

## **THE APPLICANT'S RESPONSE TO THE SECRETARY OF STATE'S REQUEST FOR FURTHER INFORMATION, DATED 31 JANUARY 2024**

### **HyNet Carbon Dioxide Pipeline DCO**

**Planning Act 2008**

**Document Reference Number D.7.1.18**

**Applicant: Liverpool Bay CCS Limited**

**Inspectorate Reference: EN070007**

**REVISION: A**

**DATE: February 2024**

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**PUBLIC**

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14 February 2024

Dear Mr Stephens,

### **EN070007 HyNet Carbon Dioxide Pipeline**

This document has been prepared by Liverpool Bay CCS Limited (the Applicant) and relates to the Application for a Development Consent Order (DCO) that has been submitted to the Secretary of State (SoS) for Energy Security & Net Zero (DESNZ) under section 37 of the Planning Act 2008.

This document is in response to the SoS's request for further information dated 31 January 2024. The Applicant notes that the majority of items seek confirmation from the interested party rather than the Applicant, and the Applicant provides the following short submission only as confirmation of its understanding in relation to those items.

#### **CADENT GAS LIMITED**

The Applicant confirms that the side agreement has been completed and the Protective Provisions as set out in Schedule 10, Part 5 of the DCO have been agreed. Cadent Gas Limited have removed their objection, and the Applicant understands that this has been confirmed via email directly to the SoS on 02 February 2024.

#### **THE CANAL AND RIVER TRUST**

The parties have continued to progress negotiations for a voluntary land agreement however that agreement is not yet concluded. The Applicant has made a number of concessions during the week commencing 12 February 2024 with the goal of agreeing the commercial terms for a land agreement as swiftly as possible. Having made such concessions, the Applicant believes the commercial offer is fair and reasonable. The Applicant considers that the position remains as set out in the Deadline 7 update on DCO drafting [**REP7-294**] that the protective provisions are not fully agreed, but that the only point not agreed on is restriction of Compulsory Acquisition powers. The Applicant cannot agree to the restriction on use of compulsory powers unless and until the land agreement is in place. To restrict these powers without an agreement in place would create a ransom situation and create risk to the delivery of the NSIP.

## DŴR CYMRU WELSH WATER

Welsh Water contacted the Applicant following the issue of the Secretary of State's letter of 31 January. This is the first response the Applicant has received from Welsh Water since May 2023 and Welsh Water has suggested that rather than complete the draft previously in circulation between the parties, they wished to start from a new version. The Applicant advised that it does not consider it appropriate or practical to restart protective provisions discussions entirely anew at this stage. The Applicant notes that it engaged with Welsh Water during Examination and sought to agree provisions to the extent that, as far as the Applicant was aware, only 2 points of definition (easement distances for crossings and the definition of a 'clearance area') were under discussion.

The Applicant is happy to continue working with Welsh Water to agree reasonable amendments to the provisions contractually under paragraph 129. "*The provisions of this Part have effect unless otherwise agreed in writing between the undertaker and Welsh Water*", but does not consider it necessary to amend the DCO as before the Secretary of State. The Applicant considers it reasonable that the provisions it has included in the draft DCO are included in the Order given that Welsh Water had a considerable period to comment on those and failed to do so.

The version included by the Applicant aligns with the standard protections for water and sewerage undertakers. The Applicant accordingly submits that no serious detriment can arise as all the standard protections are in place.

## ENVIRONMENT AGENCY

The Applicant has continued to engage and discuss commercial terms for a voluntary land agreement with the Environment Agency and considers the points of difference between the parties to have been narrowed since the close of examination. The Applicant considers that the remaining points are resolvable and continues to engage positively with the Environment Agency on these points. All matters raised by the Environment Agency prior to the date of this letter have been responded to by the Applicant who awaits a response from the Environment Agency. The Applicant has been chasing for a response and considers its commercial offer to be a fair and reasonable one.

## ENCIRC LIMITED

The Applicant's Update to the Secretary of State dated 19 December 2023 (Applicant's **Document Reference: D.7.1.16**) included in Appendix B, the Applicant's Position Statement with Encirc Limited (Applicant's **Document Reference: D.7.70**) which was jointly prepared by Encirc Limited and the Applicant. This sets out at items 1.1.8 and 1.1.9 the jointly held intent to continue engagement and resolve open points.

The Applicant can confirm that since the update in December 2023, the parties have met on multiple occasions and have agreed a basis for engagement and are in the process of establishing further detailed meetings to progress towards agreeing Heads of Terms and subsequent real estate agreements, and any necessary protective provisions and side agreements.

## EXOLUM PIPELINE SYSTEMS LIMITED

The parties have now agreed the drafting of the protective provisions. Minor amendments to the version as submitted by the Applicant are required to reflect that agreement. The amendments are shown as track changes in Appendix A. All of the three changes (to paragraphs 253, 256 and 294) are as shown in the Applicant's Response to Rule 17 request for further information **[REP9-012]**.

