~together with methods or evidence to demonstrate compliance with the depths referred to in sub paragraph a) of this paragraph~~
- ~~(f)~~(g) Methods and timescales to rectify any issues which may compromise the level referred to in sub paragraph a) of this paragraph 4.
- ~~(g)~~(h) A requirement for a process (subject to paragraphs 8 and 9) and timescales (both the undertaker and PLA acting reasonably) for cable re-installation should the level ~~of that~~ the cable is such that the under keel clearance specified in Outline CSIP cannot be achieved over the lifetime of the authorised development.

Monitoring

5. If following the results of any geophysical surveys carried out using multi-beam echo sounder survey (MBES), it is confirmed ~~that~~ cable exposure which has resulted the cables or reduction in navigable depth has occurred within the Area of Interest, the undertaker will notify the PLA as soon as reasonably practicable and in any event no later than 2 business days after the undertaker confirms any exposure has occurred.

6. The PLA must notify the undertaker of any potential cable exposure that is identified by the PLA in the relation to the Area of Interest as soon as reasonably practicable.

Remediation

7. Where, following the installation of cables forming Work No. 2(c) in relation to the Area of Interest it is identified by the undertaker (who shall notify the PLA as soon as reasonably practicable of this fact) and in any ~~event~~ effect within 2 business days) or, following inspection by the PLA, it is identified by the PLA (and the same is notified to the undertaker as soon as reasonably practicable), that the level of cable is such that the paragraph 4(a) has not been achieved or at any time following installation or maintenance the cable has moved such that the requirements of paragraph 4(a) are no longer being achieved, then, unless otherwise agreed in writing with the PLA, the undertaker is required to carry out remediation works as specified in the cable specification and installation plan subject to paragraph (8) in relation to the Deep Water Routes.

8. Unless otherwise agreed in writing with the PLA, the undertaker will carry out the following arrangements for the carrying out the remediation works:

(1) the undertaker will re-bury the cables to the required specification to achieve the requirements of paragraph 4(a); and

(2) Following the completion of the works in sub-paragraph (1), if it is identified by the undertaker or the PLA (following inspection) that the required specification is not achieved, then the undertaker will remove the cable without unreasonable delay and thereafter relay a new cable pursuant to an updated cable specification and installation plan and an updated operation and maintenance plan, which updated cable specification and installation plan and updated operation and maintenance plan specifically identifies and addresses why the previous cable burial was not successful, how that has been addressed and what measures are to be used in relaying the cable to prevent the failure reoccurring.

(3) The ~~undertaker will consult the PLA on the draft~~ updated cable specification and installation plan and updated operation and maintenance plan required under sub-paragraph (2) will be submitted to the PLA for approval under paragraph 3, and the provisions of both this paragraph and paragraph 54 will apply to that updated cable specification and installation plan and updated operation and maintenance plan.

(4) The steps in this paragraph shall be repeated until the requirement in paragraph 4(a) is achieved or the cable is permanently removed from the Area of Interest.

Provision of as built details

9. As soon as reasonably practicable following the completion of the installation of cables forming Work No. 2(c) and after any maintenance of the same, the undertaker must provide (on a strictly confidential basis) to the PLA as built drawings of Work No. 2(c) in a form and scale to be agreed between the undertaker and the PLA to show the position, depth and any cable protection installed as part of Work No 2(c) in relation to the Deep Water Routes provided that the PLA must not disclose (without the written consent of the undertaker) any information that has been provided by the undertaker to the PLA on a confidential basis or which is marked as commercially sensitive and must hold such information on a confidential basis only, except that the PLA may provide the information to contractors and agents acting on its behalf (including but not limited to contractors engaged to carry out dredging operations) provided that such agents and contractors are required by the PLA to treat such information as confidential.

Indemnity

(1). The undertaker will pay to the PLA its proper and reasonable legal costs, professional fees and disbursements incurred in connection with reviewing the details submitted to the PLA pursuant to this Part [] of Schedule [].

(2) The undertaker is responsible for and must make good to the PLA all financial costs, charges, damages losses or expenses which may be incurred reasonably or suffered by the PLA by reason of—

(3) the construction or operation of Work no 2(c), any specified work or its failure or a failure to adhere to the requirements of the onshore protective provisions in this part of schedule 9;

(4) any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged on the construction or operation of a specified work or Work no 2(c) or with any failure, and the undertaker must indemnify the PLA from and against all claims and demands arising out of or in connection with a specified work, Work no 2(c) or any such failure, act or omission or any failure to adhere to the requirements of the onshore protective provisions in this part[] of schedule [].

(5) The fact that any act or thing may have been done—

(a) by the PLA on behalf of the undertaker; or

(b) by the undertaker, its employees, contractors or agents in accordance with plans or particulars submitted to or modifications or conditions specified by the PLA, or in a manner

approved by the PLA, or under its supervision or the supervision of its duly authorised representative, does not (if it was done or required without negligence on the part of the PLA or its duly authorised representative, employee, contractor or agent) excuse the undertaker from liability under the provisions of this paragraph.

(6) The PLA must give the undertaker reasonable notice of any such claim or demand as is referred to in sub-paragraphs (1) and (2) and no settlement or compromise of it is to be made without the prior consent of the undertaker.

Transfer of the benefit

~~4011~~ The undertaker must within 7 days after the completion of any sale, agreement or other transaction under article 7 (Benefit of the Order) in relation to which any powers, rights and obligations of the undertaker are transferred to another party, notify the PLA in writing, and the notice must include particulars of the other party to the transaction under article 7, the general nature of the transaction and details of the extent, nature and scope of the works or functions sold, transferred or otherwise dealt with.

Disputes

~~4412~~ Any dispute arising between the undertaker and the PLA under this Schedule is to be escalated in the first instance to senior representatives from the PLA and the undertaker, and the PLA and undertaker must seek to resolve the dispute through a meeting between the parties promptly and in any event within 10 business days, Where following escalation the dispute is not resolved-, it is to be determined by arbitration as provided in article 48 (arbitration) of this Order.



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