

# Gate Burton Energy Park EN010131

Draft Statement of Common Ground between the Applicant and the Environment Agency  
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Planning Act 2008  
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Gate Burton Energy Park Limited

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# 1. Introduction

## 1.1 Introduction

- 1.1.1 This Statement of Common Ground (SoCG) has been prepared to accompany an application made to the Secretary of State for the Department for Business, Energy & Industrial Strategy for a Development Consent Order (the Application) under section 37 of the Planning Act 2008 (PA 2008) for the proposed Gate Burton Energy Park (the Scheme). The Application is submitted by Gate Burton Energy Park Ltd (the Applicant) which is a subsidiary/group company of Low Carbon Ltd ('Low Carbon'). Low Carbon is a privately-owned UK investment and asset management company specialising in renewable energy. **The Funding Statement [EN010131/APP/6.7]** provides further information on the Applicant and Low Carbon.
- 1.1.2 This SoCG has been prepared by (1) Gate Burton Energy Park Ltd as the Applicant and (2) the Environment Agency (EA). Together the Applicant and the EA are 'the parties' in this SoCG.
- 1.1.3 The EA is a non-departmental public body, the purpose of which is 'to protect or enhance the environment taken as a whole', so as to contribute to 'the objective of achieving sustainable development' (Environment Act, 1995). The Environment Agency is a prescribed consultee in respect of all DCO applications that are likely to affect land in England. Annex D of Advice Note 11 'Working with Public Bodies' produced by the PINS sets out in detail the role of the EA in the DCO process, including the level of input and agreement that might be expected from the EA. The Applicant has consulted the EA throughout development of the Scheme.
- 1.1.4 The EA's role covers various topics including:
- managing the risk of flooding from main rivers, reservoirs and the sea;
  - regulating major industry and waste;
  - treatment of contaminated land;
  - water quality and resources;
  - fisheries;
  - inland river, estuary and harbour navigation; and
  - conservation and ecology of the aquatic environment.
- 1.1.5 It can be taken that any matters not specifically referred to in the Issues chapter of this SoCG are not of material interest or relevance to the EA representations and therefore have not been considered in this document.

- 1.1.6 This SoCG has been produced to confirm to the Examining Authority where agreement has been reached between the parties, where agreement has not been reached (and that is the parties' final position) and where discussions are still ongoing.
- 1.1.7 **This version of the SoCG has been prepared for submission with the Application to document discussions between the parties to date. Therefore this version does not yet incorporate comments from Environment Agency. A draft version was issued to the Environment Agency on 24 January 2023. This document will continue to be revised and updated as discussions progress during the Pre-Examination and Examination periods as required.**

## 1.2 The Scheme

- 1.2.1 Gate Burton Energy Park is a proposed solar photovoltaic electricity generating facility. The Application is for development consent to construct, operate, maintain and decommission ground mounted solar photovoltaic (PV) panel arrays, on-site battery storage and associated infrastructure. Associated infrastructure includes, but is not limited to, access provision and an underground 400kV electrical connection of approximately 7.5km to the National Grid Substation at Cottam Power Station. A detailed description of the Scheme is included in **Chapter 2: The Scheme** of the Environmental Statement [EN010131/APP/3.1].
- 1.2.2 Following engagement with the EA, the following changes have been made to the Scheme:
- Precautionary easements of 10 m have been applied around all watercourses (except for where watercourse crossings are required), increasing to 16 m in the vicinity of flood defences.
  - The layout has been amended in the north eastern corner with panels removed from fluvial flood zones associated with Padmoor Drain to ensure a sequential approach has been taken to the location of infrastructure within the site.

## 1.3 Format of Document and Terminology

- 1.3.1 Section 2 summarises the issues that are 'agreed', 'not agreed' or are 'under discussion'. 'Not Agreed' indicates a final position where the parties have agreed to disagree, 'Agreed' indicates where the issue has been resolved.
- 1.3.2 A full record of engagement between the parties is provided in Appendix A.