### *Paragraph Change(s)*

*253.— (1) Regardless of any other provision in the Order or anything shown on the land plans or if the Order covers any Premises or interest in any land in which any Apparatus is placed or over which access to any Apparatus is enjoyed:*

*(a) The undertaker must not, otherwise than by agreement with Exolum, acquire any Apparatus or Exolum's rights in respect of Apparatus;*

*(b) Where the undertaker acquires the freehold of any land in which Exolum holds an interest, the undertaker must afford to or secure for Exolum such rights in land in substitution for any right which would be extinguished by that acquisition (the replacement rights). These replacement rights must be granted upon substantially the same terms and conditions as the right to be extinguished, unless otherwise agreed between the undertaker and Exolum, and must be granted or put in place contemporaneously with the extinguishment of the right which they replace;*

*256 Where the undertaker takes temporary possession of any land or carries out survey works on land in respect of which Exolum has an easement, right, asset, interest, Apparatus or Premises:*

*(a) where reasonably necessary, and provided that all health and safety requirements are complied with, including any requirements applicable to the undertaker under the Construction, Design and Management Regulations 2015, Exolum may exercise its rights to access such land:*

*294 Paragraph deleted.*

## NETWORK RAIL (ENGLAND AND WALES)

The Applicant confirms that the framework agreement that was agreed at the end of Examination has been signed and completed. The parties continue to progress on the other agreements however these will not all be fully completed until there is a detailed design, and it was not the intention of the Applicant to imply that these were required ahead of DCO determination. It is entirely normal for these detailed agreements to be completed at a later date. The protective provisions were confirmed by Network Rail to be agreed as demonstrated in the email from Network Rail (Eversheds Sutherland LLP on behalf of Network Rail) to the Applicant dated 20 September 2023 which was submitted by the Applicant as Appendix 8 to the Applicant's Response to Rule 17 request for further information **[REP9-012]**.

## **NATIONAL GRID ELECTRICITY TRANSMISSION PLC**

The Applicant can confirm in respect of National Grid Electricity Transmission plc that the relevant Protective Provisions contained at Schedule 10, Part 3 of the Applicant's draft DCO are not agreed, and their objection therefore remains in place.

We can confirm, however, that good progress has been made on negotiations to resolve the objection and that only one issue remains between the parties which, the parties are working expeditiously to resolve. This issue is administrative in nature, rather than technical, and has no effect on the ability of the Protective Provisions to protect assets or exclude the creation of any statutory detriment.

## **NATIONAL GAS GRID PLC**

The Applicant can confirm in respect of National Grid Gas plc that the relevant Protective Provisions contained at Schedule 10, Part 4 of the Applicant's draft DCO are not agreed, and their objection therefore remains in place.

We can confirm, however, that good progress has been made on negotiations to resolve the objection and that only one issue remains between the parties which, the parties are working expeditiously to resolve. This issue is administrative in nature, rather than technical, and has no effect on the ability of the Protective Provisions to protect assets or exclude the creation of any statutory detriment.

## **NATIONAL HIGHWAYS**

The Applicant had understood that the parties had made considerable progress on a commercial agreement, however, in the week commencing 5<sup>th</sup> February 2024 National Highways abruptly adopted the position that the agreement would be conditional upon the Applicant advising “the SoS in writing, by the deadline of 23:59 on 14 February 2024, that it no longer requires powers of compulsory acquisition or powers of temporary possession in respect of land owned by NH (in particular those plots which form part of the SRN), and relatedly inviting the SoS to exclude those plots from the Order in the event that the SoS decides to make the Order”. Given that the voluntary agreement was not completed and there was no realistic prospect of it being completed by the deadline quoted, the Applicant could not and does not agree to this request.

This was a change in position by National Highways which it must know would not be acceptable as it would put the Applicant in a ransom position due to the voluntary agreement not yet being in place. Given National Highway's inconsistent positions to date (submitting to the Examination that land rights are not required because the New Roads and Street Works Act applies but continuing to negotiate land rights) and the unreasonable positions taken (such as submitting to the Examination that no land agreement will be completed unless the unreasonable National Highway's protective provision drafting is imposed **[REP8-038]**), the Applicant considers that the degree of risk in not seeking compulsory powers and being reliant on reaching agreement with National Highways without the potential of recourse to such powers is unacceptable to it.

The Applicant submits that National Highways would not consider it reasonable to be put in such a ransom position when it is acting as a DCO promoter and is therefore acting unreasonably towards the Applicant. **The Applicant has been and is willing to agree a prohibition on use of compulsory powers in the voluntary agreement. The Applicant remains happy to proceed on that basis which would adequately protect National Highways.** The Applicant has never agreed to request that the Secretary of State amend the DCO and has not, for example, prepared updated land plans, as such a request was never raised in discussion before week commencing 5<sup>th</sup> February 2024 and is not agreed.

The Applicant therefore notes that it is still seeking compulsory powers as set out during Examination and objects to any request from National Highways for such powers not to be included. The powers sought remain necessary to ensure that the NSIP is deliverable as no voluntary agreement is yet in place (although the Applicant continues to try to agree this). Further, the Applicant submits that National Highway's sudden and unreasonable demand that the voluntary agreement be made conditional on the Applicant placing itself in a ransom position further demonstrates why the powers sought are necessary and justified.

The Applicant submits that the considerable policy support for the Application which underpins the need for certainty that the project can be delivered and that this can be done within the short timescales set out by Government for Track 1 projects. The Applicant also notes that there is recent precedent for the granting of compulsory powers over statutory undertaker land in order to secure delivery certainty and where the undertaker objected to such powers being granted and asserted they would result in serious detriment and its position is therefore not unreasonable (Secretary of State decision letter on the Thurrock Flexible Generation Plant DCO, 16 February 2022, paragraph 7.10 regarding grant of compulsory powers over the statutory undertaking of the Port of Tilbury).

