

SCHEDULE 1

Article 23(1)

PROTECTIVE PROVISIONS

PART 1

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 “construct” 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 that such works

(a) 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

(b) shall be executed to the reasonable satisfaction of A.B. Ports.

(2) When submitting plans to the Secretary of State pursuant to article 12 of this Order, the Company shall

(a) send a copy of those plans to A.B. Ports, and

(b) on receipt of approval of plans or of any conditions or restrictions imposed by the Secretary of State, 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 14 days’ written notice of its intention to commence the construction of a tidal work and, not more than 14 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 inspection of 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 the Company 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 failing to so do within a reasonable period after receiving such notice, A.B. Ports may remove the same and may recover the reasonable costs of doing so from the Company.

6.—(1) If—

(a) during the construction of a tidal work or within 10 years after the completion of that work and wholly or partly in consequence of its construction or,

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- (b) during the exercise of the powers conferred by article 10 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 acting reasonably before or within the period of 19 years after such completion or exercise, shall remedy such accumulation or erosion to the extent attributable to such construction or exercise of powers in the manner specified in sub-paragraph (3) and, if it refuses or fails to do so, A.B. Ports may itself cause the work to be done and may recover the reasonable cost of doing so from the Company.

(2) If any accumulation or erosion in consequence of such construction or exercise of the powers conferred under article 10 arises within the said period of 10 years and is remedied in accordance with sub-paragraph (3), 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 if, 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, inspection, 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 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.

(5) For the purposes of sub-paragraph (1) 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 any tidal work such fog-signalling apparatus as may be reasonably required by A.B. Ports and properly operate such apparatus during periods of restricted visibility for the purpose of warning vessels of the existence of those works; and
- (c) afford to A.B. Ports such facilities as it may reasonably require for the placing and maintenance on any tidal work 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 reasonable and 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 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)—
  - (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 is liable to remedy under paragraph 6; 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 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 article 10.

(2) Without prejudice to the generality of sub-paragraph (1), 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 referred to in sub-paragraphs (1) or (2) is 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 in writing 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 any 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 2

### PROTECTION OF THE ENVIRONMENT AGENCY

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

(2) In this Part of this Schedule—

“accumulation” means any accumulation of silt or other material;

“the Agency” means the Environment Agency;

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“completion” in relation to a work means when it is brought into use;

“construction” includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying and removal and “construct” and “constructed” shall be construed accordingly;

“damage” includes scouring, erosion and environmental damage and “damaged” shall be construed accordingly;

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

“erosion” means any erosion of the bed or shore of the sea or the bed or banks of the river or any jetty or other structure of whatever nature, including the Humber Sea Defences;

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

“the Humber Sea Defences” includes any wall, bank, embankment, (including any berm, counterwall or cross wall connected thereto) barrier, tidal sluice or other defences whether natural or artificial against the tidal waters of the River Humber;

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

“specified work” means any permanent or temporary work or operation authorised by this Order (including any dredging and any exploratory geotechnical investigations that may be undertaken) riverward of, but including any work to, the Humber Sea Defences;

“watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and passages through which water flows (whether or not the flow is intermittent) except a public sewer.

**2.—(1)** Before beginning to construct any specified work, the Company shall submit to the Agency plans of the work and such further particulars available to it as the Agency may within 28 days of the submission of the plans 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 Agency, or determined under paragraph 14.

(3) Any approval of the Agency 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 in the case of a refusal, accompanied by a statement of the grounds for refusal within two months of the submission of the plans for approval; and
- (c) may be given subject to such reasonable requirements as the Agency may make in the discharge of its environmental and recreational duties 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.

**3.** Without prejudice to the generality of paragraph 2, the requirements which the Agency may make under that paragraph include—

- (a) conditions as to the time and the manner in which any work or operation is to be carried out;
- (b) conditions requiring the Company at its own expense—
  - (i) to provide or maintain means of access for the Agency;
  - (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, outfalls and other new works and the strengthening, repair or renewal of existing banks, walls or embankments, outfalls or other works) 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 monitor accumulation, erosion or alteration of the tidal flow arising during the construction or following the completion of the specified works;

(iv) to provide, maintain and operate arrangements for dealing with any pollution incidents which may occur during and as a result of the construction of the specified works.