## 2. Areas of Discussion between the Parties

Ref.	Document	Topic	EA Position	Applicant Position	Status
1.1	EA Stat Con Response:	Flood Risk	<p>Following review of PEIR, recommend measures are incorporated within the development proposals as follows:</p> <ul style="list-style-type: none"> <li>• Suitable easements to development are established around all watercourses and any cable crossing points agreed with the relevant parties, this is to include main rivers, ordinary watercourses and IDB assets.</li> <li>• Critical infrastructure, panels and structures within the development should be sequentially located to avoid areas of high fluvial flood risk and raised to a sufficient height to avoid floodwater. These should be preferentially located within flood zone 1, an area at low probability of flooding. All services within areas at risk should be designed where possible to be flood resilient/water compatible.</li> </ul>	<p><b>Chapter 9: Water Environment [EN010131/APP/3.1]</b> and accompanying appendices have been updated for the Environmental Statement and reflect the following:</p> <ul style="list-style-type: none"> <li>• Precautionary easements of 10 m have been applied around all watercourses (except for where watercourse crossings are required) to take account of minor differences between required easements from relevant parties. These have been increased to 16 m in the vicinity of flood defences. It is proposed that the easement (or buffer) is measured from the centre line of the watercourse as determined from Ordnance Survey mapping (with the exception of the River Trent). This avoids issues with determining the watercourse edge in situations where this varies considerably as flow rate changes.</li> <li>• A sequential approach has been taken in locating panel layout for all sources of flooding to avoid areas of flood risk. The BESS Compound have been sequentially located to Flood Zone 1. The layout has been amended in the north eastern corner with panels removed from fluvial flood zones associated with Padmoor Drain.</li> <li>• Panels are raised a minimum of 800 mm above ground level to avoid floodwater.</li> <li>• Noted regarding site/boundary fencing, this will be accounted for at detailed design.</li> </ul>	Agreed

Ref.	Document	Topic	EA Position	Applicant Position	Status
1.2	EA Stat Con Response:	Flood Risk (Cable Route)	<p>• Any site/boundary fencing should be designed to prevent minor obstructions occurring allowing the continuation of flow routes (if present) unimpeded through the site.</p> <p>Construction methods for undertaking the works are yet to be fully confirmed, however directional drilling may be a preferred option in laying the cabling along its required route. It is advised that the following recommendations are adhered to in conjunction with the necessary safe working practices.</p> <p>We have the following initial recommendations:</p> <ul style="list-style-type: none"> <li>• That the launching and landing areas for the cabling installation works are a minimum of 16 metres from the toe of the defences to limit the impact of the works.</li> <li>• Permanent hazard markers on both banks of the main river are erected.</li> <li>• All excavated material not re-used on the site of the works is removed from the floodplain.</li> </ul>	<p>The recommendations are noted and have been incorporated into locations for launch/exit pits (see <b>Appendix 2-B: Construction Method Statement [EN010131/APP/3.3]</b>)</p> <p><b>Chapter 9: Water Environment [EN010131/APP/3.1]</b> and the Outline Design Principles document <b>[EN010131/APP/2.3]</b> incorporate a requirement to include a minimum of 16 m distance from launch/landing pits to the toe of defences to limit impact of the works, and all excavated material not re-used will be removed from the floodplain.</p> <p>Discussion and early engagement with the PSO team will be undertaken regarding management and mitigation against disturbance of the bed and banks of the main river (River Trent). A <b>Framework CEMP</b> is included in in the DCO application <b>[EN010131/APP/7.3]</b> and outlines mitigation for the water environment based on best practice. This is secured through a requirement of the DCO and will be developed into a detailed CEMP post consent.</p>	Agreed