The parties remain some considerable distance apart on the protective provisions. The Applicant maintains its position on the protective provisions as set out in Examination (in particular Applicant's Comments on Submissions Received at Deadline 5 **[REP6-035]** Appendix A, Applicant's Comments on Submissions Received at Deadline 6 & Deadline 6A **[REP7-290]**, Applicant's Final Position Statement **[REP8-037]** and Applicant's Response to Rule 17 request for further information **[REP9-012]**) and supported by the opinion of King's Counsel **[REP8-038]**, that the National Highways drafting is unnecessary, disproportionate and unreasonable, and the Applicant's drafting of these provisions should be preferred. No credible case has been made by National Highways that serious detriment would arise under the DCO, however even if that were to be considered a risk the draft protective provisions submitted by the Applicant adequately protect National Highways' statutory undertaking.

## **PEEL NRE LIMITED**

The Applicant confirms that the Commercial Framework Agreement has been signed and entered into, and the Protective Provisions as set out in Schedule 10, Part 14 of the DCO have been agreed. Peel NRE Limited have removed their objection, and the Applicant understands that this has been confirmed via email directly to the SoS.

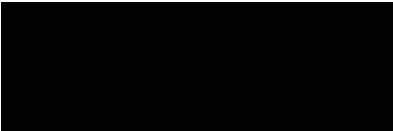
## **UNITED KINGDOM OIL PIPELINES LIMITED**

The Applicant understands that the protective provisions are agreed in the form submitted at Deadline 9 **[REP9-012]** and it is understood by the Applicant that the objection was accordingly resolved.

## **WALES AND WEST UTILITIES**

The Applicant understand that protective provisions were agreed, and it is understood by the Applicant that the objection is accordingly resolved. This is set out within the SoCG signed by Wales and West Utilities **[REP8-023]**.

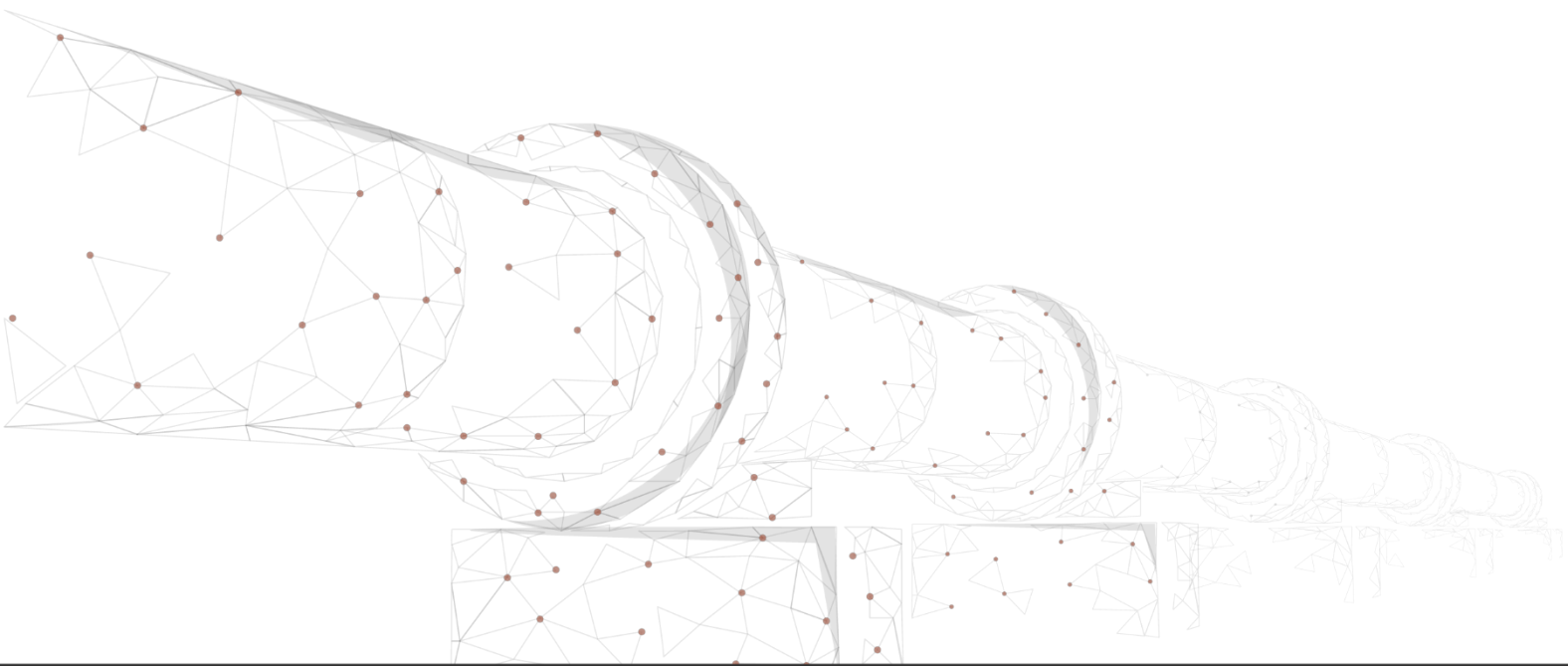
Yours sincerely,



**Martin Currie**  
Director, Liverpool Bay CCS Limited

**HyNet North West**

**APPENDIX A – EXOLUM PIPELINE  
SYSTEM LTD PROTECTIVE  
PROVISIONS**





## PART ~~120~~

### For the protection of Exolum Pipeline System Ltd

#### Application

**251.** For the protection of Exolum the following provisions, unless otherwise agreed in writing at any time between the undertaker and Exolum, have effect.