4.—(1) Subject to sub-paragraph (2), any specified work, approved under paragraph 3, and all protective works required by the Agency under paragraph 3, shall be constructed—

(a) within such reasonable period (if any) as the Agency may approve at the time of approval or upon an application by the Company thereafter (such approval not to be unreasonably withheld);

(b) in accordance with the plans approved or deemed to have been approved or settled under this Schedule; and

(c) to the reasonable satisfaction of the Agency;

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

(2) The Company shall give to the Agency not less than 14 days' prior notice in writing of the commencement of construction of any specified work and notice in writing of its completion not later than 7 days after the date thereof.

(3) If any part of the works comprising a structure in, over or under a watercourse is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the Agency may by notice in writing require the Company at the Company's own expense to comply with the requirements of this Part of this Schedule or (if the Company so elects and the Agency in writing consents, such consent not to be unreasonably withheld) to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent as the Agency reasonably requires.

(4) Subject to sub-paragraph (5), if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (3) is served upon the Company, the Company has failed to begin taking steps to comply with the reasonable requirements of the notice and thereafter to complete them within such reasonable period as may be specified in such notice, the Agency may take the steps specified in the notice and may recover the reasonable costs of doing so from the Company.

(5) 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 sub-paragraph (3), or as to the reasonableness of any requirement of such a notice, the Agency shall not except in emergency exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined.

5.—(1) If, during the construction of a specified work of within 10 years after the completion of such work, there is caused or created an accumulation or erosion or alteration of the tidal flow or littoral drift which in whole or in part is reasonably attributable to that work, the Company shall, if so required by the Agency before or within the period of 10 years after such completion and to the extent that it is so attributable, remedy such accumulation, erosion, alteration of tidal flow or littoral drift, in the manner specified in sub-paragraph (3) and, if it refuses or fails to do so, the Agency may itself cause such remedy to be carried out and may recover the reasonable cost of doing so from the Company.

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(2) If any accumulation or erosion or alternation of the tidal flow or littoral drift arise in consequence of such construction within the said period of 10 years and be required to be remedied in accordance with sub-paragraph (1), any continuation or recurrence of such accumulation or erosion or alteration of the tidal flow or littoral drift 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 if following the remedying of any accumulation or erosion or alteration of the tidal flow or littoral drift, a period of 10 years elapses without any further accumulation or erosion or alteration of the tidal flow or littoral drift.

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

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

(4) To the extent that the Company establishes by surveys, inspections, tests or sampling and without unreasonably delaying the execution of any remedial action required under sub-paragraph (2) that such accumulation or erosion or alteration of tidal flow or littoral drift would have been caused in any event by factors other than the construction of a specified work the Company shall not be liable to remedy such accumulation or erosion or alteration of tidal flow or littoral drift.

6.—(1) Before commencing the construction of a specified work the Company shall procure at its expense in liaison with and to the reasonable satisfaction of the Agency a survey of any drainage work liable to be affected by that specified work.

(2) 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 Agency;

(3) Without prejudice to sub-paragraph (2) but subject to sub-paragraph (4), the Company shall, from the commencement of the construction of the specified works and except to the extent that any approval given by the Agency under this Part of this Schedule permits otherwise, maintain in good repair and condition and free from obstruction any drainage work which is situated both within the limits of deviation and on land owned by the Company or which it otherwise has control of or is in occupation of for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers of this Order or is already in existence.

(4) The obligation imposed on the Company by sub-paragraph (3) does not apply where the Agency or another person is liable to maintain the drainage work in question and is not precluded by the exercise of the powers of this Order from doing so.

(5) If any drainage work referred to in paragraph (3) is not maintained in good repair and free from obstruction the Agency may by notice in writing require the Company to repair and restore the work, or any part of it, or (if the Company so elects and the Agency in writing consents, such consent not to be unreasonably withheld), to remove the work and restore the site (including sea defences) to its former condition, to such extent and within such limits as the Agency thinks proper.

