

## SCHEDULES

### SCHEDULE 9

#### PROTECTIVE PROVISIONS

#### PART 3

##### FOR THE PROTECTION OF THE CANAL & RIVER TRUST

**23.** The following provisions are to have effect for the protection of the Canal & River Trust, unless otherwise agreed in writing between the undertaker and the Canal & River Trust.

**24.** In this Part of this Schedule–

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“the engineer” means an engineer appointed by the Canal & River Trust and approved by the undertaker for the purposes of this Order;

“Canal & River Trust” means the Canal & River Trust acting as a trustee of the Waterways Infrastructure Trust or any successor body performing the same functions and which holds any waterways within the order limits;

“code of practice” means the Code of Practice for Works Affecting the Canal & River Trust April 2016 as amended from time to time;

“detriment” means any damage to the waterway or any other property of the Canal & River Trust caused by the presence of the authorised works and, without prejudice to the generality of that meaning, includes–

- (a) any effect on the stability of the Canal & River Trust property or the safe operation of any waterway;
- (b) any obstruction of, or interference with, or hindrance or damage to, navigation or to any use of the waterway (including towing paths);
- (c) the erosion of the bed or banks of the waterway, or the impairment of the stability of any works, lands or premises forming part of the waterway;
- (d) the deposit of materials or the siltation of the waterway so as to damage the waterway;
- (e) the pollution of the waterway;
- (f) any significant alteration in the water level of the waterway, or significant interference with the supply of water thereto, or drainage of water therefrom;
- (g) any harm to the ecology of the waterway (including any adverse impact on any site of special scientific interest comprised in the Canal & River Trust network); and
- (h) any interference with the exercise by any person of rights over the Canal & River Trust’s network;

“plans” includes sections, designs, design data, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), programmes

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and details of the extent, timing and duration of any proposed use and/or occupation of any Canal & River Trust property;

“specified work” means so much of Work No.10 as is situated upon, across, under, over or within 15 metres of, or may in any way affect the waterway; and

“waterway” means the canal within the order limits 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 the Canal & River Trust and held or used by it in connection with its statutory functions.

**25.—**(1) Where under this Part of this Schedule or anywhere else under this Order the 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 Canal & River Trust must observe the provisions of its 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. For the avoidance of doubt, any consent may be issued subject to reasonable conditions including any condition which required compliance with the code of practice or any applicable part thereof and in respect of article 16 (discharge of water), it is reasonable to impose the following conditions—

- (a) requiring the payment of such charges as are typically charged by the owner of the relevant waterway;
- (b) specifying the maximum volume of water which may be discharged in any period; and
- (c) authorising the Canal & River Trust on giving reasonable notice (except in an emergency, when the Canal & River Trust may require immediate suspension) to the undertaker to require the undertaker to suspend the discharge of water or reduce the flow of water where this is necessary by reason of any operational or environmental requirement of the Canal & River Trust

(2) In so far as any specified work or the acquisition of rights under and/or over or use of the Canal & River Trust property is or may be subject to the code of practice, the 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
- (b) use its reasonable endeavours to avoid any conflict arising between the application of that code and the proper implementation of the authorised development pursuant to this Order.

**26.—**(1) The undertaker must not exercise the powers conferred by article 20 (compulsory acquisition of land) or the powers conferred by section 11(3) of the 1965 Act against the Canal & River Trust in respect of any Canal & River Trust property.

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

(3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, as applied by article 29 (statutory undertakers) to this Order, in relation to any right of access of the Canal & River Trust to Canal & River Trust property, but such right of access may be diverted with the consent of the Canal & River Trust.

(4) The undertaker shall not exercise any power conferred by this Order to discharge water into the waterway under article 16 (discharge of water) or in any way interfere with the supply of water to or the drainage of water from the waterway unless such exercise is with the consent of the Canal & River Trust, save as to surface water discharge which will not require the consent of the Canal & River Trust.

(5) The undertaker shall not exercise the powers conferred by article 18 (authority to survey and investigate the land) of this Order in relation to the waterway unless such exercise is with the consent of the Canal & River Trust.