#### Interpretation

**252.** In this Part of this Schedule, the following terms have the following meanings—

“Additional Rights” means rights for the construction and for access to and for the use, protection, inspection, maintenance, repair and renewal of retained Apparatus including any restrictions on the landowner and occupiers for the protection of the retained Apparatus and to allow Exolum to perform its functions.

“Alternative Apparatus” means alternative apparatus adequate to enable Exolum to fulfil its functions as a pipeline operator in a manner not less efficient than previously.

“Alternative Rights” means rights for the construction and for access to and for the use, protection, inspection, maintenance, repair and renewal of Alternative Apparatus including any restrictions on the landowner and occupiers for the protection of the Alternative Apparatus and to allow Exolum to perform its functions.

“Apparatus” means the pipeline and storage system and any ancillary apparatus owned and/or operated by Exolum and includes:

- (a) any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;
- (b) any ancillary works, all protective wrappings, valves, sleeves and slabs, cathodic protection units, together with ancillary cables and markers;
- (c) such legal interest, and benefit of property rights and covenants as are vested in in respect of these items;

and, where the context allows, includes Alternative Apparatus.

“Application” means the application to the Secretary of State for the Order made by the undertaker under the Planning Act 2008 on 3 October 2022.

“Authorised Development” has the same meaning as that given in article 2(1) (interpretation) of the Order and for the purposes of this Part of this Schedule includes the use and maintenance of the authorised development and construction of any works authorised by this Schedule.

“Commence” has the same meaning as that given in article 2(1) of the Order (and commencing must be construed accordingly).

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

“Exolum” means Exolum Pipeline System Ltd (company number 09497223) and for the purpose of enforcing the benefit of any provisions in this Schedule, any group company of Exolum Pipeline System Ltd and in all cases any successor in title.

“Expert” is a person appointed in accordance with paragraphs 307 to 315 to resolve a dispute under this Schedule.

“Functions” includes powers, duties and commercial undertaking.

“in” in a context referring to Apparatus in land includes a reference to Apparatus under, over or upon land.

“Order” means the order granting development consent, made by the Secretary of State and brought into force following the Application under the Planning Act 2008.

“parties” means the undertaker and Exolum and "party" is to be construed accordingly.

“Plan” includes all designs, drawings, sections, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary to allow Exolum to assess the relevant works to be executed properly and sufficiently and in particular must describe:

- (d) the exact position of the works;
- (e) the level at which the works are proposed to be constructed or renewed;
- (f) the manner of the works' construction or renewal including details of excavation, positioning of plant etc.;
- (g) the position of the affected Apparatus and/or Premises and any other apparatus belonging to another undertaker;
- (h) by way of detailed drawings, every alteration proposed to be made to or close to any such apparatus;
- (i) any intended maintenance regime;
- (j) details of the proposed method of working and timing of execution of works; and
- (k) details of vehicle access routes for construction and operational traffic.

“Premises” means land that Exolum owns, occupies or otherwise has rights to use including but not limited to storage facilities, administrative buildings and jetties.

“Protective Works” means works for the inspection and protection of Apparatus.

“Restricted Works” means any works that are near to, or will or may affect any Apparatus or Premises including:

- (l) all works within 15 metres measured in any direction of any Apparatus including embankment works and those that involve a physical connection or attachment to any Apparatus,
- (m) the crossing of Apparatus by other utilities,
- (n) the use of explosives within 400 metres of any Apparatus or Premises,
- (o) piling, undertaking of a 3D seismic survey or the sinking boreholes within 30 metres of any Apparatus or Premises,
- (p) all works that impose a load directly upon the Apparatus, wherever situated

whether carried out by the undertaker or any third party in connection with the Authorised Development.

“Working Day” means any day other than a Saturday, Sunday or English bank or public holiday.

### Acquisition of Apparatus

**253.**—(1) Regardless of any other provision in the Order or anything shown on the land plans or if the Order covers any Premises or interest in any land in which any Apparatus is placed or over which access to any Apparatus is enjoyed:

(a) the undertaker must not, otherwise than by agreement with Exolum, acquire any Apparatus or Exolum’s rights in respect of Apparatus;

(b) where the undertaker acquires the freehold of any land in which Exolum holds an interest, the undertaker must afford to or secure for Exolum such rights in land in substitution for any right which would be extinguished by that acquisition (the replacement rights). These replacement rights must be granted upon substantially the same terms and conditions as the right to be extinguished, unless otherwise agreed between the undertaker and Exolum, and must be granted or put in place contemporaneously with the extinguishment of the right which they replace;

~~(a)~~(c) the undertaker must not, otherwise than in accordance with this Schedule:

- (i) obstruct or render less convenient the access to any Apparatus or Premises;
- (ii) interfere with or affect Exolum's ability to carry out its functions as an oil pipeline operator;
- (iii) require that Apparatus is relocated or diverted; or

(iv) remove or required to be removed any Apparatus;

~~(b)~~(d) any right of Exolum to maintain, repair, renew, adjust, alter or inspect Apparatus may not be extinguished until any necessary Alternative Apparatus has been constructed, it is in operation and the Alternative Rights have been granted, all to the reasonable satisfaction of Exolum; and

~~(e)~~(e) any right of Exolum to access the Exolum Apparatus and/or Premises must not be extinguished until necessary alternative access has been provided to Exolum's reasonable satisfaction.

