

The Planning Inspectorate  
National Infrastructure Planning  
Temple Quay House  
2 The Square  
Bristol  
BS1 6PN

**Our ref:** NE/2020/132089/02-L01  
**Your ref:** TR010029  
**Date:** 4 February 2021

Dear Messrs. Allen and McArthur

**Application by Highways England for an Order granting Development Consent for the proposed M25 Junction 28 Improvement Scheme**

Please find enclosed our comments for 'procedural deadline 2' relating to the M25 Junction 28 improvement scheme Development Consent Order application. This includes our Written Representation comments (Appendix A) and answers to the Examining Authority's Written Questions (see Appendix B/C).

**The Role of the Environment Agency**

The Environment Agency has a responsibility for protecting and improving the Environment as well as contributing to sustainable development.

Our work helps to support a greener economy through protecting and improving the natural environment for beneficial uses, working with business to reduce waste and save money, and helping to ensure that the UK economy is ready to cope with climate change. Our three main roles are as an environmental regulator, an environmental operator and an environmental advisor. One of our specific functions is as a Flood Risk Management Authority. We have a general supervisory duty relating to specific flood risk management matters in respect of flood risk arising from Main Rivers or the sea.

**Ongoing engagement with the applicant**

Since we provided our relevant representation response to you on 9 September 2020, the applicant has sought our advice in relation to the outstanding issue on 'waste deposits' and the requirement for an Environmental Permit. In this regard, we have held meetings with the applicant's agents during September and November 2020.

We have also provided our initial comments on the form of protective provisions provided within the draft Development Consent Order (APP-015) and the agreement which deals with the offsite mitigation for the impacts on the River Ingrebourne. We are continuing to discuss both these elements with legal representatives of the applicant. Please see Appendix A and Appendix B/C for further detail.

Please do not hesitate to contact me if you require any further information. We look forward to continuing to work with the applicant to resolve any ongoing matters and to ensure the best environmental outcome for this project.

Yours sincerely

**Keira Murphy**  
**Planning Specialist**  
**Sustainable Places, Hertfordshire & North London**

## Appendix A

### Written Representations on behalf of the Environment Agency

#### 1.0 Draft Order

As stated in our relevant representation RR-009, the protective provisions for the Environment Agency (Schedule 9, Part 3) within the draft Order (APP-015) deviate from our standard protective provisions and have yet to be agreed. Our answer to Examining Authority's Written Question CA1.2 in Appendix B provides further detail. We will continue to engage with the applicant on this matter.

#### 2.0 Waste deposits

- 2.1 To recap we raised the concern that the only mechanism referenced in ES Chapter 12 'Materials and Waste' (APP-034) for dealing with the re-use of waste materials through the construction process is a Materials Management Plan (MMP). MMPs are normally used as part of a CL:AIRE Definition of Waste Code of Practice (DoWCoP) to permit the re-use of both natural soils and made-ground without the need to apply for an Environmental Permit. As the materials previously deposited on site within the historical landfill and the unauthorised recently deposited waste are considered controlled waste, the recovery of them will require an Environmental Permit from the Environment Agency. An Environmental Permit will ensure that these materials are dealt with in a manner that minimises any harmful impacts to the local environment.
- 2.2 Since our relevant representation the applicant has sought further advice from us on this matter. This has been in the form of written feedback from us, as well as discussion during meetings held 30 September 2020 and 3 November 2020. During those meetings we gave advice on applying for an Environmental Permit based on a range of options to manage the disposal or reuse of the existing controlled waste deposits and the deposit of construction wastes. Following our advice, it is the applicant's intention to reuse the controlled wastes once excavated for construction works (e.g. construction of the loop road and an environmental bund) and apply for a Waste Recovery for Deposit Permit. The applicant intends to re-use naturally occurring materials through an MMP where feasible. We are aware this has resulted in changes to the scheme design captured within the non-statutory targeted consultation by the applicant.
- 2.3 The applicant has also submitted to us on 14 December 2020 a draft Waste Recovery Plan for a permit pre-application. This will be assessed by our National Permitting Service (NPS) and we previously advised the enhanced pre-application service normally takes 2-3 months from receiving a submission. Our NPS team will issue a decision in principle as to what type of Environmental Permit the applicant can apply for. Following this the applicant can proceed with applying for the appropriate Environmental Permit. Since we are unable to pre-judge what the outcome of the pre-application assessment by NPS will be we can only agree with the applicant that an Environmental Permit is required at this stage.
- 2.4 We also require (as stated within RR-009) the Register of Environmental Actions and Commitments (APP-097) is updated to reference the requirement for an Environmental Permit in respect of the 'waste deposits.' On 28 October 2020, we provided written feedback to the applicant's agent directly on ES Chapter 12 'Materials and Waste' (APP-034) and the Outline Construction Environmental Management Plan (APP-096), to ensure that the Environmental Permitting requirements are appropriately incorporated within these documents. The applicant's agent submitted an updated ES Chapter 12

