

**PROTECTIVE PROVISIONS FOR THE PROTECTION OF AIR
PRODUCTS PLC**

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

2. In this Schedule—

“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;

“alternative apparatus” means such altered and relocated pipeline(s) 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 for the purposes of gas supply; and

“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.

Commented [AC1]: Issue 1

Precedence of the 1991 Act in respect of apparatus in streets

3. This Schedule 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 is 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.

Commented [AC2]: Issue 2 - Acquisition other than by agreement

Removal of apparatus

5.—(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 Schedule, 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.

Commented [AC3]: Issue 3 - Scope of rights for construction of 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 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 Schedule.

(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.

Co-operation

6. The undertaker and Air Products will use reasonable endeavours to resolve any potential conflicts or impacts of the authorised development upon the apparatus and/or the alternative apparatus whilst maintaining use of any apparatus (except as agreed by the undertaker and Air Products for the commissioning and decommissioning of the apparatus) by or for the benefit of Air Products.

Commented [PM4]: Issue 4

Commented [AC5]: Issue 5 - No interruption

Facilities and rights for alternative apparatus

7.—(1) Where, in accordance with the provisions of this Schedule, the undertaker affords 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.

Commented [PM6]: Issue 6 - Application of paragraph 7

(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 sub-paragraph (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, paragraphs 5(1) to 5(7) 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) insofar 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 reasonable 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).

Commented [AC7]: Issue 7

(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 Schedule, and which is not reused as part of the alternative apparatus, that value being calculated after removal.

Commented [AC8]: Issue 8 - Scope of expenses

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

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was, 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 Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity of 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.

Commented [AC9]: Issue 9 - Deduction of excess expenses

(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.

Commented [AC10]: Issue 10 - Removal of deduction where contractor permitted to dispose of apparatus

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 Schedule, 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—

Commented [AC11]: Issue 11 - costs

- (a) bear and pay the cost reasonably incurred by Air Products in making good such damage or restoring the supply; and
- (b) make reasonable compensation to 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—

- (a) any damage or interruption to the extent that it is attributable to the act, neglect or default of Air Products, its officers, employees, servants, contractors or agents; or
- (b) any indirect or consequential loss or loss of profits by Air Products.

(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).

(6) The undertaker shall only be liable under this paragraph 10 for claims reasonably incurred by Air Products.

Application of Schedule to certain apparatus

11. This Schedule and Schedule 39 cannot both apply to the same apparatus, and to the extent that both Schedules do or may apply, only Schedule 39 applies to that apparatus and to any matter arising in relation to the interaction of that apparatus and the authorised development.

Commented [PM12]: Issue 12

Enactments and agreements

12. Nothing in this Schedule 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.

1. Issue 1 – Defined terms (paragraph 2)

- 1.1 The form of Protective Provisions (PPs) for the protection of Air Products (AP) contained in Schedule 26 of the draft DCO (DCO PPs) [REP7-018] include definitions of “alternative apparatus” and “apparatus”.
- 1.2 These definitions are removed from the AP PPs [REP5a-008], notwithstanding that these terms are used throughout both the DCO and AP PPs.
- 1.3 The definitions are required in order to properly understand the meaning of those terms within the PPs. The proposed definitions are uncontroversial and accurately reflect the meaning of the relevant terms. Furthermore, we have not been provided with any comments or alternative drafting by AP in this regard.

2 Issue 2 – Acquisition other than by agreement

- 2.1 The AP PPs provide for the inclusion of a new paragraph 5 which imposes a restriction on acquisition of AP’s apparatus other than by agreement. By contrast, the DCO PPs retain the right to compulsory acquisition powers for the benefit of the proposed development, provided that any right of AP to maintain that apparatus in such 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 APs reasonable satisfaction (the AP PPs also contain this language).
- 2.2 The DCO PPs (absent APs proposed paragraph 5) reflect the position that compulsory powers are required and are necessary in order to protect the delivery of the authorised development, being a project of national significance (by virtue of the direction issued pursuant to s 35 of the Planning Act 2008 on 22 December 2022). They also provide appropriate protection for AP’s operations and interests through the requirements to provide alternative apparatus as outlined above.
- 2.3 The applicant strongly refutes the proposed restrictions on the use of compulsory acquisition powers as they would jeopardise the delivery of the authorised development. These powers are required to ensure the authorised development can be constructed, operated and maintained and also to ensure that the authorised development’s nationally significant public benefits can be realised, including supporting the Government’s policies in relation to the timely delivery of new generating capacity and achieving ambitious net zero targets. The Applicant considers that the balance lies clearly in favour of the grant of compulsory acquisition powers, taking into account the measures to avoid, minimise or mitigate the effects of such powers, and noting the substantial public benefits that it considers exist for the authorised development.
- 2.4 The applicant also refers to the justification for compulsory acquisition powers that is outlined in the Statement of Reasons [CR1-013]

3 Issue 3 – Scope of rights for construction of alternative apparatus

- 3.1 The AP PPs include additional wording as a tailpiece to sub-paragraph 6(2) which details the scope of rights to be granted to AP in respect of the construction of alternative apparatus pursuant to the provisions contained within paragraph 5(2) of the DCO PPs.
- 3.2 The additional wording set out in the AP PPs is unnecessary. The existing requirement in paragraph 5(2) for the applicant to provide “the necessary facilities and rights for the construction of alternative apparatus” is sufficiently broad. Matters regarding timing of delivery of and the grant of access to such alternative apparatus are addressed under paragraphs 5(1), 5(4) and 5(5).
- 3.3 Furthermore, the scope of rights set out in paragraph 5(2) of the DCO PPs is consistent with that which was contained in the PPs for the benefit of AP in the Net Zero Teesside Order (see paragraph 52 in Part 5 of Schedule 12).