**254.** Prior to the carrying out of any Restricted Works or any works authorised by this Order that will affect the existing rights of Exolum, the parties must use all reasonable endeavours to negotiate and enter into such Deeds of Consent (crossing consent) and (if necessary) variations to the existing rights upon such terms and conditions as may be agreed between Exolum and the undertaker acting reasonably and which must be no less favourable on the whole to Exolum than this Schedule, and it will be the responsibility of the undertaker to procure and / or secure the consent and entering into of such deeds and variations by all other third parties with an interest in the land at that time who are affected by such works.

**255.** Where the undertaker acquires land which is subject to any existing rights held by Exolum and the provisions of paragraph 265 do not apply, the undertaker must:

- (a) Retain any notice of the existing rights held by Exolum on the title to the relevant land when registering the undertaker's title to such acquired land; and
- (b) provide up to date official entry copies to Exolum within 20 working days of receipt of such up to date official entry copies.

**256.** Where the undertaker takes temporary possession of any land or carries out survey works on land in respect of which Exolum has an easement, right, asset, interest, Apparatus or Premises:

- (a) where reasonably necessary, and provided that all health and safety requirements are complied with; (including any requirements applicable to the undertaker under the Construction, Design and Management Regulations 2015), Exolum may exercise its rights to access such land:
  - (i) in an emergency, without notice but in all such instances Exolum will notify the undertaker as soon as reasonably practicable and until service of such notice, entry will be at Exolum's own risk; and
  - (ii) in non-emergency circumstances, having first given prior written notice to the undertaker in order to allow the parties to agree the timing of their respective works during the period of temporary possession; and
- (b) the undertaker may not remove or in any way alter Exolum's rights in such land, unless in accordance with the provisions of this Order.

### **Removal of Apparatus and Rights for Alternative Apparatus**

**257.** If, having used all reasonable endeavours to implement the Authorised Development without the removal of any Apparatus:

- (a) the undertaker reasonably requires the removal of any Apparatus; or
- (b) Exolum reasonably requires the removal of any Apparatus;

then the relevant party must give written notice of that requirement to the other.

**258.** The parties must use all reasonable endeavours to produce a plan of the work proposed and a plan of the proposed position of the Alternative Apparatus to be provided or constructed.

**259.** The undertaker must afford to Exolum the necessary facilities and rights for the construction of Alternative Apparatus and subsequently the grant of Alternative Rights in accordance with paragraphs 265 to 269.

**260.** Any Alternative Apparatus is to be constructed in land owned by the undertaker or in land in respect of which Alternative Rights have been or are guaranteed to be granted to Exolum. The Alternative Apparatus must be constructed in such manner and in such position or situation as may be agreed between Exolum and

the undertaker or in default of agreement settled by expert determination in accordance with paragraphs 304 to 315.

**261.** After the details for the works for Alternative Apparatus to be provided or constructed have been agreed or settled by expert determination in accordance with paragraphs 304 to 315, and after the grant to Exolum of any such facilities and rights as are referred to in paragraph 257, Exolum must proceed as soon as reasonably practicable using all reasonable endeavours to construct and bring into operation the Alternative Apparatus and subsequently to remove (or if agreed between the parties to allow the undertaker to remove) any redundant Apparatus required by the undertaker to be removed under the provisions of this Schedule.

**262.** The following paragraphs 263 and 264 only apply if:

- (a) Exolum fails to comply with its obligations under paragraph 261 to remove any redundant Apparatus; and
- (b) the undertaker has served notice on Exolum specifying the default; and
- (c) Exolum has failed to remedy the default within 28 days.

**263.** In the circumstances set out in paragraph 262, if the undertaker then gives notice in writing to Exolum that it will remove the redundant Apparatus, that work, instead of being executed by Exolum, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of Exolum.

**264.** Nothing in paragraph 263 authorises the undertaker to execute the placing, installation, bedding, packing, removal, connection or disconnection of any Apparatus, or execute any filling around the Apparatus (where the Apparatus is laid in a trench) within 3000 millimetres of the Apparatus unless that Apparatus is redundant and disconnected from Exolum's remaining system.

### **Facilities and Rights for Alternative Apparatus**

**265.** Where, in accordance with the provisions of this Schedule, the undertaker affords to Exolum facilities and rights for the construction of Alternative Apparatus and the grant of Alternative Rights, 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 Exolum in accordance with this Schedule or in default of agreement settled by expert determination in accordance with paragraphs 304 to 315.

**266.** Alternative Rights must be granted before any Alternative Apparatus is operating as part of the pipeline and storage system which forms the Apparatus.

**267.** The parties agree that the Alternative Rights be granted by way of a 999 year lease, substantially in the form of Exolum's precedent from time to time as amended by written agreement between the parties acting reasonably.

