

SCHEDULE 12

Protective provisions

PART 5

Protection of Environment Agency

1.—(1) The provisions of this Part have effect for the protection of the Agency unless otherwise agreed in writing between the undertaker and the Agency.

2. In this Part—

“Agency” means the Environment Agency;

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

“drainage work” means any watercourse and includes—

- (a) any land that provides or is expected to provide flood storage capacity for any watercourse;
- (b) any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage, flood defence or tidal monitoring; and
- (c) any ancillary works constructed as a consequence of works carried out for drainage purposes;

“fishery” means any watercourse within the Order limits containing fish, fish in such waters and the spawn, habitat or food of such fish;

“plans” includes sections, drawings, specifications 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 16 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; or
- (d) affect the conservation, distribution or use of water resources;

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

3.—(1) Before commencing construction of 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 require.

(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 13.

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

- (a) must not be unreasonably withheld or delayed;
- (b) is deemed to have been given if it is neither given nor refused within 2 months of the submission of the plans for approval or receipt of further particulars if such particulars

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have been required by the Agency and, in the case of a refusal, accompanied by a statement of the grounds of refusal; and

- (c) may be given subject to such reasonable requirements as the Agency may make for the protection of any drainage work or 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)(b).

4. Without limiting paragraph 3 but subject always to the provision of that paragraph as to reasonableness, the requirements that the Agency may make 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;
- (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 the specified work.

5.—(1) Subject to sub-paragraph (2), the specified work, and all protective works required by the Agency under paragraph 4, must be constructed—

- (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under this Part; and
- (b) to the reasonable satisfaction of the Agency,

and an officer of the Agency is entitled 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 before the construction of any specified work.

(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 Part, the Agency may by notice in writing require the undertaker at the undertaker's own expense to comply with the requirements of this Part 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) and paragraph 9, if within a reasonable period, being not less than 28 days from the date on which a notice under sub-paragraph (4) is served on the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice or subsequently to make reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice, and any expenditure incurred by it in so doing is 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 must not except in an emergency exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined.

6.—(1) Subject to sub-paragraph (6), 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 that is situated within the Order limits 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) If any such drainage work that 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 work and restore the site to its former condition, to such extent and within such limits as the Agency reasonably requires.

(3) Subject to paragraph 9, 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 (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice or has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the undertaker.

(4) If there is any failure by the undertaker to obtain consent or comply with conditions imposed by the Agency in accordance with this Part, 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 of them until it has obtained the consent or complied with the condition unless the cessation of the specified works or part of them would cause greater damage than compliance with the written notice.

(5) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the Agency must not except in a case of emergency exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined.

(6) This paragraph does not apply to drainage works that are vested in the Agency, or that the Agency or another person is liable to maintain and is not prevented by this Order from doing so.

7. Subject to paragraph 9, 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 the 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 same and recover from the undertaker the expense reasonably incurred by it in doing so.

8.—(1) The undertaker must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in a 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) Subject to paragraph 9, 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 may recover from the undertaker the expense reasonably incurred by it in doing so.

(4) Subject to paragraph 9, 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 the reasonable cost of doing so, provided that notice specifying those steps is served on the undertaker as

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soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

9.—(1) Nothing in paragraphs 5(5), 6(3), 7 and 8(3) and (4) authorises the Agency to execute works on or affecting the authorised development without the prior consent in writing of the undertaker.

(2) Consent under sub-paragraph (1) must not be unreasonably withheld or delayed, and the undertaker is deemed to have given its consent if it has not refused consent within 2 months of receiving a written request from the Agency.

10. The undertaker must indemnify the Agency in respect of all costs, charges and expenses that the Agency may reasonably incur, have to pay or sustain—

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

11.—(1) Without limiting the other provisions of this Part, the undertaker must indemnify the Agency from all claims, demands, proceedings, costs, damages, expenses or loss that may be made or taken against, recovered from, or incurred by, the Agency by reason of—

- (a) any damage to a drainage work so as to impair its efficiency for the purposes of flood defence;
- (b) any damage to a fishery;
- (c) any raising or lowering of the water table in land adjoining the authorised development or any sewers, drains and watercourses;
- (d) any flooding or increased flooding of any such land; or
- (e) inadequate water quality in any watercourse or in any groundwater that is caused by the construction of any of the specified works or any act or omission of the undertaker, its contractors, agents or employees whilst engaged on the work.

(2) The Agency must give to the undertaker reasonable notice of any such claim or demand, and no settlement or compromise may be made without the agreement of the undertaker, which agreement must not be unreasonably withheld or delayed.

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

13. Any dispute arising between the undertaker and the Agency under this Part, if the parties agree, is to be determined by arbitration under article 44 (arbitration), but otherwise must be determined by the Secretary of State for the Environment, Food and Rural Affairs and after notice in writing by 1 to the other.