

SCHEDULE

PROTECTIVE PROVISIONS

Article 27(1)

Part I

PROTECTION OF ASSOCIATED BRITISH PORTS

1. In this Part of this Schedule—

“accumulation” means any accumulation of silt or other material which constitutes an impediment to navigation;

“construction” includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying, and removal, and

“constructed” shall be construed accordingly;

“erosion” means any erosion of the bed or banks of the river or any jetty or other structure of whatever nature owned or occupied by A.B. Ports;

“plans” includes sections, descriptions, drawings and specifications.

2.—(1) Before commencing the construction of a tidal work the Company shall furnish to A.B.Ports for its approval, which it shall not unreasonably withhold, plans of the work showing the general mode of construction and such work shall not be constructed otherwise than in accordance with such plans as may be approved by A.B.Ports or as may be determined as hereinafter provided and all such works shall be executed to the reasonable satisfaction of A.B.Ports.

(2) When submitting plans to the Secretary of State pursuant to article 12 (Tidal works not to be executed without approval of Secretary of State) of this Order, the Company shall send a copy thereof to A.B.Ports and the Company shall, on receipt of approval of plans or of any conditions or restrictions imposed under that article, send a copy to A.B.Ports.

(3) In the event of A.B.Ports failing to express its disapproval of any plans within 56 days after they have been delivered to it under this paragraph, it shall be deemed to have approved them.

3. The Company shall give to A.B.Ports not less than fourteen days' written notice of their intention to commence the construction of a tidal work and, not more than fourteen days after completion of such construction, shall give to A.B.Ports written notice of such completion.

4. The Company shall at all reasonable times during construction of the works and thereafter allow A.B.Ports, its servants and agents, access to the works and all reasonable facilities for inspecting any tidal work.

5. After the purpose of any temporary works has been accomplished the Company shall with all reasonable dispatch, or after a reasonable period of notice in writing from A.B.Ports requiring them so to do, remove any such temporary works or any materials relating thereto which may have been placed below the level of high water by or on behalf of the Company and, on their failing so to do within a reasonable period after receiving such notice, A.B.Ports may remove the same and charge the Company with the reasonable expense of so doing, which expense the Company shall repay to A.B.Ports.

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6.—(1) If, during the construction of a tidal work or within 10 years after the completion of such work and wholly or partly in consequence of its construction or, if during the exercise of the powers conferred by article 10 (Power to dredge) of this Order or within 10 years thereafter and wholly or partly in consequence thereof there is caused or created an accumulation or erosion, the Company, if so requested by A.B.Ports before or within the period of 10 years after such completion or exercise, shall remedy such accumulation or erosion in the manner specified in sub-paragraph (3) below and, if they refuse or fail so to do, A.B.Ports may itself cause the work to be done and may recover the reasonable cost thereof from the Company.

(2) Should any accumulation or erosion in consequence of such construction or exercise arise within the said period of 10 years and be remedied in accordance with sub-paragraph (3) below, any recurrence of such accumulation or erosion shall from time to time be so remedied by the Company during the said period of 10 years and at any time thereafter, save that the Company's obligation under this paragraph shall cease in the event that following the remedying of any accumulation or erosion a period of 10 years elapses without any further accumulation or erosion being caused or created in consequence of such construction or exercise.

(3) For the purposes of sub-paragraphs (1) and (2) above—

- (a) in the case of an accumulation, the remedy shall be its removal; and
- (b) in the case of erosion, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be necessary.

(4) In the event that surveys, inspections, tests and sampling carried out pursuant to paragraph 8(1)(b) of this Part of this Schedule establish that such accumulation or erosion would have been caused in any event by factors other than the construction of a tidal work or the exercise of the powers conferred by the said article 10, the Company shall be liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction or exercise as aforesaid.

(5) For the purposes of sub-paragraph (1) above the date of completion of a work shall be the date on which it is brought into use.

