

ENVIRONMENT AGENCY

EXPLANATORY NOTE TO STANDARD PROTECTIVE PROVISIONS

1 Introduction

- 1.1 This Explanatory Note (**EN**) accompanies the Environment Agency's (**EA**) standard form of Protective Provisions (**PPs**) to be included in Development Consent Orders (**DCO**) in connection with both the protection of its interests and, where appropriate, the disapplication of any prescribed non-planning consent pursuant to section 150 of the Planning Act 2008 (**PA2008**). This EN should be read alongside the PPs.
- 1.2 This EN has been prepared for applicants seeking development consent for a Nationally Significant Infrastructure Project (**NSIP**) and it is designed to explain the purpose, effect and context of each provision contained within the PPs. The EA's standard form of PPs have been carefully developed with a view to striking a balance between enabling NSIP developments to be progressed in an efficient and streamlined manner whilst also ensuring that important environmental protections are not diluted. The PPs are also designed to protect the EA's interests, statutory functions and powers.
- 1.3 The EA welcomes the opportunity to engage in pre-application discussions with DCO applicants as regards the particulars of their NSIP proposals. The EA considers the inclusion of the PPs is likely to be essential in any DCO which seeks to disapply any prescribed non-planning consent and so these provisions represent the basis on which any request to the EA for consent under section 150 PA2008 will be considered.

2 Definitions

- 2.1 Paragraph 1(1) sets out that the PPs apply for the protection of the EA unless otherwise agreed in writing between the applicant and the EA. This is designed to enable flexibility between the parties should they both agree that changes are necessary or desirable during the post-DCO consenting period. In some cases, it may be desirable for the EA and the applicant to enter into a legal agreement alongside the PPs to address further matters between the parties.
- 2.2 Paragraph 1(2) sets out the definitions that apply throughout the PPs. Where appropriate, the definitions are based on those used in relevant legislation including the Water Resources Act 1991 and the Environmental Permitting (England and Wales) Regulations 2016 (**the EPR 2016**). We have set out further explanation in relation to some of the specific definitions below.
- 2.3 The definition of "*specified work*" is intentionally wide given the scope of works that can be authorised by a DCO. Whilst some of the works listed in the definition of specified works may not seem to be immediately relevant to every NSIP, DCOs generally include a wide range of ancillary works which can be carried out for the purposes of or in connection with the construction of any of the works and other development referred to in the DCO, provided such works would not give rise to any materially new or materially different environmental effects in comparison with those reported in the Environmental Statement (ES). This is designed to allow

some degree of flexibility at implementation stage and in order to enable certain activities not originally envisaged to be undertaken.

- 2.4 The ancillary works could potentially include matters which would amount to flood risk activities and any amendment to the definition of “specified works” could therefore inadvertently leave a gap in environmental protection that is neither covered by the EPR 2016 or the PPs.
- 2.5 The EA does not consider it to be necessary to tailor or amend this definition of “specified work” even in cases where the undertaker considers that certain works will not be carried out under the DCO, or for example where only a tidal or non-tidal main river would be relevant. This is because the duties under the PPs will in any event only ever apply to any specified works that are actually carried out. Adopting a comprehensive approach to the definition cannot, as a matter of practice, impose addition or unnecessary duties upon the applicant but it does ensure that unforeseen activities are not inadvertently omitted.

3 Submission and approval of plans

- 3.1 Paragraph 2(1) sets out the process for the submission and approval of plans before the undertaker commences any specified work. The undertaker must submit plans (which includes plans, sections, elevations, drawings, specifications, programmes, proposals, calculations, method statements and descriptions) which will enable the EA to fully consider the nature of the works to be carried out. The PPs provide that the EA is entitled to request such further particulars (within 28 days of receipt of the plans) which it may require when considering the plans. The period of time for making its decision will be paused from the request being made to receipt of the further information.

As set out in sub-paragraph (2), any specified works must be carried out in accordance with any approved plans (or plans which are determined under the disputes provision in paragraph 12).

- 3.2 Paragraph 2(3) sets out that the EA will not unreasonably withhold or delay approval of the plans.
- 3.3 As set out in paragraph 2(4), the EA will use reasonable endeavours to respond to the submission of plans within 2 months.
- 3.4 Any approval given by the EA may be subject to reasonable requirements 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 for nature conservation or the prevention of environmental harm in the discharge of the EA’s environmental duties. It is necessary for the EA to be able to impose such requirements in the absence of the statutory provisions contained with the EPR 2016 should it agree that these would be disapplied by a DCO.
- 3.5 Where the EA refuses consent under the PP, it will provide reasons for the grounds of that refusal.