**268.** Nothing in this Schedule or contained in the Alternative Rights shall require Exolum to divert or remove any Alternative Apparatus.

**269.** 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 Exolum 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 will make such provision for the payment of compensation by the undertaker to Exolum as appears to the Expert to be reasonable having regard to all the circumstances of the particular case.

### **Retained Apparatus and Alternative Apparatus: protection**

**270.** Before commencing the execution of any Restricted Works, the undertaker must submit to Exolum a Plan of the works to be executed and any other information that Exolum may reasonably require to allow Exolum to assess the works.

**271.** No Restricted Works are to be commenced until the Plan to be submitted to Exolum under paragraph 270 has been approved by Exolum in writing and are to be carried out only in accordance with the details submitted under paragraph 270 and in accordance with such reasonable requirements as may be notified to the undertaker in writing in accordance with paragraph 272 by Exolum.

**272.** Any approval by Exolum of the Plan of works submitted under paragraph 270 must not be unreasonably withheld or delayed, and Exolum must communicate its approval or refusal of the plans within 56 days of the date of submission of the plan under paragraph 270 and any approval of the Plan of works may be given subject to such reasonable requirements as Exolum may require to be made for:

- (a) the continuing safety and operational viability of any Apparatus and/or Premises; and
- (b) the requirement for Exolum to have reasonable access with or without vehicles to inspect, repair, replace, maintain and ensure the continuing safety and operation or viability of any Apparatus and/or Premises

providing such reasonable requirements are notified to the undertaker in writing.

**273.** Exolum will be entitled to watch and inspect the execution of Restricted Works at any time.

**274.** Where reasonably required by either party, in view of the complexity of any proposed works, timescales, phasing or costs, the parties must with due diligence and good faith negotiate a works agreement for the carrying out of Protective Works or the installation of Alternative Apparatus.

**275.** If in consequence of the works notified to Exolum by the undertaker under paragraph 271, the circumstances in paragraph 7 apply, then the parties will follow the procedure in paragraph 257 onwards.

**276.** Nothing in paragraphs 270 to 275 precludes the undertaker from submitting prior to the commencement of works to protect retained Apparatus or to construct Alternative Apparatus (unless otherwise agreed in writing between the undertaker and Exolum) a new Plan, instead of the Plan previously submitted, in which case the parties will re-run the procedure from paragraph 275 onwards.

**277.** Where Exolum reasonably requires Protective Works, the parties must use all reasonable endeavours to produce a plan of the work proposed and a plan of the proposed position of any physical features to be provided or constructed.

**278.** The undertaker must afford to Exolum the necessary facilities and rights for the construction of Protective Works and subsequently the grant of Additional Rights in accordance with paragraphs 265 to 269.

**279.** Any Protective Works are to be constructed in land owned by the undertaker or in land in respect of which Additional Rights have been or are guaranteed to be granted to Exolum. The Protective Works must be constructed in such manner and in such position or situation as may be agreed between Exolum and the undertaker or in default of agreement settled by expert determination in accordance with paragraphs 304 to 315.

**280.** After the details for the Protective Works to be provided or constructed have been agreed or settled in accordance with paragraphs 305 to 315, and after the grant to Exolum of any such facilities and rights as are referred to in paragraph 259, Exolum must proceed as soon as reasonably practicable using reasonable endeavours to construct and bring into operation the Protective Works.

**281.** Where the undertaker needs to carry out emergency works:

- (a) it must give to Exolum notice before such works commence, or as soon as is reasonably practicable after the works have commenced where it is not reasonably practicable to provide notice prior to commencement;
- (b) the parties will work together to co-ordinate their respective works and agree a plan of those works before such works commence, or as soon as is reasonably practicable after the works have commenced where it is not reasonably practicable to provide notice prior to commencement; and
- (c) it must comply with the conditions imposed under paragraph 272 insofar as is reasonably practicable in the circumstances.

**282.** In this Part of this Schedule, “emergency works” means works whose execution at the time when they are executed is required in order to put an end to, or to prevent the occurrence of, circumstances then existing

or imminent (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.

### **Cathodic protection testing**

**283.** Where in the reasonable opinion of Exolum or the undertaker:

- (a) the Authorised Development might interfere with the cathodic protection forming part of Apparatus; or
- (b) any Apparatus might interfere with the proposed or existing cathodic protection forming part of the Authorised Development;

Exolum and the undertaker must co-operate in undertaking the tests which they consider reasonably necessary for ascertaining the nature and extent of such interference and measures for providing or preserving cathodic protection.

**284.** The Parties must carry out the works and enter into such agreements as are reasonably necessary to implement the measures for providing or preserving cathodic protection.

### **Expenses**

**285.**—(1) Subject to the following provisions of these paragraphs 285 to 288, the undertaker must pay to Exolum the reasonable and properly incurred costs and expenses (including reasonable staffing costs if work is carried out in-house) incurred by Exolum in, or in connection with:

- (a) undertaking its obligations under this Schedule including:
  - (i) the installation, inspection, removal, alteration, testing or protection of any Apparatus, Alternative Apparatus and/or Protective Works;
  - (ii) the execution of any other works under this Schedule; and
  - (iii) the review and assessment of Plans;
- (b) the watching of and inspecting the execution of the Authorised Development, any Restricted Works and any works undertaken by third parties as a result of Authorised Development (including the assessment of Plans); and
- (c) imposing reasonable requirements for the protection or alteration of Apparatus affected by the Authorised Development or works as a consequence of the Authorised Development in accordance with paragraph 272;

together with any administrative costs properly and reasonably incurred by Exolum.