Ref.	Document	Topic	EA Position	Applicant Position	Status
			The works seek to manage and mitigate against disturbance of the bed and banks of the main river - we advise further discussion and early engagement with our Partnerships and Strategic Overview (PSO) team in relation to this. The East Midlands PSO team can be contacted via EMD_PSO@environment-agency.gov.uk		
1.3	EA Stat Con Response:	Environmental Permitting	<p>The Environmental Permitting (England and Wales) Regulations 2016 require a permit or exemption to be obtained for any activities which will take place:</p> <ul style="list-style-type: none"> <li>• on or within 8 metres of a main river (16 metres if tidal)</li> <li>• on or within 8 metres of a flood defence structure or culverted main river (16 metres if tidal)</li> <li>• on or within 16 metres of a sea defence</li> <li>• involving quarrying or excavation within 16 metres of any main river, flood defence (including a remote defence) or culvert</li> <li>• in a floodplain more than 8 metres from the riverbank, culvert or flood defence structure (16 metres if it's a tidal main river)</li> </ul>	<p>A precautionary approach to watercourse easement (or buffers) for the Scheme has been included within <b>Chapter 9: Water Environment [EN010131/APP/3.1]</b> to reflect relevant parties' requirements. These have been set to 10 m to take account of minor differences between required easements from relevant parties (EA, Lead Local Flood Authority, Internal Drainage Board). These have been increased to 16 m in the vicinity of flood defences on River Trent.</p> <p>The advice regarding environmental permitting is noted. Requirements for permits are outlined in <b>Chapter 9: Water Environment [EN010131/APP/3.1]</b> of the Environmental Statement.</p> <p>The Applicant seeks by way of Article 6(h) in the draft DCO to disapply the requirement for environmental permits under Regulation 12 of the Environmental Permitting Regulations (England and Wales) 2016, which are ordinarily to be granted by the EA. The Applicant also seeks disapplication of the requirements for abstraction licences and impounding licences under the Water Resources Act 1991 by way of Article 6(d) and Article 6(e) in the draft DCO. In order for Article 6(h), (d) and (e)</p>	<p>Agreed</p> <p>Under discussion</p>



Ref.	Document	Topic	EA Position	Applicant Position	Status
			and you don't already have planning permission.	of the draft DCO to take effect, the Applicant requires the consent of the EA to include such provisions under s150 Planning Act 2008.	
1.4	EA Stat Con Response:	Water Framework Directive	EA are happy with the detail provided around the WFD and that a relevant WFD assessment will be undertaken.	<p><b>Appendix 9-A – WFD Assessment [EN010131/APP/3.3]</b> accompanies <b>Chapter 9: Water Environment [EN010131/APP/3.1]</b>.</p> <p>Since the WFD Screening provided within the PEI Report, the 'worst case' for assessment in regard to watercourse crossings has been updated. This is reflected in the full <b>Appendix 9-A – WFD Assessment [EN010131/APP/3.3]</b> within the ES. As a worst case it is assumed for the assessment of water quality that all watercourses that are crossed for access tracks within the Solar and Energy Storage Park will be culverted. These are expected to require 17 watercourse crossings, 10 of which are new crossings and seven are existing culverted crossings. It should be noted that the crossing locations will be fixed at detailed design and so the number required may change. Open span crossings may be used in some instances. Nonetheless, the assessment presents the worst case of 10 new culverted crossings. Where works are required to the seven existing culverts, this is assumed to be a maximum extension of up to 2m in each case.</p> <p>For the assessment of water quality, the access track for the Grid Connection Corridor is assumed to require culverting of all watercourses that are crossed for cable installation (with the exception of the River Trent) for a five year period as a worst case.</p> <p>During construction works, it is assumed that flow would be maintained by damming and over pumping. The culvert design in all cases will aim to minimise changes in alignment and</p>	To be discussed