4 Construction of protective works

- 4.1 Paragraph 3 provides further detail in relation to the requirements that may be imposed by the EA when approving plans. It is not intended to restrict the scope of the requirements that can be imposed by the EA but specifies that the undertaker may be required to construct protective works before or during the construction of the specified works as are reasonably necessary to safeguard any drainage work against damage or secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased by reason of any specified work.
- 4.2 Such protective works could include the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments.

5 Timing of works and service of notices

- 5.1 Paragraph 4 sets out some provisions regarding the timing of specified works and protective works. Protective works may need to be constructed prior to the specified work if the EA reasonably requires them to be.
- 5.2 In summary, an undertaker must carry out all specified works and protective works without unreasonable delay, in accordance with the approved plans and to the reasonable satisfaction of the EA. The EA is entitled to watch and inspect the construction of such works.
- 5.3 The undertaker must give the EA not less than 14 days written notice of its intention to commence any specified work and written notice of its completion within 7 days of completion.

6 Works not in accordance with this Schedule

- 6.1 Paragraph 5(1) provides for the EA to serve a notice on an undertaker requiring it to cease all or part of a specified work where there is any failure by the undertaker to obtain consent or comply with conditions imposed by the EA. The EA can serve such a notice in cases where it considers it is necessary to avoid any of the following risks:
- 6.1.1 risk of flooding;
 - 6.1.2 risk of harm to the environment; or
 - 6.1.3 risk of detrimental impact on drainage
 - 6.1.4 damage to the fishery.
- 6.2 The undertaker must cease the specified works or part of them within the period stated in the notice until it has either obtained consent or complied with the condition.
- 6.3 This provision reflects the EPR 2016 and is necessary for the EA to ensure that any works which are unauthorised and could cause the risks set out above are not allowed to continue. If agreeing to disapply the requirement for an undertaker to obtain a relevant consent or

authorisation outside of the DCO under section 150 of the Planning Act 2008, the EA needs to be able to take prompt steps to address non-compliance by an undertaker with the prescribed procedures set down within the DCO in order to prevent the risks set out above from arising.

- 6.4 Paragraph 5(3) provides for the EA to be able to serve notice on an undertaker where a specified or protective work is carried out otherwise than in accordance with the requirements of the PPs. The EA can require the undertaker to comply with the requirements or, if the undertaker so elects and the EA consents, to remove, alter or pull down the work and restore the site to its former condition. Paragraph 5(4) provides for the EA to execute the works specified in a notice under 5(3) if the undertaker has not taken steps to comply with the notice within 28 days. This is necessary in order to ensure that the EA can step in to remedy a breach of the protective provisions in the event that an undertaker does not comply with a notice under 5(3). This power is subject to paragraph 5(5) which states that the EA must not, except in the case of an emergency, exercise this power until any dispute as to whether paragraph 5(3) is properly applicable to any work in respect of which a notice has been served or as to the reasonableness of any requirement of such a notice, has been fully determined.
- 6.5 As above, the EA must be able to take steps to rectify any works which are not carried out in accordance with the PPs when agreeing to remove the requirement to obtain a consent or authorisation outside of the DCO under section 150 of the Planning Act 2008.

7 Maintenance of works

- 7.1 The EA requires assurance that, subject to the exceptions set out in paragraph 6(5), any relevant drainage work will be maintained in good repair and condition and will be kept free from any obstruction. This applies to any drainage work which is within the limits of deviation and on land held by the undertaker for the purposes of or in connection with the specified works which are carried out in accordance with the PPs.
- 7.2 In the event that an undertaker fails to maintain a drainage work to the satisfaction of the EA, the EA can serve written notice on the undertaker requiring them to repair and restore the work or, if the undertaker so elects and the EA consents, remove the work and restore the site to its former condition.
- 7.3 In a similar way to paragraph 5(4) above, paragraph 6(3) enables the EA to do what is necessary to effect compliance with the notice, and recover its reasonable expenditure in doing so from the undertaker if the undertaker has not taken steps to comply with the notice within 28 days. This is necessary in order to ensure that the EA can step in to remedy a breach of the protective provisions in the event that an undertaker does not comply with a notice under 6(2). Again, the EA must not exercise this power until any dispute has been fully determined, except in the case of an emergency.

8 Remediating impaired drainage work

- 8.1 Paragraph 7 provides that if the efficiency of any drainage work for flood defence purposes is impaired, or that drainage work is otherwise damaged by reason of the construction of any specified work or the failure of any such work, the undertaker must make good such impairment

or damage to the reasonable satisfaction of the EA. If the undertaker fails to do so, the EA can make good the impairment or damage and recover any expenditure it incurs in doing so from the undertaker.