7. The Company shall—

- (a) pay to A.B.Ports the reasonable costs of such alterations to the marking and lighting of the navigational channel of the river as may be necessary during or in consequence of the construction of a tidal work;
- (b) provide and maintain on the works such fog-signalling apparatus as may be reasonably required by A.B.Ports and shall properly operate such apparatus during periods of restricted visibility for the purpose of warning vessels of the existence of the works; and
- (c) afford to A.B.Ports such facilities as it may reasonably require for the placing and maintenance on the works of signals, tide-boards, tide-gauges or other apparatus for the safety or benefit of navigation.

8.—(1) Without prejudice to the other provisions of this Part of this Schedule, the Company shall be responsible for, and make good to A.B. Ports, all losses, costs, charges, damages and expenses however caused (including a proper proportion of the overhead charges of A.B.Ports) which may reasonably be incurred by or occasioned to A.B.Ports by reason of or arising from or in connection with—

- (a) the perusal of plans and the inspection of any of the tidal works or the regulation of the exercise of powers conferred by article 10 (Power to dredge) of this Order by A.B.Ports or its duly authorised representative;
- (b) the carrying out of surveys, inspections, tests and sampling within and of the river (including the bed and banks thereof)—

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- (i) to establish the marine conditions prevailing prior to the construction of any of the tidal works in such area of the river as A.B.Ports has reasonable cause to believe may subsequently be affected by any accumulation or erosion which the Company are liable to remedy under paragraph 6 of this Part of this Schedule; and
- (ii) where A.B.Ports has reasonable cause to believe that the construction of any of the tidal works or the exercise of the powers conferred by the said article 10 is causing or has caused any accumulation or erosion as aforesaid;
- (c) the construction of any of the tidal works or the exercise of the powers conferred by the said article 10, the failure of any of the tidal works or the undertaking by A.B.Ports of works or measures to prevent or remedy danger or impediment to navigation or damage to any property of A.B.Ports arising from such construction, exercise or failure;
- (d) any act or omission of the Company or their servants or agents whilst engaged in the construction of any of the tidal works or the exercise of the powers conferred by the said article 10.

(2) Without prejudice to the generality of sub-paragraph (1) of this paragraph, the Company shall indemnify A.B.Ports from and against all claims and demands arising out of, or in connection with, such construction, exercise, failure or act or omission as is mentioned in that sub-paragraph.

(3) Nothing in this paragraph shall impose any liability on the Company to the extent that any losses, costs, charges, damages, expenses, claims or demands as referred to in sub-paragraphs (1) and (2) above are attributable to negligence on the part of A.B.Ports or of any person in its employ or of its contractors or agents.

(4) A.B.Ports shall give to the Company notice of any claim or demand for which the Company may be liable under this paragraph and no settlement or compromise of any such claim or demand shall be made without the consent in writing of the Company.

9. The fact that any work or thing has been executed or done with the consent of A.B.Ports and in accordance with any conditions or restrictions prescribed by A.B.Ports or in accordance with plans approved or deemed to be approved by A.B.Ports or to its satisfaction or in accordance with any directions or award of an arbitrator or in accordance with any plans approved by the Secretary of State and any conditions or restrictions imposed by him, shall not relieve the Company from any liability under the provisions of this Part of this Schedule.

10. With the exception of any duty owed by A.B.Ports to the Company expressly provided for in the foregoing provisions of this Part of this Schedule, nothing in this Order shall be construed as imposing upon A.B. Ports, either directly or indirectly, any form of duty or liability to which A.B.Ports would not otherwise be subject which is enforceable by proceedings before any court.

11. Nothing in this Order shall affect prejudicially any statutory or other rights, powers or privileges vested in, or enjoyed by, A.B.Ports or the Harbour Master at the commencement of this Order or any title of A.B. Ports in, to or over any lands or foreshore held or acquired by it.

12. Any difference arising between the Company and A.B. Ports under this Part of this Schedule shall be determined by arbitration.