Ref.	Document	Topic	EA Position	Applicant Position	Status
				<p>length as much as is feasible and will be oversized to allow a naturalised substrate to form. Length for length equivalent watercourse enhancements have been committed to within the DCO for all culverts, and this will be described in a WFD Mitigation and Enhancement Strategy that is a requirement of the DCO.</p> <p>There are six watercourse crossings that are outside of the avoidance areas that could require open cut installation techniques. In all cases a pre-works morphology survey of the channel of each watercourse to be crossed will be undertaken prior to construction to ensure that there is a formal record of the condition of each watercourse prior to commencement. For these crossings it is assumed again that water flow would be maintained during the works by damming and over pumping. Once the watercourses are reinstated, silt fences, geotextile matting or straw bales should be used initially to capture mobilised sediments until the watercourse has returned to a settled state. It will be a requirement that the watercourses are reinstated as found and water quality monitoring will be undertaken prior to, during, and following on from the construction activity. Regular observations of the watercourses will also be required post-works during vegetation re-establishment of the banks, especially following wet weather, to ensure that no adverse impacts have occurred. These requirements will be described in the Water Management Plan (WMP), which will be a technical appendix of the final CEMP.</p>	
1.5	EA Stat Con Response:	Biodiversity	Outstanding surveys to be completed but happy with surveys proposed. Certain comments regarding the proposal which the Environment Agency would like considered:	1) Surveys for riparian mammals have been undertaken within watercourses where impacts are predicted and, in consideration of the potential for Otter holts, has included adjacent woodland, scrub and mature trees that may be used by Otter. Construction within the Grid Connection Corridor, including any internal access tracks, will utilise	

Ref.	Document	Topic	EA Position	Applicant Position	Status
			<p>1) Otter surveys need to include assessment of adjacent woodland for otter holt potential as well as just species presence along the watercourses in question. Where there are works on the banks of watercourses there needs to be a specific attention with regards to water vole. Displacement techniques may be required during construction phase, but this should be highlighted sooner rather than later.</p> <p>2) Biodiversity Net Gain (BNG) needs to meet 10% as a minimum, currently there is no plan with regards to BNG. We would like to see improvement of watercourses in the area for flora and fauna, particularly water vole which may include the management of invasive species which have a major impact on water vole populations but also habitat improvements in ditches and other watercourses.</p> <p>3) The loss of marsh land on site is a potentially significant impact from the project. Can this area be left and buffered as watercourses have been?</p>	<p>non-intrusive methods (including offsets from the banks of the watercourses to protect riparian habitats) for the majority of watercourses to avoid physical disturbance to watercourses, particularly those where the habitat quality is suitable for riparian mammals, or where evidence of these species has been recorded. As such, no displacement is required for riparian mammals. Pre-commencement surveys will be used to determine baseline conditions remain the same and update mitigation measures accordingly.</p> <p>2) A BNG assessment has been undertaken to quantify the overall effect of the Scheme upon the site's biodiversity value. Calculations consider the level of proposed habitat loss, retention, enhancement and/or creation which could be delivered by the Scheme and are measured using DEFRA's Biodiversity Metric 3.1. The <b>BNG assessment</b> is provided as part of the Application [EN010131/APP/7.9].</p> <p>3) Solar panels have been removed from the area of marshy grassland that is within the Solar and Energy Storage Park boundary and the surrounding habitat retained.</p> <p>4) The need to clearly outline measures that are mitigation and measures that are enhancement are noted, and this has been outlined in <b>Chapter 8: Ecology and Nature Conservation</b> [EN010131/APP/3.1] where applicable.</p>	

Ref.	Document	Topic	EA Position	Applicant Position	Status
			4) There needs to be a clear outline of what is mitigation and what is enhancement for the purposes of the scheme, and how this has been derived.		
1.6	EA Stat Con Response:	Aquatic Ecology	Can the applicant confirm there will be no potential impact fish and eel and rule this out within the proposal?	Horizontal drilling will be used to install the power cables >2m below the River Trent (and other watercourses and ditches where this approach is required). This will ensure that there will be no impediment to movement or impact on fish and eel. Minor and temporary vibrations may be experienced during drilling, but these are not expected to be of an intensity or duration sufficient to cause an impact. A comprehensive aquatic desk study has been completed, and along with targeted aquatic surveys, will inform the ecological appraisal and impact assessment (refer to <b>Appendix 8-E Aquatic Baseline Report [EN01031/APP/3.3]</b> ), including for watercourses and ditches where new culverts, or extension of existing culverts, or open-trenching through watercourses, is required. An exercise of rating the sensitivity of watercourses and ditches has been completed to inform the requirement for targeted aquatic ecological surveys, also informed by the desk study of existing data.	Under discussion
1.7	EA Stat Con Response:	Water Quality	At any stage of the development no polluting matter shall be allowed to enter any surface water or groundwater body without the benefit of an Environmental Permit.  No quantities of water greater than 20m <sup>3</sup> /day shall be removed or impounded from surface water or groundwater sources without	The requirements regarding water quality and permits are noted. Mitigation measures to control runoff and spillages that may contain polluting matter, and to reduce mobilisation of sediments and pollution where works are required in watercourses are included in the <b>Framework CEMP [EN010131/APP/7.3]</b> , which are also discussed in <b>Chapter 9: Water Environment [EN010131/APP/3.1]</b> . The Framework CEMP provides the structure and content for the detailed CEMP, which will be completed once a contractor is appointed. The Framework CEMP also secures the requirement for a WMP to accompany the detailed CEMP. The WMP will provide	Under discussion