**286.** Provided that Exolum takes all reasonable steps to minimise the costs incurred in the following circumstances, there will be no deduction from any sum payable under paragraph 285 as a result of:

- (a) the placing of apparatus of a better type, greater capacity or of greater dimensions, or at a greater depth than the existing Apparatus; or
- (b) the placing of apparatus in substitution of the existing Apparatus that may defer the time for renewal of the existing Apparatus in the ordinary course;

**287.** The scrap value (if any) of any Apparatus removed under the provisions of this Schedule is to be deducted from any sum payable under paragraph 285.

**288.** Upon the submission of proper and reasonable estimates of costs and expenses to be incurred by Exolum, the undertaker must pay Exolum sufficiently in advance but to enable Exolum to undertake its obligations under this Schedule provided that in the event that the costs reasonably incurred by Exolum are less than the amount paid by the undertaker pursuant to this paragraph 288 then Exolum must promptly repay any overpayment to the undertaker within 30 days of the payment of those costs.

### **Damage to property and other losses**

**289.** Subject to paragraphs 290 to 294, the undertaker will:

- (a) indemnify Exolum for all reasonable loss, damage, liability, costs and expenses reasonably suffered or incurred by Exolum directly arising out of:
  - (i) the carrying out of works under this Schedule;
  - (ii) the carrying out of the Authorised Development;
  - (iii) the use or occupation of land over or in the vicinity of any Apparatus or in the vicinity of any Premises in connection with the carrying out of the Authorised Development;
  - (iv) any injury or damage whatsoever to any property, real or personal, including the property of Exolum; and
  - (v) any matters arising out of or in connection with this Order;
- (b) indemnify Exolum against any claim made against, or loss suffered by, Exolum as a result of any act or omission committed by the undertaker's officers, employees, contractors or agents whilst on or in the vicinity of any Apparatus or Premises;
- (c) pay to Exolum on demand the cost reasonably incurred by Exolum in making good any damage to the Apparatus (other than Apparatus the repair of which is not reasonably necessary in view of its intended removal or abandonment) arising out of the carrying out of works under this Schedule and arising out of the carrying out of the Authorised Development; and
- (d) pay to Exolum the cost reasonably incurred by Exolum in stopping, suspending and restoring the supply through its Apparatus in consequence of the carrying out of works under this Schedule or the carrying out of the Authorised Development;

and make reasonable compensation to Exolum for any other expenses, losses, damages, penalty or costs incurred by Exolum by reason of any such damage or interruption including all claims by third parties.

**290.** The fact that any act or thing may have been done by Exolum on behalf of the undertaker or in accordance with a Plan approved by Exolum or in accordance with any requirement of Exolum or under its supervision will not, subject to paragraph 291, excuse the undertaker from liability under the provisions of paragraph 289.

**291.** The undertaker and Exolum must at all times take reasonable steps to prevent and mitigate any loss, damage, liability, claim, cost or expense (whether indemnified or not) which either suffers in connection with this Schedule.

**292.** The undertaker warrants that:

- (a) the information it or any of its employees, agents or contractors provide to Exolum about the Plans or the Authorised Development and on which Exolum relies in the design of and carrying out of any works is accurate; and
- (b) the undertaker or any of its employees, agents or contractors have exercised all the reasonable skill, care and diligence to be expected of a qualified and experienced member of their respective profession.

**293.** Exolum must give to the undertaker reasonable notice of any claim or demand to which paragraph 289 applies.

~~**294.** Under no circumstances shall the undertaker be liable for any consequential loss or direct loss suffered by Exolum.~~

~~*294. Not used*~~

## **Insurance**

**295.** The undertaker must not Commence the Authorised Development or any intrusive environmental (including archaeological) surveys and investigation or intrusive site or soil surveys on any land in respect of which Exolum has an easement, right, operations, assets or other interests or carry out any Restricted Works unless and until Exolum has confirmed to the undertaker in writing that it is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker (or its contractor) has procured acceptable professional indemnity insurance, where relevant, and public liability insurance with minimum cover of £25 million per event, with respect to the carrying out of the works.

**296.** The undertaker must maintain such insurance for the construction period of the Restricted Works, being from the proposed date of Commencement of the Authorised Development to the completion of any Restricted Works or Protective Works.

### **Co-operation and reasonableness**

**297.** Where Apparatus is required to be protected, altered, diverted or removed under this Schedule, the undertaker must use all reasonable endeavours to co-ordinate the execution of any works under this Schedule:

- (a) in the interests of safety;
- (b) 47.2 in the interest of the efficient and economic execution of both Exolum's works and the Authorised Development; and
- (c) 47.3 taking into account the need to ensure the safe and efficient operation of Apparatus and carrying out of Exolum's functions.

**298.** Exolum must use all reasonable endeavours to co-operate with the undertaker for the purposes outlined in paragraph 297.

**299.** The undertaker and Exolum must act reasonably in respect of any given term of this Schedule and, in particular, (without prejudice to generality) where any approval, consent or expression of satisfaction is required by this Schedule it must not be unreasonably withheld or delayed.