27.—(1) The undertaker must before commencing construction of any specified work or carrying out any works on Canal & River Trust property whatsoever supply to the Canal & River Trust proper and sufficient plans of that work and such further particulars available to it as the Canal & River Trust may within 14 days of the submission of the plans reasonably require for the reasonable 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 without such approval except in accordance with article 40 (arbitration).

(2) If—

- (a) at the expiry of the period of 28 days beginning on the date on which plans (and any other particulars reasonably required under sub-paragraph (1)) have been submitted to the Canal & River Trust for its consent under sub-paragraph (1); and
- (b) the engineer has not served
  - (i) notice of refusal of those plans; and
  - (ii) the grounds for refusal upon of those plans,

the undertaker may serve upon the engineer a determination notice.

(3) If—

- (a) the undertaker has served a determination notice referred to in paragraph 27(2) and the period of 14 days from the date of service has expired; and
- (b) the engineer has not served upon the undertaker;
  - (i) notice of refusal of those plans; and
  - (ii) the grounds of refusal,

the engineer is deemed to have approved the plans as submitted.

(4) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under paragraph 27(2), the Canal & River Trust gives notice to the undertaker that the Canal & River Trust desires itself to construct any part of a specified work which in the opinion of the engineer may or will cause any detriment in respect of Canal & River Trust property or the safe operation of any waterway, then if the undertaker requires such part of such specified work to be constructed the Canal & River Trust must construct it with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision of the undertaker.

(5) When signifying his approval of the plans, the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before commencement of the construction of a specified work to prevent any detriment and such protective works (which for the avoidance of doubt may include requirements to fence any proposed works in order to separate the same from the waterways, ponds or watercourses situated on the Canal & River Trust property either on a permanent or temporary basis) as may be reasonably necessary to prevent detriment must be constructed by the undertaker, as agreed between the parties or settled by arbitration in accordance with article 40 (arbitration) and such protective works must be carried out at the expense of the undertaker with all reasonable dispatch and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to his reasonable satisfaction.

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(6) The undertaker shall pay to the Canal & River Trust a capitalised sum representing the reasonably increased or additional cost of maintaining and, when necessary, renewing any works, including any permanent protective works provided under sub-paragraph (5) above, and of carrying out any additional dredging of the waterway reasonably necessitated by the exercise of any of the powers under this Order but if the cost of maintaining the waterway, or of works of renewals of the waterway, is reduced in consequence of any such works, a capitalised sum representing such reasonable saving shall be set off against any sum payable by the undertaker to the Canal & River Trust under this paragraph.

(7) In the event that the undertaker fails to complete the construction of, or part of, the specified works the Canal & River Trust may, if reasonably required in order to avoid detriment, serve on the undertaker a notice in writing requesting that construction be completed. Any notice served under this sub-paragraph shall state the works that are to be completed by the undertaker and lay out a timetable for the works' completion. If the undertaker fails to comply with this notice within 35 days, the Canal & River Trust may construct any of the specified works, or part of such works (together with any adjoining works) in order to complete the construction of, or part of, the specified works and the undertaker shall reimburse the Canal & River Trust all costs, fees, charges and expenses it has reasonably incurred in carrying out such works.

**28.** The undertaker shall not use any land or property of the Canal & River Trust forming part of the waterway for the passage or siting of vehicles, plant and machinery employed in the construction of the specified works other than—

- (a) with the consent in writing of the engineer whose consent shall not be unreasonably withheld; and
- (b) subject to compliance with such reasonable requirements as the engineer may from time to time specify—
  - (i) for the prevention of the detriment; or
  - (ii) in order to avoid or reduce any inconvenience to the Canal & River Trust, its officers and agents and all other persons lawfully on such land or property, but nothing in this paragraph shall apply in relation to anything done in accordance with any approval given by the Canal & River Trust under paragraph 27.

**29.—(1)** Before the commencement of the initial construction of any part of the specified works and again following practical completion of the specified works the undertaker shall bear the reasonable cost of the carrying out by a qualified engineer (“the surveyor”), to be approved by the Canal & River Trust and the undertaker, of a survey including a dip-survey to measure the depth of the waterway (“the survey”) of so much of the waterway and any land and existing works of the undertaker which may provide support for the waterway as will or may be affected by the specified works.