Ref.	Document	Topic	EA Position	Applicant Position	Status
			<p>the benefit of an Abstraction Licence.            This includes non-consumptive abstractions.</p>	<p>greater detail regarding the mitigation to be implemented to protect the water environment from adverse effects during construction. This will be agreed with the EA Land and Water team post consent.</p>	
			<p>Before any in-river work is undertaken correct measures, including a detailed method statement, shall be considered and assessed by the Environment Agency's Land and Water team. Particular care should be given to minimising and mitigating the risk of siltation to the concerned watercourse(s).</p>	<p>Permitting requirements relating to water and water quality are outlined in <b>Chapter 9: Water Environment [EN010131/APP/3.1]</b>. As noted above, the applicant seeks to disapply the requirement for environmental permits under Regulation 12 of the Environmental Permitting Regulations (England and Wales) 2016. All types of permits under this regime are issued by the EA. The applicant also seeks disapplication of the requirements for abstraction licences and impounding licences under the Water Resources Act 1991.</p>	
			<p>Should any pollution, over-abstraction or flooding events occur work should stop as soon as is safe and practicable and the Environment Agency informed within the same timeframe.</p>	<p>The EA reference to Park Wood East/West SSSI sites appears to be in error as this is not mapped in the vicinity of the Scheme, nor is any reference to it available online.</p>	
			<p>The site borders the Park Wood East/West SSSI sites. Should there be any risk of these locations being affected permission should be gained from Natural England before any work is undertaken.</p>		
			<p>Should any of the above points be breached please be minded that the Environment Agency has</p>		

Ref.	Document	Topic	EA Position	Applicant Position	Status
			<p>powers of under the Environmental Permit Regulations 2016 (England and Wales) and the Water Resources Act 1991 and enforcement action, up to and including prosecution, may be taken against the offender(s).</p>		
1.8	EA Stat Con Response:	Ground Conditions	<p>The PEIR report suggests that any low level risks to water quality will be able to be managed.</p> <p>There are unlikely to be significant risks to controlled water receptors as this is a predominantly undeveloped site. We are therefore satisfied with the information presented on ground conditions and have no further comments to make at this stage.</p>	Comments are noted and agreed.	Agreed

## Appendix A: Record of Engagement

Date	Correspondence	Topics discussed and outcomes
13 October 2021	Letter/e-mail	Correspondence from Applicant to EA introducing the Scheme as part of non-statutory consultation including details and dates of the proposed non-statutory consultation process in Jan-Feb 2022.
14 Dec 2021	EIA Scoping request and response	The EA provided an opinion in response to the EIA Scoping request, which was returned to the applicant via PINS on 20 December 2021. Within the response the EA stated that they were satisfied that an FRA would be submitted to support the DCO and supported the proposal to undertake a WFD Screening and Scoping Assessment to ensure WFD compliance. With regard to ground conditions, it was stated that the EA were satisfied that a Preliminary Risk Assessment will be submitted with the DCO. Finally, it was stated that the EA were satisfied that waste could be scoped out of the EIA.
11 January 2022	Letter/e-mail	Correspondence from Applicant to EA issued on the non-statutory consultation process
16 June 2022	Letter/ email	Correspondence from Applicant to EA issued on the statutory consultation process, including consultation booklet and feedback form.
3 August 2022	E-mail	Correspondence from EA to Applicant providing response to statutory consultation
August 2022	Statutory Consultation	The EA reviewed the Preliminary Environmental Information Report (PEIR) and provided a response in August 2022. All of the points from this response are included in Section 2 – Areas of Discussion between the Parties.
24 January 2023	E-mail	A draft version of this SoCG (and associated protective provisions) was issued to the Environment Agency for comment. A response has not yet been received.