(6) If, within a reasonable period being not less than 28 days from the date when a written notice under sub-paragraph (5) is served on the Company, the Company has failed to begin taking steps to comply with the reasonable requirements of the notice and thereafter to complete them within such reasonable period as may be specified in the notice, the Agency may take the steps specified in the notice and may recover the reasonable costs of doing so from the Company.

(7) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (5), the Agency shall not except in an emergency exercise the powers conferred by sub-paragraph (6) until the dispute has been finally determined.

7. If by reason of the construction of any specified work or by reason of the failure of any such work or of the Company to maintain it, the efficiency of any drainage work for flood defence purposes is impaired, or such a drainage work is otherwise damaged, that impairment or damage shall be made good by the Company to the reasonable satisfaction of the Agency and if the Company fails to do so within such reasonable period as the Agency may require by notice in writing to the Company, the Agency may make good the same and may recover the reasonable costs of doing so from the Company.

8.—(1) The Company shall 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 written notice on the Company 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 Company fails to take such steps as are described in the written notice served under sub-paragraph (2), the Agency may take those steps and may recover the reasonable costs of doing so from the Company.

(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 the reasonable costs of doing so from the Company provided that written notice specifying those steps is served on the Company as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

9. The Company shall indemnify the Agency in respect of all reasonable and proper costs, charges and expenses which the Agency 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 Agency under this Part of this Schedule.

10. If any works are constructed by the Agency in relation to a drainage work, the Company shall have no claim against the Agency in respect of any additional costs which may be incurred by the Company as a result of such works.

11.—(1) Without prejudice to the other provisions of this part of this Part of this Schedule, the Company shall indemnify the Agency from all claims, demands, proceedings, costs, damages expenses or losses, which may be made or taken against, or recovered from or incurred by the Agency by reason of the construction of any of the works or by reason of their existence or use or any act or omission of the Company, its contractors, agents, workmen or servants whilst engaged upon the work or compensatory habitat.

(2) The Agency shall give to the Company reasonable written notice of any such claim, demand, proceedings, costs, damages expenses or losses and no settlement or compromise of any such claim, demand, proceedings, costs, damages expenses or losses shall be made without the consent of the Company, which shall not be unreasonably withheld.

(3) Prior to incurring any expense which it may seek to recover under this paragraph, the Agency shall, except in a case of urgency, serve written notice on the Company informing it of the Agency's

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intentions and requiring it within such time as the Agency may reasonably specify to take such steps as may be reasonably practicable to avoid the need for the Agency to incur such expense.

(4) Nothing in this part of this Schedule shall impose any liability on the Company in respect of any damage to the extent that it is attributable to the negligent act or omission of the Agency, its officers, servants, contractors or agents (other than the Company).

**12.** The fact that any work or thing has been executed or done by the Company 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 shall not relieve the Company from any liability under the provisions of this Part of this Schedule.

**13.** For the purposes of Chapter II of Part II of the Water Resources Act 1991<sup>(1)</sup> (abstraction and impounding of water) and section 109 of that Act (as to structures in, over or under watercourses) as applying to the construction of any specified work, any consent or approval given or deemed to be given by the Agency under this Part of this Schedule with respect to such construction shall be deemed also to constitute a licence under that Chapter to obstruct or impede the flow of inland waters at that point by means of impounding works or, as the case may be, a consent or approval under section 109 of that Act.

**14.—(1)** Unless the parties agree to arbitration, any difference arising between the Company and the Agency under this Part of this Schedule shall be determined by the Secretary of State for Environment, Food and Rural Affairs on a reference to him by either party after notice in writing to the other.

(2) If the parties agree to arbitration, a difference arising between them under this Part of this Schedule shall be referred to and settled by a single arbitrator appointed by agreement between the parties, on a reference to him by either party after notice in writing to the other, or, in default of agreement, by the President of the Institution of Civil Engineers.

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(1) 1991 c. 57; section 109 was amended by the Environment Act 1995 (c. 25), section 120(1), schedule 22, paragraph 128.