- 8.2 This is required to ensure that the EA's assets are not impaired or damaged as a result of specified works.

9 Agency access

- 9.1 The EA needs to be able to access flood defences or equipment maintained for flood defence purposes in order to comply with its statutory functions and duties. Paragraph 8 therefore provides that if such an access is obstructed because of the construction of a specified work, the undertaker must provide an alternative means of access as soon as reasonably practicable after becoming aware of the obstruction.

- 9.2 In the case of an emergency, which is defined as an occurrence which presents a risk of: serious flooding; serious detrimental impact on drainage; or serious harm to the environment, the undertaker must provide an alternative access on demand to enable the Agency to adequately address the emergency.

10 Free passage of fish

- 10.1 Paragraph 9 places an obligation on the undertaker to 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. In the event that any damage to the fishery is caused by reason of the construction of failure of any specified work, or the EA has reason to believe that such damage may be caused, the EA can serve notice on the undertaker requiring it to take steps to make good the damage, or protect the fishery against such damage.

- 10.2 Similar step in rights to those set out above also apply in a case where the undertaker fails to comply with a notice served under this paragraph. Paragraph 9(4) also provides that in a case where immediate action is reasonably required to secure that any such risk is avoided or reduced, the EA 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 EA has taken, or commenced to take, the steps specified in the notice. This provision is required to ensure that the EA can comply with its statutory duties and functions.

11 Indemnity

- 11.1 As set out in paragraph 10(1) of the PPs, the EA requires a full indemnity in respect of all costs, charges and expenses which the undertaker may incur when:

11.1.1 considering plans submitted for approval;

11.1.2 inspecting the construction of the specified works or any protective works that may be required by the EA; or

- 11.1.3 carrying out any surveys or tests which are reasonably required in connection with the construction of the specified works.
- 11.2 Further Indemnity
- 11.3 The undertaker is also required to fully indemnify the EA against all costs, losses, liabilities, claims and demands which may be reasonably incurred or suffered by the EA by reason of or arising out of:
 - 11.3.1 the construction, operation or maintenance of any specified works comprised within the authorised development or the failure of any such works comprised within them; or
 - 11.3.2 any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged upon the construction, operation or maintenance of the authorised development or dealing with any failure of the authorised development.
- 11.4 Paragraph 11(2) provides further detail in relation to the meaning of costs, losses, claims and liabilities.
- 11.5 Paragraph 11(3) provides that the EA must give the undertaker reasonable notice of any such claim or demand and must not settle or compromise a claim without the agreement of the undertaker (which must not be unreasonably withheld or delayed).
- 11.6 Paragraph 11(4) provides that the EA must, at all times take reasonable steps to prevent and mitigate any such claims, demands, proceedings, costs, damages, expenses or loss.
- 11.7 Paragraph 11(5) provides that the fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved by the EA, or to its satisfaction, or in accordance with any directions or award of an arbitrator, must not relieve the undertaker from any liability under the indemnity provisions.
- 11.8 Nothing in paragraph 11 imposes any liability on the undertaker with respect to any costs, charges, expenses, damages, claims, demands or losses to the extent that they are attributable to the neglect or default of the EA, its officers, servants, contractors or agents.
- 11.9 Given the very significant nature and extent of works which are ordinarily authorised by a DCO it is virtually impossible to predict and quantify all potential losses and damage which might arise and the EA is not therefore able to specify a monetary limit for inclusion within these indemnity provisions. It is notable that this is true generally of DCO indemnities offered to other statutory undertakers and public bodies. The EA has its own statutory functions and duties to perform and therefore cannot allow itself to be put in a position where losses suffered would be greater than those covered by an indemnity.
- 11.10 The overarching purpose of the PPs is to protect the EA's interests generally in the context of the authorised development as a and it is therefore necessary for the indemnity to extend to any damage etc. caused as a result of the construction, operation or maintenance of the whole authorised development i.e., not just those works which would usually require an environmental permit under the EPR 2016.

12 Disputes

- 12.1 Paragraph 12 sets out how any disputes between the undertaker and the EA are to be dealt with. In summary, any dispute will be determined by arbitration in accordance with the relevant article of the DCO if the parties agree. In the event that the parties do not agree to refer the dispute to arbitration, the dispute will be determined by the Secretary of State for Environment, Food and Rural Affairs (or any successor) and the relevant Secretary of State who would be the decision maker for the relevant DCO. The Secretaries of State would act jointly on a reference to them by the undertaker or the EA, after notice in writing by one to the other.