## PART [8]

### FOR THE PROTECTION OF THE ENVIRONMENT AGENCY

**83.**—(1) The following provisions apply for the protection of the Agency unless otherwise agreed in writing between the undertaker and the Agency.

(2) In this Part of this Schedule—

“the Agency” means the Environment Agency;

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

“drainage work” means any main river and includes any land which provides flood storage capacity for any main river and any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage or flood defence;

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

“main river” means all watercourses shown as such on the statutory main river maps held by the Agency and the Department for Environment Food and Rural Affairs including any structure or appliance for controlling or regulating the flow of water in or out of such watercourses;

“plans” includes sections, drawings, specifications, calculations and method statements;

“specified work” means so much of any work or operation authorised by this Order as is in, on, under, over or within 8 metres of a drainage work or is otherwise likely to—

- (a) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;
- (b) affect the flow, purity or quality of water in any main river;
- (c) cause obstruction to the free passage of fish or damage to any fishery;
- (d) affect the conservation, distribution or use of water resources; or
- (e) affect the conservation value of the main river and habitats in its immediate vicinity and

“watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, basins, sewers and passages through which water flows except a public sewer.

**84.** The provisions within this Part of this Schedule will not apply where a matter would fall within the remit of the Lead Local Flood Authority or the relevant internal drainage board under the Land Drainage Act 1991.

**85.**—(1) Before commencing construction any specified work, the undertaker must submit to the Agency for its approval plans of the specified work and such further particulars available to it as the Agency may within 28 days of the receipt of the plans reasonably request.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 0.

(3) Any approval of the Agency required under this paragraph—

- (a) must not be unreasonably withheld or delayed;
- (b) in the case of a refusal must be accompanied by a statement of grounds of refusal;
- (c) is deemed to have been refused if it is neither given nor refused within 2 months of the submission of the plans or receipt of further particulars if such particulars have been requested by the Agency for approval; and
- (d) may be given subject to such reasonable requirements as the Agency may have for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.



(4) The Agency must use its reasonable endeavours to respond to the submission of any plans before the expiration of the period mentioned in sub-paragraph (3)(c).

**86.** The requirements which the Agency may have under paragraph 85(3)(d) include conditions requiring the undertaker, at its own expense, to construct such protective works, whether temporary or permanent, before or during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work against damage; or
- (b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased beyond the level of flood risk that was assessed in the environmental statement,

by reason of any specified work.

**87.** Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 86, must be constructed—

- (a) without unreasonable delay in accordance with the plans approved under this Part of this Schedule; and
- (b) to the reasonable satisfaction of the Agency,

and the Agency is entitled by its officer to watch and inspect the construction of such works.

(2) The undertaker must give to the Agency not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than seven days after the date on which it is completed.

(3) If the Agency reasonably requires, the undertaker must construct all or part of the protective works so that they are in place prior to 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 Agency is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the Agency may by notice in writing require the undertaker at the undertaker's own expense to comply with the requirements of this Part of this Schedule or (if the undertaker so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent and within such limits as the Agency reasonably requires.

(5) Subject to sub-paragraph (6) and paragraph 92, if, within a reasonable period, being not less than 28 days beginning with the date when a notice under sub-paragraph (4) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice and any reasonable expenditure incurred by the Agency 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 Agency must not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph (4).

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

(2) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the undertaker to repair and restore the drainage work, or any part of such work, or (if the undertaker so elects and the Agency 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 Agency reasonably requires.

(3) Subject to sub-paragraph (4) and paragraph 92, 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 requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is necessary for such compliance and any reasonable expenditure incurred by the Agency in so doing will be recoverable 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 Agency must not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined in accordance with paragraph 0.