Part II

PROTECTION OF NATIONAL RIVERS AUTHORITY

1. In this Part of this Schedule—

“accumulation” means any accumulation of silt or other material which affects the operation of any outfall;

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“the Authority” means the National Rivers Authority;

“construction” includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying and removal; and

“construct” and “constructed” have corresponding meanings;

“drainage work” means any watercourse and includes any land used for providing flood storage capacity for any watercourse and any bank, wall, embankment or other structure or appliance constructed or used for defence against water (including sea water);

“erosion” means any erosion of the bed or banks of the river or any jetty or other structure of whatever nature, including the Humber sea defences, under the jurisdiction of the Authority for the purposes of the Water Resources Act 1991⁽¹⁾;

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

“plans” includes sections, descriptions, drawings, specifications and method statements and other such particulars;

“specified work” means so much of any permanent or temporary work or operation authorised by this Order (which includes, for the avoidance of doubt, any dredging and any exploratory geotechnical investigations that may be undertaken) as is undertaken between low water mark and the Humber Bank sea defence embankment or is otherwise situated in, on, under, over or within 16 metres of a drainage work or which is otherwise likely to—

- (a) affect any drainage work or the volumetric flow rate of water in or flowing to or from any drainage work;
- (b) affect the flow, purity or quality of water in any watercourse;
- (c) cause obstruction to the free passage of fish in any watercourse;
- (d) affect the conservation, distribution or use of water resources; and

“watercourse” has the meaning given in section 221(1) of the Water Resources Act 1991.

2.—(1) Before beginning to construct any specified work, the Company shall submit to the Authority plans of the work and such further particulars available to them as the Authority may reasonably require.

(2) Any such specified work shall not be constructed except in accordance with such plans as may be approved in writing by the Authority, or determined in accordance with paragraph 16 below.

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

- (a) shall not be unreasonably withheld;
- (b) shall be deemed to have been given if it is neither given nor refused in writing and with a statement of the grounds for refusal within two months of the submission of plans for approval;
- (c) may be given subject to such reasonable requirements as the Authority may impose for the protection of any drainage work or fishery or water resources, for the prevention of flooding and water pollution and in the discharge of its environmental and recreational duties.

3. Without prejudice to the generality of paragraph 2 above, the requirements which the Authority may impose under that paragraph include—

- (a) conditions as to the time at which and the manner in which any work is to be carried out;
- (b) conditions requiring the Company at their own expense—

(1) 1991 c. 57.

- (i) to provide or maintain means of access for the Authority;
- (ii) to construct such protective works whether temporary or permanent during the construction of the specified works (including the provision of flood banks, walls or embankments and other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary to safeguard any drainage work against damage or 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;
- (iii) to provide, maintain and operate arrangements for dealing with any pollution incidents which may occur;
- (iv) to undertake monitoring of any accumulation, scouring or erosion which may be caused by any specified work.

4. Any specified work, and all protective works required by the Authority under paragraph 2 above, shall be constructed to the reasonable satisfaction of the Authority, and the Authority shall be entitled by its officer to watch and inspect the construction of such works.

5. The Company shall give to the Authority notice in writing of the commencement of any specified work not less than 14 days prior to its commencement and notice in writing of its completion not later than 7 days after such completion.

6.—(1) If, during the construction of a specified work or within 10 years after the completion of such work and wholly or partly in consequence of its construction there is caused or created an accumulation or erosion, the Company, if so requested by the Authority before or within the period of 10 years after such completion shall remedy such accumulation or erosion in the manner specified in sub-paragraph (3) below and, if they refuse or fail so to do, the Authority may itself cause the work to be done and may recover the reasonable cost thereof from the Company.

(2) Should any accumulation or erosion in consequence of such construction arise within the said period of 10 years and be remedied in accordance with sub-paragraph (3) below, any recurrence of such accumulation or erosion shall from time to time be so remedied by the Company during the said period of 10 years and at any time thereafter, save that the Company's obligation under this paragraph shall cease in the event that following the remedying of any accumulation or erosion a period of 10 years elapses without any further accumulation or erosion being caused or created in consequence of such construction.