'Materials and Waste' on 18 December 2020, which we have provided positive feedback on. We look forward to receiving the updated REAC and Outline CEMP.

2.5 The Statement of Common Ground (REP1-003) recently submitted by the applicant reflects our latest position on the waste matters.

### 3.0 **Water Framework Directive Mitigation works**

3.1 Our relevant representation (RR-009) confirmed that Water Framework Directive (WFD) mitigation and compliance is in principle an area of agreement and provided an agreement on terms acceptable to the Environment Agency can be concluded this issue should be resolved. We are close to reaching agreement on the wording of a legal agreement to deal with the offsite mitigation works, and will hopefully be able to update the Examiners once agreement has been reached at the next available deadline. The Statement of Common Ground (REP1-003) recently submitted by the applicant reflects our latest position this matter.

## Appendix B

### Environment Agency responses to Examining Authority's first written questions (WQ1)

1.0 We have provided our answers either to direct questions to the Environment Agency or Statutory Undertakers where relevant.

1.1 **Question CA1.2** - *A number of Statutory Undertakers have raised concerns regarding Protective Provisions.*

*i) If there are substantive concerns with the wording of Protective Provisions as set out in the draft DCO [APP-015] provide a clean and tracked changed version of the Protected Provisions required together with an explanation for the need for the change. Or;*

*ii) If the changes are not substantive, set out where there are differences of opinion and what changes would be required.*

i) The Environment Agency has a substantive concern with the proposed amendments to its standard protective provisions which relate to maintenance of the drainage works. These are contained in paragraph 22 of Schedule 9, Part 3 of the draft DCO (APP-015). The Environment Agency's standard protective provisions require the undertaker to maintain the drainage works described for the lifetime of those works. The amendments proposed limit the undertaker's obligation to maintain the drainage works to a maintenance period of 12 months. Highways England have added a sub-paragraph to specify that upon the expiry of the maintenance period, the drainage works must be maintained by the highway authority of the highway to which the specified work relates.

The Environment Agency's first concern is with the effectiveness of including a clause introducing liability for other highway authorities in the protective provisions afforded to the Environment Agency, if indeed, that is what is intended. The second concern is that it is unclear whether all of the drainage works will in fact be maintained by those highway authorities and the mechanism by which that liability will transfer. These are issues which the Environment Agency requests clarity from Highways England, so that the appropriateness of these changes can be properly assessed.

The changes are needed to reflect the Environment Agency's standard protective provisions in the absence of agreement for a substantive deviation from them. Appendix C provides a clean and tracked change version of the Protective Provisions which brings them back in line with our standard protective provisions. The Environment Agency does not accept that because these changes were agreed for Highway England's M25 J10 / A3 Wisley Interchange Scheme, the same changes should be accepted for the M25 J28 scheme without due consideration.

ii) There are also non-substantive changes that are yet to be agreed between the Environment Agency and Highways England in relation to the works in default and compensation provisions. The Environment Agency is reasonably confident that it can agree the wording with Highways England on this before Deadline 5, Tuesday 13 April 2021.

1.2 **Question CA1.19** – *It is stated in the respective RRs [RR-002], [RR-006], [RR-009], [RR-022] that adequate Protective Provisions are required in the draft DCO [APP-015]. To date, these have not yet been agreed with the Applicant.*

*The ExA requires a regular update to this position. If, by **Deadline 5, Tuesday 13 April 2021**, Protective Provisions have not been agreed, the ExA requests the relevant*

*Statutory Undertaker's preferred wording, clean and tracked changed, together with an explanation of where the difference(s) of opinion lie(s).*

We note the ExA's requirement for regular updates and will seek to work with the applicant in view of Deadline 5. We will also provide our preferred wording as requested should the Protective Provisions not be agreed by Deadline 5.

