

SCHEDULE 8

Protective provisions

PART 5

Protection for Canal & River Trust

1. The provisions of this Part have effect for the protection of Canal & River Trust unless otherwise agreed in writing between the undertaker and Canal & River Trust.

2. In this Part—

“construction” includes execution, placing, alteration and reconstruction; and “construct” must be construed accordingly;

“engineer” means an engineer appointed by Canal & River Trust for the purpose of this Order;

“Canal & River Trust” means the Canal & River Trust or any successor body performing the same functions in relation to any waterways;

“Canal & River Trust property” means any land owned by Canal & River Trust within the Order limits and includes land covered with water, subsoil, air space and waterways;

“code of practice” means the code of practice⁽¹⁾ for works affecting Canal & River Trust (April 2015) as amended from time to time;

“plans” includes sections, designs, design data, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), programmes and details of the extent, timing and duration of any proposed use or occupation of any Canal & River Trust property;

“specified work” means so much of any of the authorised development to be situated on, across, under, over or within the waterway or that may in any way adversely affect the waterway;

“waterway” means the River Witham and includes any pond or other waterway or course situated on Canal & River Trust property, any works, services, apparatus, equipment, lands (including subsoil) or premises belonging to or under the control of Canal & River Trust and held or used by it in connection with its statutory functions in relation to the River Witham.

3.—(1) Where, under this Part or anywhere else under this Order, Canal & River Trust (or the engineer) is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that the undertaker must observe the provisions of the code of practice for works affecting waterways and, where the code of practice is adhered to and its provisions observed, such consent must not be unreasonably withheld.

(2) To avoid doubt, any consent may be given subject to reasonable conditions including a condition which requires compliance with the code of practice or any applicable part of it and, in respect of article 12 (discharge of water), it is reasonable to impose a condition requiring the payment of such charges as are typically charged by the owner of the waterway.

(3) In so far as any specified work or the acquisition of rights under or over, or the use of, Canal & River Trust property is or may be subject to the code of practice, Canal & River Trust must—

(a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from that code; and

(1) Canal & River Trust (April 2015).

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- (b) use its reasonable endeavours to avoid any conflict arising between the application of that code and the proper implementation of the authorised development under this Order.

4.—(1) The undertaker must not in the exercise of the powers conferred by this Order prevent, obstruct or interfere with pedestrian or vehicular access to any Canal & River Trust property, unless preventing, obstructing or interfering with such access is with the consent of Canal & River Trust.

(2) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act in relation to any right of access of Canal & River Trust to Canal & River Trust property, but such right of access may be diverted with the consent of Canal & River Trust.

5.—(1) The undertaker must, before commencing construction of any specified work or carrying out any works on Canal & River Trust property, supply to Canal & River Trust proper and sufficient plans of that work (and such further information as Canal & River Trust may reasonably require) for the approval (having regard to the undertaker's timetable for the construction of the authorised development) of the engineer; and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration in accordance with article 36 (arbitration).

(2) If by the end of the period of 28 days beginning with the date on which the plans have been supplied to Canal & River Trust the engineer has not provided, in writing, disapproval of the plans and the grounds of disapproval, the undertaker may serve on the engineer written notice requiring the engineer to intimate approval or disapproval within a period of 14 days beginning with the date on which the engineer receives written notice from the undertaker; and if by the expiry of the 14 days the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.

(3) When signifying approval of the plans, the engineer may specify any protective works (whether temporary or permanent) that in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of the waterway or the continued safe and efficient use of the waterway or any Canal & River Trust property, and—

- (a) such protective works (which for the avoidance of doubt may include requirements to fence any proposed works in order to separate them from the waterways, ponds or watercourses situated on Canal & River Trust property either on a permanent or temporary basis) as may be reasonably necessary for those purposes must be constructed by the undertaker, as agreed between the parties or settled by arbitration in accordance with article 36;
- (b) the protective works must be carried out at the expense of the undertaker with all reasonable dispatch; and
- (c) the undertaker must not commence the construction of the specified work until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

(4) If the undertaker fails to complete the construction of, or part of, any specified work or any protective work, Canal & River Trust may, if reasonably necessary to ensure the safety or stability of the waterway or the continued safe and efficient use of the waterway, construct any specified work or protective or part of such work in order to complete the construction of, or part of, the work.

6.—(1) Any specified work and any protective work to be constructed by virtue of paragraph 5(3) must, when commenced, be constructed —

- (a) with all reasonable dispatch (having regard to the undertaker's timetable for construction of the authorised development) in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;

- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage or disturbance as is possible to the waterway;
- (d) in such a manner to ensure that no materials are discharged or deposited into any stream, watercourse, waterway, pond or any other water feature on or forming part of Canal & River Trust property; and
- (e) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of the waterway.