(5) This paragraph does not apply to—

- (a) drainage works which are vested in the Agency, or which the Agency or another person is liable to maintain and is not proscribed by the powers of the Order from doing so; or
- (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.

**89.** Subject to paragraph 92, if by reason of the construction of any specified work or of the failure of any such work, the efficiency of any drainage work for flood defence purposes is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by the undertaker to the reasonable satisfaction of the Agency and if the undertaker fails to do so, the Agency may make good the impairment or damage and recover any expenditure incurred by the Agency in so doing from the undertaker.

**90.** If by reason of construction of the specified work the Agency'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 Agency 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.

**91.—(1)** The undertaker must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in the fishery during the construction of any specified work.

(2) If by reason of—

- (a) the construction of any specified work; or
- (b) the failure of any such work,

damage to the fishery is caused, or the Agency has reason to expect that such damage may be caused, the Agency may serve notice on the undertaker requiring it to take such steps as may be reasonably practicable to make good the damage, or, as the case may be, to protect the fishery against such damage.

(3) Subject to paragraph 92, if within such time as may be reasonably practicable for that purpose after the receipt of written notice from the Agency of any damage or expected damage to a fishery, the undertaker fails to take such steps as are described in sub-paragraph (2), the Agency may take those steps and any expenditure incurred by the Agency in so doing will be recoverable from the undertaker.

(4) Subject to paragraph 92, in any case where immediate action by the Agency is reasonably required in order to secure that the risk of damage to the fishery is avoided or reduced, the Agency may take such steps as are reasonable for the purpose, and may recover from the undertaker any expenditure incurred in so doing provided that notice specifying those steps is served on the undertaker as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

**92.** The undertaker must make reasonable compensations for costs, charges and expenses which the Agency may 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 Agency under this Part of this Schedule; and
- (c) in the carrying out of any surveys or tests by the Agency which are reasonably required in connection with the construction of the specified works.

**93.—**(1) The undertaker must make reasonable compensation for costs and losses which may be reasonably incurred or suffered by the Agency by reason of—

- (a) the construction of any specified work comprised within the authorised development; or
- (b) any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged upon the construction of the authorised development.

(2) In sub-paragraph 93—

“costs” includes—

- (a) expenses and charges;
- (b) staff costs and overheads; and
- (c) legal costs; and

“losses” includes physical damage.

(3) The undertaker must make reasonable compensation for liabilities, claims and demands against the Agency arising out of or in connection with the authorised development or otherwise out of the matters referred to in sub-paragraphs (1)(a) and (1)(b).

(4) In sub-paragraph (3)—

“claims” and “demands” include as applicable—

- (a) costs (within the meaning of sub-paragraph (2)) incurred in connection with any claim or demand; and
- (b) any interest element of sums claimed or demanded; and

“liabilities” includes—

- (c) contractual liabilities;
- (d) tortious liabilities (including liabilities for negligence or nuisance);
- (e) liabilities to pay statutory compensation or for breach of statutory duty; and
- (f) liabilities to pay statutory penalties imposed on the basis of strict liability (but does not include liabilities to pay other statutory penalties).

(5) The Agency must give to the undertaker reasonable notice of any such claim or demand.

(6) The Agency must not compromise or settle any such claim or make any admission which might be prejudicial to the claim without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.

(7) The Agency must, at all times take reasonable steps to prevent and mitigate any such claims, demands, proceedings, costs, damages, expenses or loss.

(8) The Agency 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.

(9) The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved by the Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, does not relieve the undertaker from any liability under the provisions of this Part of this Schedule.

Any dispute arising between the undertaker and the Agency under this Part of this Schedule must, if the parties agree, be determined by arbitration under article **Error! Reference source not found.** (arbitration), but will otherwise be determined by the Secretary of State for Environment,

Food and Rural Affairs or its successor and the Secretary of State for Business, Energy, and Industrial Strategy or its successor acting jointly on a reference to them by the undertaker or the Agency, after notice in writing by one to the other.