4 Issue 4 – Co-operation

- 4.1 The applicant has inserted paragraph 6 to address the co-operation needed between the parties to resolve any potential conflicts between AP’s apparatus and the authorised development. The applicant considers this paragraph provides sufficient protection for AP and notes that this same paragraph has been included in Schedule 40, for the benefit of Lighthouse Green Fuels Limited.

- 4.2 The AP PPs include a new sub-paragraph 5(8) which goes for beyond the necessary protections for the parties to co-operate.
- 4.3 This additional wording is considered to be too wide and has the potential to cut across the provisions contained within the remainder of PPs which set out in clear terms the requirements that must be met by both the applicant and AP to safeguard the delivery of the authorised development without negatively impacting on AP's operations (see paragraphs 5, 7, and 8), and the means by which AP will be compensated should the applicant fail to deliver on its obligations (see in particular paragraph 10).
- 4.4 Furthermore, it is noted that the additional sub-paragraph 5(8) being sought by AP was not included in the PPs for the benefit of AP in the Net Zero Teesside Order (see paragraph 52 in Part 5 of Schedule 12).

5 Issue 5 – No Interruption

- 5.1 The AP PPs have sought to include a new sub-paragraph 5(9) which requires the Applicant not to cause/permit any interruption in APs ability to use the apparatus/alternative apparatus, this wording is considered unnecessary.
- 5.2 The processes set out in paragraph 5 of the DCO PPs (which require the applicant to maintain existing apparatus until such time as alternative apparatus has been constructed, tested and is in operation and access to it has been provided) are intended to ensure that there will be no interruption to APs operations.
- 5.3 Furthermore, paragraph 10(1) provides protections to AP in the event that (notwithstanding the preceding provisions) any damage or interruption is caused to the use of APs apparatus.
- 5.4 The DCO PPs therefore provide AP with adequate protection whilst ensuring the delivery of the nationally significant project is safeguarded.
- 5.5 Furthermore, it is noted that the additional sub-paragraph 5(9) being sought by AP was not included in the PPs for the benefit of AP in the Net Zero Teesside Order (see paragraph 52 in Part 5 of Schedule 12).

6 Issue 6 – Application of paragraph 7

- 6.1 Paragraph 7 is intended to ensure that where the applicant affords AP facilities and rights for the construction and maintenance of alternative apparatus within the undertaker's land, the terms and conditions on which such facilities/rights are to be granted must either be as agreed between the parties or as settled by arbitration.
- 6.2 AP have sought the inclusion of additional wording in paragraph 7(1) of the DCO PPs, the effect of which would be to extend the application of that paragraph beyond the scope of the DCO such that it would apply to any such facilities/rights granted by the Applicant to AP.
- 6.3 The amendment sought by AP goes beyond the scope of the DCO and is therefore considered neither appropriate nor necessary. The purpose of the PPs is to provide AP with protection in connection with damage/disturbance that may arise as a result of the authorised development and should not extend to matters outside of the DCO.
- 6.4 Furthermore, it is noted that the additional wording within sub-paragraph 7(1) being sought by AP was not included in the PPs for the benefit of AP in the Net Zero Teesside Order (see paragraph 53 in Part 5 of Schedule 12).

7 Issue 7 – Reasonableness of expenses

- 7.1 AP have sought to remove reference at paragraph 9(1) of the DCO PPs to the applicant being responsible for repayment of AP's **reasonable** expenses incurred in connection with the relocation/removal of apparatus or the construction of new apparatus arising out of such works as are referred to in paragraph 5(2).
- 7.2 The removal of the word "reasonable" is not agreed. The Applicant should not be responsible for expenses that have been incurred by AP acting unreasonably.
- 7.3 The inclusion of reference to reasonableness with regard to expenses in paragraph 5(2) is precedented in various bespoke protective provisions (see, for example paragraphs 85(1) (CF

Fertilisers UK Limited) and 223(1) (Sembcorp Utilities (UK) Limited) of Parts 7 and 17 respectively of Schedule 12 to the Net Zero Teesside Order).

8 Issue 8 – Scope of expenses

- 8.1 AP have sought to include a list of costs and expenses that AP can seek to recover from the applicant under the PPs as a tailpiece to sub-paragraph 9(1). This is unnecessary.
- 8.2 Sub-paragraph 9(1) in the DCO PPs (absent the list proposed by AP) already sets out the scope of expenses that the applicant must repay to AP.
- 8.3 The list is sufficiently broad to cover the types of expenses AP may incur as a result of the works being referred to. This is consistent with the protective provisions for the benefit of Air Products in Net Zero Teesside Order (see paragraph 55(1) of Part 5 of Schedule 12).