- 1.3 **Question FDW 1.14** - *Although Chapters 8 [APP-030] and 16 [APP-038] of the ES and the REAC [APP-097] identify no significant effects from the Proposed Development on flooding and water, they nonetheless rely on the outline CEMP and in particular the submission of a SWMP to mitigate any potential effects caused from the construction of the Proposed Development.*

*The Outline CEMP [APP-096] contains little details on how measures set out in the REAC would be achieved and the SWMP has not been submitted into the Examination. Moreover, paragraph 4.4.3 of the CEMP lists the SWMP as a document which may or may not be ultimately submitted as part of the CEMP and Requirement 4 of the draft DCO [APP-015].*

*The ExA is concerned that water management and drainage matters are not adequately addressed at this stage having regard to the concerns raised in RRs and that pre-commencement works as set out in the draft DCO [APP-015] would be uncontrolled. The ExA considers the approach to surface water drainage should be known in this Examination.*

- i) Comment on the approach not to submit an SWMP into the Examination.*
- ii) Explain how the ExA can be satisfied that pre-commencement and uncontrolled works would have no significant effect on drainage matters and the discharge of Requirement 8 of the draft DCO and that mitigation would be adequate. OR*
- iii) Submit an outline SWMP into the Examination and update Requirement 8 of the draft DCO accordingly securing the final SWMP to be in accordance with the outline version.*

As mentioned in paragraph 3.5 of RR-009 our interest in surface water drainage matters is limited to water quality concerns. We defer to the relevant Lead Local Flood Authorities for the primary view as they are the lead authority for assessing surface water flooding and drainage. However, we had taken for granted on our reading of the application (in particular Parts 1 and 2 of the REAC APP-097) that a Surface Water Management Plan (SWMP) would be submitted prior to commencement of works. Although we have accepted in principle the applicant's approach on the mechanisms for designing and maintaining sustainable drainage features to protect water quality, our preference is for the provision of a SWMP as a definite and not an 'optional' submission. In view of the overall environmental sensitivity of the site, it should be demonstrated how sustainable drainage will be managed for both the short and long-term to ensure the effectiveness of the proposed drainage system.

## **Appendix C – Clean and Tracked Change Version of Protective Provisions**

Attached/enclosed as separate documents.

## PART 3

### FOR THE PROTECTION OF THE ENVIRONMENT AGENCY

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

(2) In this part of this Schedule—

“the Agency” means the Environment Agency;

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

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

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

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

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

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

(a) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;

(b) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;

(c) cause obstruction to the free passage of fish or damage to any fishery;

(d) affect the conservation, distribution or use of water resources; or

(e) affect the conservation value of the main river and habitats in its immediate vicinity;

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

**19.**

—(1) Before beginning to construct any specified work, the undertaker must submit to the Agency plans of the specified work and such further particulars available to it as the Agency may within 28 days of the receipt of the plans reasonably request.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 28.

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

(a) must not be unreasonably withheld or delayed;

(b) in the case of a refusal must be accompanied by a statement of grounds of refusal;

(c) is deemed to have been refused if it is neither given nor refused within 2 months of the submission of the plans or receipt of further particulars if such particulars have been requested by the Agency for approval and

(d) may be given subject to such reasonable requirements as the Agency may have for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

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

**20.**

Without limiting paragraph 19, the requirements which the Agency may have under that paragraph include conditions requiring the undertaker, at its own expense, to construct such protective works, whether temporary or permanent, before or during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

(a) to safeguard any drainage work against damage; or

(b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased,

by reason of any specified work.

**21.**

—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 20, must be constructed—

(a) without unreasonable delay in accordance with the plans approved under this Part of this Schedule; and

(b) to the reasonable satisfaction of the Agency,

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

(2) The undertaker must give to the Agency not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days after the date on which it is completed.

(3) If the Agency reasonably requires, the undertaker must construct all or part of the protective works so that they are in place prior to the construction of the specified work to which the protective works relate.

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

(5) Subject to sub-paragraph (6), if within a reasonable period, being not less than 28 days beginning with the date when a notice under sub-paragraph (4) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice and any reasonable expenditure incurred by the Agency in so doing will be recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the

reasonableness of any requirement of such a notice, the Agency will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 28.