### **Emergency circumstances**

**300.** The undertaker acknowledges that Exolum provides services to His Majesty's Government, using the Apparatus, which may affect any works to be carried under this Schedule and the Authorised Development.

**301.** In the following circumstances, Exolum may on written notice to the undertaker immediately suspend all works that necessitate the stopping or suspending of the supply of product through any Apparatus under this Schedule and Exolum will not be in breach of its obligations under this Schedule:

- (a) circumstances in which, in the determination of the Government, there subsists a material threat to national security, or a threat or state of hostility or war or other crisis or national emergency (whether or not involving hostility or war); or
- (b) circumstances in which a request has been received, and a decision to act upon such request has been taken, by the Government for assistance in relation to the occurrence or anticipated occurrence of a major accident, crisis or natural disaster; or
- (c) circumstances in which a request has been received from or on behalf of NATO, the EU, the UN, the International Energy Agency (or any successor agency thereof) or the government of any other state for support or assistance pursuant to the United Kingdom's international obligations and a decision to act upon such request has been taken by the Government; or
- (d) any circumstances identified as such by the COBRA committee of the Government (or any successor committee thereof); or
- (e) any situation in connection with which the Government requires fuel capacity, including where the United Kingdom is engaged in any planned or unplanned military operations within the United Kingdom or overseas.

**302.** The parties agree to act in good faith and in all reasonableness to agree any revisions to any schedule, programme or costs estimate (which will include costs of demobilising and remobilising any workforce, and any costs to protect the Apparatus "mid-works") to account for the suspension.

**303.** Exolum is not liable for any costs, expenses, losses or liabilities the undertaker incurs as a result of the suspension of any activities under paragraphs 300 to 303 or delays caused by it.



## **Escalation of differences**

**304.** The undertaker and Exolum must use their reasonable endeavours to secure the amicable resolution of any dispute or difference arising between them out of or in connection with this Schedule in accordance with the following provisions.

**305.** The undertaker and Exolum will each nominate a representative who will meet to try to resolve the matter. If the matter is not resolved at that level within ten working days of either the undertaker or Exolum requesting such a meeting (or such longer period as may be agreed between the undertaker and Exolum) the matter may at the request of either the undertaker or Exolum be referred for discussion at a meeting to be attended by a senior executive from each party.

**306.** If the meeting between senior executives fails to result in a settlement within 20 working days of the date of the request for such a meeting (or if it is not possible to convene a meeting within this period) then either the undertaker or Exolum may refer the matter to expert determination or arbitration in accordance with the provisions of paragraphs 304 to 315.

## **Dispute resolution**

**307.** If any dispute or difference arising out of or in connection with this Schedule is not resolved in accordance with paragraphs 304 to 306, either the undertaker or Exolum may refer the matter to:

- (a) in the case of any dispute or difference pursuant to paragraphs 260, 265, 269 or 283, expert determination under paragraphs 308 to 314; or
- (b) in the case of any dispute or difference not falling within paragraphs 307(a), arbitration under article 48 (arbitration) of the Order.

**308.** The parties will agree on the appointment of an independent Expert and must agree with the Expert the terms of their appointment.

**309.** If the parties are unable to agree on an Expert or the terms of their appointment within five working days of either party serving details of a suggested expert on the other, either party will then be entitled to request the Institution of Civil Engineers or its successor to appoint an Expert and to agree with the Expert the terms of their appointment.

**310.** The Expert is required to prepare a written decision including reasons and give notice (including a copy) of the decision to the parties within a maximum of three months of the matter being referred to them.

**311.** If the Expert dies or becomes unwilling or incapable of acting, or does not deliver the decision within the time required by paragraph 310 then either party may re-apply to the relevant professional body referred to above to discharge the Expert and to appoint a replacement Expert with the required expertise and this clause will apply to the new Expert as if they were the first Expert appointed.

**312.** The parties are entitled to make submissions to the Expert and will provide the Expert with such assistance and documents as the Expert reasonably requires for the purpose of reaching a decision.

**313.** The Expert will act as an expert and not as an arbitrator. The Expert may award interest as part of their decision. The Expert's written decision on the matters referred to them will be final and binding on the parties in the absence of manifest error or fraud.

**314.** The Expert may direct that any legal costs and expenses incurred by a party in respect of the determination will be paid by another party to the determination on the general principle that costs should follow the event, except where it appears to the Expert that, in the circumstances, this is not appropriate in relation to the whole or part of such costs. The Expert's fees and any costs properly incurred by them in arriving at his determination (including any fees and costs of any advisers appointed by the Expert) will be borne by the parties equally or in such other proportions as the Expert directs.

**315.** The dispute resolution procedure set out in this Schedule will apply to matters dealt with in this Schedule notwithstanding any dispute resolution procedure provided for either in the Order or as part of any other consent in respect of the Authorised Development.

## **Miscellaneous**

**316.** Nothing in this Schedule affects the provisions of any enactment or prior agreement regulating the relations between the undertaker and Exolum in respect of any Apparatus laid or erected in land belonging to the undertaker on the date the Order is granted.

**317.** No failure or delay by a party to exercise any right or remedy provided under this Schedule or by law will constitute a waiver of that or any other right or remedy, nor will it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy will prevent or restrict the further exercise of that or any other right or remedy.