(2) If any damage to the waterway is caused by the carrying out of, or in consequence of, the construction of a specified work or a protective work, the undertaker must make good such damage and must pay to Canal & River Trust all reasonable and proper expenses that Canal & River Trust may incur or may be put to and reasonable and proper compensation for any loss which it may sustain in making good or otherwise by reason of such damage, interference or obstruction.

(3) Nothing in this Part imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligent act or default of Canal & River Trust or its servants, contractors or agents or any liability on Canal & River Trust with respect to any damage, costs, expenses or loss attributable to the negligent act or default of the undertaker or its servants, contractors or agents.

7. The undertaker must—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or the method of constructing it.

8. Canal & River Trust must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Canal & River Trust under this Part during their construction and must supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them.

9. The undertaker must repay to Canal & River Trust in accordance with the code of practice all costs, charges and expenses reasonably incurred by Canal & River Trust in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work.

10. If, at any time during or after the completion of a specified work or a protective work, Canal & River Trust gives notice to the undertaker informing it that the state of maintenance of any part of the specified work or protective work appears to be such as adversely affects the operation of the waterway, the undertaker must, on receipt of the notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect the operation of the waterway.

11.—(1) The undertaker must pay to Canal & River Trust all reasonable and proper costs, charges, damages, losses and expenses not otherwise provided for in this Part that may be reasonably incurred by Canal & River Trust by reason of—

- (a) the existence, construction or maintenance of a specified work or a protective work or the failure of such a work; or
- (b) any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged on a specified work or a protective work,

and the undertaker must indemnify and keep indemnified Canal & River Trust from and against all reasonable and proper claims and demands arising out of or in connection with a specified work

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or a protective work or any such act or omission within 12 months of completion of the specified work or a protective work.

(2) The fact that any act or thing may have been done by Canal & River Trust on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision does not (if it was done without negligence on the part of Canal & River Trust or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under this paragraph.

(3) Canal & River Trust must give the undertaker reasonable notice of any such claim or demand, and except as such conduct would be contrary to law no settlement or compromise of such a claim or demand may be made without the prior written consent of the undertaker, such consent not to be unreasonably withheld or delayed.

12. Canal & River Trust must, on receipt of a written request from the undertaker, from time to time provide the undertaker free of charge with written estimates of the costs, charges, expenses and other liabilities for which the undertaker is or will become liable under this Part and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under this Part.

13. In the assessment of any sums payable to Canal & River Trust under this Part, no account must be taken of any increase in the sums claimed that are attributable to any action taken by or any agreement entered into by Canal & River Trust if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by the undertaker under this Part or increasing the sums so payable.

14. The undertaker and Canal & River Trust may enter into, and carry into effect, agreements for the transfer to the undertaker of—

- (a) any Canal & River Trust property shown on the works or land plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such Canal & River Trust property; and
- (c) any rights and obligations (whether or not statutory) of Canal & River Trust relating to any Canal & River Trust property or any lands, works or other property referred to in this paragraph.

15. The undertaker must repay to Canal & River Trust in accordance with the code of practice all fees, costs, charges and expenses reasonably incurred by Canal & River Trust—

- (a) in constructing any part of a specified work or protective work on behalf of the undertaker as provided by paragraph 5(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing the works;
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work;
- (c) in respect of the employment or procurement of the services of any persons whom it must be reasonably necessary to appoint for inspecting, signalling, watching and lighting Canal & River Trust property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or incident arising from the construction or failure of a specified work; and
- (d) in respect of any additional temporary lighting of Canal & River Trust property in the vicinity of the specified work, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

16.—(1) If any permanent or temporary alterations or additions to Canal & River Trust property are reasonably necessary in consequence of the construction of a specified work or a protective work

during construction, or during a period of 24 months after the completion, of that work in order to ensure the safety of Canal & River Trust property or the continued safe operation of the waterway, such alterations and additions may be carried out by Canal & River Trust.

(2) If Canal & River Trust gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Canal & River Trust the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Canal & River Trust in maintaining, working and, when necessary, renewing the alterations or additions.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 15, provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(4) If the cost of maintaining, working or renewing Canal & River Trust property is reduced in consequence of any such alterations or additions, a capitalised sum representing the saving must be set off against any sum payable by the undertaker to Canal & River Trust under this paragraph.

17. Any difference arising between the undertaker and Canal & River Trust under this Part (other than a difference as to the meaning or construction of this Part) must be referred to and settled by arbitration in accordance with article 36.