## 22.

—(1) Subject to sub-paragraph (7) the undertaker must from the commencement of the construction of the specified works ~~until the date falling 12 months from the date of completion (“the maintenance period”)~~, maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by the undertaker for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

~~(2) Upon the expiry of the maintenance period, the drainage work must be maintained by the highway authority of the highway to which the specified work relates.~~

(3) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the ~~person liable for maintenance~~ undertaker to repair and restore the work, or any part of such work, or (if the ~~person liable for maintenance~~ undertaker so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed), to remove the specified work and restore the site to its former condition, to such extent and within such limits as the Agency reasonably requires.

(4) Subject to sub-paragraph (6), if, within a reasonable period, being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (3) on the ~~person liable for maintenance~~ undertaker, the ~~person~~ undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is necessary for such compliance and any reasonable expenditure incurred by the Agency in so doing will be recoverable from ~~that person~~ the undertaker.

(5) If there is any failure by the undertaker to obtain consent or comply with conditions imposed by the Agency in accordance with these Protective Provisions the Agency may serve written

notice requiring the undertaker to cease all or part of the specified works and the undertaker must cease the specified works or part thereof until it has obtained the consent or complied with the condition unless the cessation of the specified works or part thereof would cause greater damage than compliance with the written notice.

(6) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (3), the Agency will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined in accordance with paragraph 28.

(7) This paragraph does not apply to—

- (a) drainage works which are vested in the Agency, or which the Agency or another person is liable to maintain and is not proscribed by the powers of the Order from doing so;
- (b) or any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule.

### **23.**

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

### **24.**

If by reason of construction of the specified work the Agency's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the undertaker must provide such alternative means of access that will allow the Agency to maintain the flood defence or use the equipment no less effectively than was possible before the obstruction within 24 hours of the undertaker becoming aware of such obstruction.

**25.**

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

(2) If by reason of—

(a) the construction of any specified work; or

(b) the failure of any such work,

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

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

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

**26.**

The undertaker must repay to the Agency all reasonable costs, charges and expenses which the Agency may reasonably incur—

(a) in the examination or approval of plans under this Part of this Schedule;

(b) in the inspection of the construction of the specified works or any protective works required by the Agency under this Part of this Schedule; and

(c) in the carrying out of any surveys or tests by the Agency which are reasonably required in connection with the construction of the specified works.

**27.**

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

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

(2) For the avoidance of doubt, in sub-paragraph (1)—

“costs” includes—

- (a) expenses and charges;
- (b) staff costs and overheads;
- (c) legal costs;
- (d) “losses” includes physical damage.

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

(4) For the avoidance of doubt, in sub-paragraph (3)—

“claims” and “demands” include as applicable—

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

“liabilities” includes—

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

- (5) The Agency must give to the undertaker reasonable notice of any such claim or demand.
- (6) The undertaker may at its own expense conduct all negotiations for the settlement of the same and any litigation that may arise therefrom.
- (7) The Agency must not compromise or settle any such claim or make any admission which might be prejudicial to the claim without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.
- (8) The Agency must, at all times take reasonable steps to prevent and mitigate any such claims, demands, proceedings, costs, damages, expenses or loss.
- (9) The Agency must, at the request of the undertaker, afford all reasonable assistance for the purpose of contesting any such claim or action, and is entitled to be repaid its reasonable expenses reasonably incurred in so doing.
- (10) The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved by the Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, will not relieve the undertaker from any liability under the provisions of this Part of this Schedule.

**28.**

Any dispute arising between the undertaker and the Agency under this part of this Schedule will, if the parties agree, be determined by arbitration under article 54 (arbitration), but will otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs or its successor and the Secretary of State for Transport or its successor acting jointly on a reference to them by the undertaker or the Agency, after notice in writing by one to the other.

## PART 3

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

(2) In this part of this Schedule—

“the Agency” means the Environment Agency;

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

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

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

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

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

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

(a) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;

(b) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;

(c) cause obstruction to the free passage of fish or damage to any fishery;

(d) affect the conservation, distribution or use of water resources; or

(e) affect the conservation value of the main river and habitats in its immediate vicinity;

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

**19.**

—(1) Before beginning to construct any specified work, the undertaker must submit to the Agency plans of the specified work and such further particulars available to it as the Agency may within 28 days of the receipt of the plans reasonably request.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 28.