9 Issue 9 – Deduction of excess expenses

- 9.1 AP have sought amendments to paragraph 9(3) to limit the scope of deductions from expenses it receives arising from excess expenditure to the extent that such excess expenditure relates to the inability to obtain the existing type, capacity or dimensions of apparatus, or to place such replacement apparatus at the existing depth.
- 9.2 The Applicant considers that the wording it proposes strikes the right balance between the parties – if the apparatus is improved through being replaced by the undertaker, compared to that which is there at present, then AP does receive a benefit. The reason for the improvement (such as AP are seeking to introduce) should not be relevant to whether that benefit is taken into account under paragraph 9(3).
- 9.3 Paragraph 9(3)(b) makes provision for referral to an arbitrator where there is a dispute as to whether the placing of apparatus of a particular type, capacity or dimension or the placing of apparatus at that depth is necessary. This in turn determines whether the relevant deduction for excess expenditure will apply.
- 9.4 Furthermore, the wording of paragraph 9(3)(b) in the DCO PPs (without AP's additional wording) is consistent with the protective provisions for the benefit of Air Products in the Net Zero Teesside Order (see paragraph 55(3)(b) of Part 5 of Schedule 12).

10 Issue 10 – Removal of Deduction where Contractor permitted to dispose of apparatus

- 10.1 AP have sought the inclusion of a new sub-paragraph 9(6) in the DCO PPs to the effect that where they have appointed a contractor to remove apparatus and have permitted that contractor to dispose of the apparatus in exchange for a reduction in the costs and expenses charged by the contractor, no further deduction should be made to the expenses paid to AP pursuant paragraph 9(2) of the DCO PPs.
- 10.2 These amendments are not considered reasonable and are not agreed by the applicant. The applicant would have no input or oversight into the identity of the relevant contractor, or the value attributed to the apparatus by AP and the contractor (and which would be reflected in the price to be paid to the contractor) and there is therefore a risk that the relevant apparatus could be undervalued and / or affect the costs which AP seeks to pass through to the applicant pursuant to this Schedule. The wording proposed by AP is also inconsistent with paragraph 9(2) of the DCO PPs.
- 10.3 It is further noted that this wording was not included in the protective provisions for the benefit of Air Products in the Net Zero Teesside Order (see paragraph 55 of Part 5 of Schedule 12).

11 Issue 11 – Costs

- 11.1 AP have sought to remove reference at sub-paragraphs 10(1)(a) and 10(1)(b) of the DCO PPs to the applicant being responsible for repayment of AP's reasonable costs incurred in respect of damage to and/or interruption in the use of apparatus or property arising out the works authorised by the PPs and are instead seeking wording to require the applicant to be responsible for all costs on an indemnity basis.

11.2 Paragraph 10 of the DCO PPs provides sufficient protection to Air Products as it covers the scope of the damage, service interruption or supply of goods that AP is most likely to suffer as a result of the works referred to.

1.1. The Applicant should not be responsible for paying for any unreasonable costs incurred by Air Products, hence the inclusion of 'reasonable' in paragraphs 10(1)(a) and (b). This is also consistent with paragraph 10(6) of the protective provisions. Further, the inclusion of 'reasonableness' in paragraphs 10(1)(a) and (b) is preceded in various bespoke protective provisions (see, for example paragraphs 86 (CF Fertilisers UK Limited), 94 (Exolum Seal Sands LTD and Exolum Riverside LTD), 102 (INEOS Nitriles (UK) Limited), 157 (NPL Waste Management Limited), 208(2)(b) (Sabic Petrochemicals UK Limited), 224 (Sembcorp Utilities (UK) Limited), 255 (Suez Recycling and Recovery UK Limited), 295 (The Breagh Pipeline Owners), 327 (Huntsman Polyurethanes (UK) Limited), and 400 (TGLP, TGPP and NGPL) of Parts 7-9, 13, 16-17, 19, 21, 23 and 28 respectively of Schedule 12 to the Net Zero Teesside Order).

11.3 The Applicant should not be liable for consequential loss, indirect loss or loss of profits as these losses are far too remote from, and lack a causal link to, the damage or interruption to service of supply of goods contemplated by paragraph 10(1). As such, the exclusion in paragraph 10(2) is appropriate. Paragraph 10(2) is preceded in various bespoke protective provisions in the Net Zero Teesside Order (see for example, paragraphs 255(2)(b) (Suez Recycling and Recovery UK Limited), 295(2)(b) (The Breagh Pipeline Owners) and 338 (Navigator Terminals) of Parts 19, 21 and 24 respectively of Schedule 12 to the Net Zero Teesside Order).

12 Issue 12 – Application of Schedule to Certain Apparatus (paragraph 11)

12.1 The AP PPs do not include paragraph 11 from the DCO PPs. The provision has been added to clarify which protective provisions apply to any particular piece of apparatus.