(3) For the purposes of sub-paragraphs (1) and (2) above—

- (a) in the case of an accumulation, the remedy shall be its removal; and
- (b) in the case of erosion, the remedy shall be the carrying out of such reconstruction works and other protective works or measures as may be reasonably required by the Authority.

(4) In the event that surveys, inspections, tests or sampling establish to the reasonable satisfaction of the Authority that such accumulation or erosion would have been caused in any event by factors other than the construction of a specified work, the Company shall be liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction or exercise as aforesaid.

7. For the purposes of paragraphs 5 and 6(1) above the date of completion of a work shall be the date on which it is brought into use.

8.—(1) Any specified work which provides a defence against flooding shall be maintained by and at the expense of the Company to the reasonable satisfaction of the Authority.

(2) If any such work is no longer required by the Company or is not maintained to the reasonable satisfaction of the Authority, the Authority may by notice in writing require the Company at the

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Company's own expense to repair and restore the work, or any part thereof, or to remove the work and restore the site (including any sea defences) to its former condition, to such an extent and within such limits as the Authority think proper.

(3) If, on the expiration of 30 days from the date on which a notice is served upon the Company, the Company have failed to comply with the requirements of the notice, the Authority may execute the works specified in the notice, and any expenditure incurred by it in so doing shall be recoverable from the Company.

9. If by reason of the construction of any specified work or by reason of the failure of that work or of the Company to maintain it the efficiency of any drainage work for flood defence purposes is impaired or that work is damaged, such impairment or damage shall be made good by the Company to the reasonable satisfaction of the Authority and, if the Company fail to do so, the Authority may make good the same and recover from the Company the expense reasonably incurred by it in so doing.

10. In the event that any works are constructed by the Authority in relation to a sea defence, the Company shall have no claim against the Authority in respect of any additional costs which may be incurred by the Company as a result of such works.

11. The Company shall indemnify the Authority in respect of all costs, charges and expenses which the Authority may reasonably incur or have to pay or which it may sustain—

- (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 Authority under this Part of this Schedule.

12.—(1) Without prejudice to the other provisions of this Part of this Schedule the Company shall indemnify the Authority against all claims, demands, proceedings, costs, damages or expenses or loss which may be made or taken against, or recovered from or incurred by, the Authority by reason of the construction of any of the works or by reason of their maintenance, repair, alteration, renewal, removal, existence or use or any act or omission of the Company, their contractors, agents, workmen or servants whilst engaged upon any such work.

(2) The Authority shall give to the Company reasonable notice of any such claim or demand; and no settlement or compromise thereof shall be made without the agreement of the Company, which agreement shall not be unreasonably withheld.

13.—(1) Plans of any specified work submitted by the Company to the Secretary of State under article 12 (Tidal works not to be executed without approval of Secretary of State) of this Order shall be consistent with the plans of that work submitted to the Authority under this Part of this Schedule and, if, on the submission of plans to the Secretary of State he requires any alteration of the plans as submitted to the Authority or approved by it or settled under this Part of this Schedule, or of any requirement relating thereto, the Company shall inform the Authority of such alteration.

(2) When submitting any plans to the Secretary of State under the said article 12, the Company shall send a copy of the plans to the Authority; and the Company shall, on receipt of approval of plans or of any conditions or restrictions imposed under that article, send a copy to the Authority.

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

15. Except as otherwise provided by this Part of this Schedule, nothing in this Order shall prejudice or affect in their application to the Authority the powers, rights, jurisdiction and obligations

conferred, arising or imposed under the Land Drainage Act 1991⁽²⁾, the Salmon and Freshwater Fisheries Act 1975⁽³⁾, the Water Resources Act 1991 or any other enactment, byelaw or regulation relating to the Authority.

16. Any difference arising between the Company and the Authority under this Part of this Schedule shall be determined by arbitration.