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

(a) must not be unreasonably withheld or delayed;

(b) in the case of a refusal must be accompanied by a statement of grounds of refusal;

(c) is deemed to have been refused if it is neither given nor refused within 2 months of the submission of the plans or receipt of further particulars if such particulars have been requested by the Agency for approval and

(d) may be given subject to such reasonable requirements as the Agency may have for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

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

**20.**

Without limiting paragraph 19, the requirements which the Agency may have under that paragraph include conditions requiring the undertaker, at its own expense, to construct such protective works, whether temporary or permanent, before or during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

(a) to safeguard any drainage work against damage; or

(b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased,

by reason of any specified work.

**21.**

—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 20, must be constructed—

(a) without unreasonable delay in accordance with the plans approved under this Part of this Schedule; and

(b) to the reasonable satisfaction of the Agency,

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

(2) The undertaker must give to the Agency not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days after the date on which it is completed.

(3) If the Agency reasonably requires, the undertaker must construct all or part of the protective works so that they are in place prior to the construction of the specified work to which the protective works relate.

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

(5) Subject to sub-paragraph (6), if within a reasonable period, being not less than 28 days beginning with the date when a notice under sub-paragraph (4) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice and any reasonable expenditure incurred by the Agency in so doing will be recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the

reasonableness of any requirement of such a notice, the Agency will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 28.

## **22.**

—(1) Subject to sub-paragraph (7) the undertaker must from the commencement of the construction of the specified works maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by the undertaker for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(3) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the undertaker to repair and restore the work, or any part of such work, or (if the undertaker so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed), to remove the specified work and restore the site to its former condition, to such extent and within such limits as the Agency reasonably requires.

(4) Subject to sub-paragraph (6), if, within a reasonable period, being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (3) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is necessary for such compliance and any reasonable expenditure incurred by the Agency in so doing will be recoverable from the undertaker.

(5) If there is any failure by the undertaker to obtain consent or comply with conditions imposed by the Agency in accordance with these Protective Provisions the Agency may serve written notice requiring the undertaker to cease all or part of the specified works and the undertaker must cease the specified works or part thereof until it has obtained the consent or complied with the condition unless the cessation of the specified works or part thereof would cause greater damage than compliance with the written notice.

(6) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (3), the Agency will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined in accordance with paragraph 28.

(7) This paragraph does not apply to—

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

(b) or any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule.

### **23.**

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

### **24.**

If by reason of construction of the specified work the Agency's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the undertaker must provide such alternative means of access that will allow the Agency to maintain the flood defence or use the equipment no less effectively than was possible before the obstruction within 24 hours of the undertaker becoming aware of such obstruction.

### **25.**

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

specified work.

(2) If by reason of—

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

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

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

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

## **26.**

The undertaker must repay to the Agency all reasonable costs, charges and expenses which the Agency may reasonably incur—

- (a) in the examination or approval of plans under this Part of this Schedule;
- (b) in the inspection of the construction of the specified works or any protective works required by the Agency under this Part of this Schedule; and
- (c) in the carrying out of any surveys or tests by the Agency which are reasonably required in connection with the construction of the specified works.

## **27.**

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

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

(2) For the avoidance of doubt, in sub-paragraph (1)—

“costs” includes—

- (a) expenses and charges;
- (b) staff costs and overheads;
- (c) legal costs;
- (d) “losses” includes physical damage.

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

(4) For the avoidance of doubt, in sub-paragraph (3)—

“claims” and “demands” include as applicable—

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

“liabilities” includes—

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

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

(6) The undertaker may at its own expense conduct all negotiations for the settlement of the same and any litigation that may arise therefrom.

(7) The Agency must not compromise or settle any such claim or make any admission which

might be prejudicial to the claim without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.

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

(9) The Agency must, at the request of the undertaker, afford all reasonable assistance for the purpose of contesting any such claim or action, and is entitled to be repaid its reasonable expenses reasonably incurred in so doing.

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

## **28.**

Any dispute arising between the undertaker and the Agency under this part of this Schedule will, if the parties agree, be determined by arbitration under article 54 (arbitration), but will otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs or its successor and the Secretary of State for Transport or its successor acting jointly on a reference to them by the undertaker or the Agency, after notice in writing by one to the other.