

PROTECTIVE PROVISIONS

PART X

FOR THE PROTECTION OF AIR PRODUCTS

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

2. In this Part—

“Air Products” means Air Products Public Limited Company (company number 00103881), Air Products (BR) Limited (company number 02532156) and Air Products Renewable Energy Limited (company number 08443239) whose registered offices are at Hersham Place Technology Park, Molesey Road, Walton On Thames, Surrey, KT12 4RZ and any successor in title to the apparatus; and

“alternative apparatus” means such alternative or relocated mains, pipes or other apparatus adequate to enable Air Products to carry out its operations.

“apparatus” means any mains, pipes or other apparatus belonging to or maintained by Air Products.

“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;

Precedence of the 1991 Act in respect of apparatus in streets

3. This Part does not apply to apparatus in respect of which the relations between the undertaker and Air Products are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

4. Regardless of the temporary closure, prohibition, restriction, alteration or diversion of use of streets under the powers conferred by article 13 (temporary closure of streets and public rights of way), Air Products are at liberty at all times to take all necessary access across any such 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 closure, prohibition, or restriction, alteration, diversion or use was in that street.

No acquisition etc. except by agreement

5. 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.

Removal of apparatus

6. — (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 over which access to any apparatus is enjoyed or requires that either Air Products' apparatus is relocated or diverted, that apparatus must not be removed under this Part, and any right of Air Products to maintain that apparatus in that land and to gain access to it must not be extinguished, until alternative apparatus has been constructed, tested and is in operation, and access to it has been provided, to the reasonable satisfaction of Air Products as appropriate in accordance with sub-paragraphs (2) to (7).

(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 Air Products written notice of that requirement, together with a plan and section of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order, Air Products reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to Air Products 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 including for the purpose of lay down, car parking and other uses ancillary to decommissioning, removal and making good of the apparatus and the construction, testing and commissioning of the alternative apparatus and for the avoidance of doubt, this shall include a requirement to grant as many easements to Air Products as may be necessary so that a easement is in place in relation to each and every part of the alternative apparatus and for such easements to be granted by the undertaker on or before the date on which Air Products requires access to the site of the alternative apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker, or 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, Air Products must, on receipt of a written notice to that effect from the undertaker, as soon as reasonably possible use reasonable 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 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 Air Products and the undertaker or in default of agreement settled by arbitration in accordance with article 46 (arbitration).

(5) Air Products must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 46 (arbitration), and after the grant to Air Products of any such facilities and rights as are referred to in sub-paragraph (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.

(6) Regardless of anything in sub-paragraph (5), if the undertaker gives notice in writing to Air Products that it desires itself to execute any work, or part of any work, in connection with the construction or removal of apparatus in any land controlled by the undertaker, that work, instead of being executed by Air Products, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of Air Products.

(7) Nothing in sub-paragraph (6) 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 300 millimetres of the apparatus.

(8) The undertaker and Air Products shall work co-operatively to:

- (a) resolve any potential clashes or impacts of the authorised development upon the apparatus and/or the alternative apparatus whilst maintaining at all times an uninterrupted use of any apparatus by or for the benefit of Air Products or its customers;
- (b) identify how and when any works to the apparatus and/or alternative apparatus might be carried out in a manner which minimises so far as reasonably practicable the impact on Air Products or its customers;
- (c) at all times and specifically prior to the commencement of any phase of the authorised development that impacts upon the apparatus and/or the alternative apparatus, agree the exact form and timing of any engineering works to divert, alter or protect the apparatus and/or the alternative apparatus;
- (d) procure that on commencement of use of the alternative apparatus, Air Products' existing rights in the apparatus are extinguished and all residual liability in respect of such rights is released.

(9) The undertaker shall not permit or cause any interruption in Air Products' ability to use the apparatus or the alternative apparatus, including Air Products' ability to supply its customers, unless otherwise agreed with Air Products, such agreement not to be unreasonably withheld or delayed PROVIDED THAT the undertaker shall not be liable under this paragraph to the extent that any such interruption is caused by Air Products or its customers to whom the supply is made.

Facilities and rights for alternative apparatus

7. —(1) Where, in accordance with the provisions of this Part, the undertaker affords (whether due to the obligations herein or otherwise) to Air Products 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 must be granted upon such terms and conditions as may be agreed between the undertaker and Air Products or in default of agreement settled by arbitration in accordance with article [46].
- (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 Air Products 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 Air Products as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained Apparatus

8. —(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 the removal of which has not been required by the undertaker under paragraph 5(2), the undertaker must submit to Air Products 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 Air Products for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and Air Products is entitled to watch and inspect the execution of those works.
- (3) Any requirements made by Air Products 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 subparagraph (1) are submitted to it.
- (4) If Air Products in accordance with sub-paragraph (1) 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, sub-paragraphs 5(1) to (9) apply as if the removal of the apparatus had been required by the undertaker under paragraph 5(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 it must give to Air Products notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph (2) in so far as is reasonably practicable in the circumstances.

Expenses and costs

9. —(1) Subject to the following provisions of this paragraph, the undertaker must repay to Air Products the expenses incurred by it in, or in connection with, the inspection, removal, alteration, reinstatement, testing or protection of any apparatus or the construction of any new apparatus which may be required in consequence of the execution or pursuance of any such works as are referred to in paragraph 5(2) including but not limited to;
- (a) compensation for all losses costs and expenses (whether third party costs or costs incurred by Air Products);

- (b) all costs associated with the decommissioning, removal and making good of the apparatus;
- (c) all costs associated with the commissioning of the alternative apparatus;
- (d) any operational interruption or shutdown;
- (e) all professional costs incurred as a consequence of or associated with the works authorised by this Part and the promotion thereof;
- (f) any increase in operational costs as a result of implementation of the development consent order; and
- (g) all costs associated with negotiating creating and/or protecting any new rights of the alternative apparatus.

(2) There is to be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part, and which is not re-used as part of the alternative apparatus that value being calculated after removal.

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

(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, 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 46 to be necessary,

then, if such placing involves cost in the construction of works under this Part 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 Air Products by virtue of sub-paragraph (1) is to be reduced by the amount of that excess save to the extent that it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker .

(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 where such extension is required in consequence of the execution of any such works as are referred to in paragraph 5(2); and

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

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

(6) The undertaker acknowledges that if a contractor that is employed by Air Products to carry out works connected with the relocation of the Air Products' apparatus and is permitted by Air Products

to dispose of apparatus that the contractor removes, then any reduction in the costs and expenses charged by such contractor that is allowed to Air Products in return for such permission will constitute the deduction envisaged by paragraph 8(2) of this Part and no further deduction will be made by the undertaker pursuant to that paragraph.

10. (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works authorised by this Part, or in consequence of the construction, use, maintenance, access or failure of any of the authorised development by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by it) in the course of carrying out such works, any damage is caused to any 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 Air Products, or there is any interruption in the use of such apparatus or property including any service provided, or in the supply of any goods, by Air Products, the undertaker must—
- (a) bear and pay the cost (on an indemnity basis) incurred by Air Products in restoring such use, making good such damage or restoring the supply; and
 - (b) compensate Air Products for any other expenses, loss, damages, penalty or costs incurred by Air Products, by reason or in consequence of any such damage or interruption.
- (2) 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 neglect or default of Air Products, its officers, employees, servants, contractors or agents; or
- (3) Air Products 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 which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.
- (4) Air Products must use its 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 10 applies.
- (5) If requested to do so by the undertaker, Air Products must provide an explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1). The undertaker shall only be liable under this paragraph 9 for claims reasonably incurred by Air Products.

Enactments and agreements

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