Part III

PROTECTION OF POWERGEN PLC

1. In this Part of this Schedule—

“accumulation” means any accumulation of silt or other material which constitutes an impediment to the operation or maintenance of the PowerGen works;

“construction” includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying and removal;

“erosion” means any erosion of the bed or banks of the river in the immediate vicinity of the PowerGen works affecting the operation and stability of those works;

“PowerGen” means PowerGen Plc;

“the PowerGen works” means any of the works PowerGen is empowered to construct under Part II of the Killingholme Generating Stations (Ancillary Powers) Act 1991⁽⁴⁾.

2.—(1) If, during the construction of a tidal work or within 10 years after the completion of such work and wholly or partly in consequence of its construction or, if during the exercise of the powers conferred by article 10 (Power to dredge) of this Order or within 10 years thereafter and wholly or partly in consequence thereof there is caused or created an accumulation or erosion, the Company, if so requested by PowerGen, before or within the period of 10 years after such completion or exercise, shall remedy such accumulation or erosion in the manner specified in sub-paragraph (3) below and, if they refuse or fail so to do, PowerGen may itself cause the work to be done and may recover the reasonable cost thereof from the Company.

(2) Should any accumulation or erosion in consequence of such construction or exercise arise within the said period of 10 years and be remedied in accordance with sub-paragraph (3) below, any recurrence of such accumulation or erosion shall from time to time be so remedied by the Company during the said period of 10 years and at any time thereafter, save that the Company’s obligation under this paragraph shall cease in the event that following the remedying of any accumulation or erosion a period of 10 years elapses without any further accumulation or erosion being caused or created in consequence of such construction or exercise.

(3) For the purposes of sub-paragraphs (1) and (2) above—

(a) in the case of an accumulation, the remedy shall be its removal; and

(b) in the case of erosion, the remedy shall be the carrying out of such protective works or measures as may be necessary and the reimbursing to PowerGen of its reasonable costs of carrying out such reconstruction works as may be necessary:

Provided that in the event that surveys, inspections, tests or sampling establish to the reasonable satisfaction of PowerGen that such accumulation or erosion would have been caused in any event by factors other than the construction of a tidal work or the exercise of the powers conferred by the said article 10, the Company shall be liable to remedy such accumulation

(2) 1991 c. 59.

(3) 1975 c. 51.

(4) 1991 c. viii.

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or erosion only to the extent that the same is attributable to such construction or exercise as aforesaid.

(4) For the purposes of sub-paragraph (1) above the date of completion of a work shall be the date on which it is brought into use.

3.—(1) This paragraph applies where—

(a) either—

(i) any costs, charges, damages or expenses are occasioned to or reasonably incurred by PowerGen by reason of—

(A) the failure of the works; or

(B) any act or omission of the Company or of any persons in their employment or of their contractors or others whilst engaged upon the construction or maintenance of the works or upon operations carried out under article (Power to dredge) of this Order; or

(ii) any claim or demand arises out of or in connection with the construction or maintenance of the works or any such failure, act or omission as aforesaid; and

(b) as a result of any such failure, act or omission or of the construction or maintenance of the works, any thing forming part of the works or used in connection with the construction or maintenance of the works or in connection with any such operations as aforesaid is carried downstream and causes damage to the PowerGen works.

(2) Where this paragraph applies, then (subject to paragraphs (3) and (4) below) the Company shall—

(a) be responsible for and make good to PowerGen all such costs, charges, damages and expenses as are mentioned in paragraph (1)(a)(i) above; and

(b) indemnify PowerGen from and against all such claims and demands as are mentioned in paragraph (1)(a)(ii) above.

(3) Nothing in this paragraph shall impose any liability on the Company in respect of any such claim or demand in so far as and to the extent to which it is attributable to the act, neglect or default of any person other than the Company, their contractors, agents, workmen or servants.

(4) PowerGen shall give to the Company immediate notice of any such claim or demand as is mentioned in paragraph(1)(a)(ii) above, and no settlement or compromise thereof shall be made except with the consent of the Company who (if they so elect) shall at their expense have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the same.

4. Any difference arising between the Company and PowerGen under this Part of this Schedule shall be determined by arbitration.