(2) For the purposes of the survey the undertaker shall—

- (a) on being given reasonable notice (save in case of emergency, when immediate access shall be afforded) afford reasonable facilities to the surveyor for access to the site of the specified works and to any land and existing works of the undertaker which may provide support for the waterways as will or may be affected by the specified works; and
- (b) supply the surveyor as soon as reasonably practicable with all such information as he may reasonably require with regard to such existing works of the undertaker and to the specified works or the method of their construction.

(3) The reasonable costs of the survey shall include the costs of any dewatering or reduction of the water level of any part of the waterway (where reasonably required) which may be effected to facilitate the carrying out of the survey and the provisions of this Part of this Schedule shall apply

with all necessary modifications to any such dewatering or reduction in the water level as though the same were specified works.

(4) Copies of the survey shall be provided to both the Canal & River Trust and the undertaker at no cost to the Canal & River Trust.

**30.**—(1) Without prejudice to its obligations under the foregoing provisions of this Part of this Schedule the undertaker shall consult, collaborate and respond constructively to any approach, suggestion, proposal or initiative made by the Canal & River Trust—

- (a) the design and appearance of the specified works, including the materials to be used for their construction; and
- (b) the environmental effects of those works,

and shall have regard to such views as may be expressed by the Canal & River Trust to the extent that these accord with the requirements of the local planning authority in response to such consultation pursuant in particular to the requirements imposed on the Canal & River Trust by section 22 (general environmental and recreational duties) of the British Waterways Act 1995<sup>(1)</sup> and to the interest of the Canal & River Trust in preserving and enhancing the environment of its waterways.

(2) Any specified work and any protective works to be constructed 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 27(3) and with any requirements made under paragraph 27(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 detriment as possible;
- (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 the Canal & River Trust property otherwise than in accordance with article 16 (discharge of water); and
- (e) in such a manner as to cause as little inconvenience as is reasonably practicable to the Canal & River Trust, its officers and agents and all other persons lawfully using the waterway, except to the extent that temporary obstruction has otherwise been agreed by the Canal & River Trust.

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

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

(5) Nothing in this Order shall authorise the undertaker to make or maintain any permanent work in or over the waterway so as to impede or prevent (whether by reducing the width of the waterway or otherwise) the passage of any vessel which is of a kind (as to its dimensions) for which the Canal

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(1) 1995 c. 1.

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& River Trust is required by section 105(1)(b) and (2) (maintenance of waterways) of the Transport Act 1968(2) to maintain the waterway.

(6) Following the completion of the construction of the specified works the undertaker shall restore the waterway to a condition no less satisfactory than its condition immediately prior to the commencement of those works unless otherwise agreed between the undertaker and the Canal & River Trust.

**31.**—(1) The undertaker shall give to the engineer 30 days' notice of its intention to commence the construction of any of the specified or protective works, or, in the case of repair carried out in an emergency, such notice as may be reasonably practicable so that, in particular, the Canal & River Trust may where appropriate arrange for the publication of notices bringing those works to the attention of users of the Canal & River Trust's network.

(2) The undertaker must—

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

**32.**—(1) The undertaker shall provide and maintain at its own expense in the vicinity of the specified or protective works such temporary lighting and such signal lights for the control of navigation as the engineer may reasonably require during the construction or failure of the specified or protective works.

(2) The Canal & River Trust, on being given reasonable notice, must afford reasonable facilities to the undertaker and its agents for access to any works carried out by the Canal & River Trust under this Part of this Schedule 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 and the undertaker shall reimburse the Canal & River Trust's reasonable costs in relation to the supply of such information.

**33.**—(1) The undertaker shall not in the course of constructing a specified work or a protective work or otherwise in connection therewith do or permit anything which may result in the pollution of the waterway or the deposit of materials therein and shall take such steps as the engineer may reasonably require to avoid or make good any breach of its obligations under this paragraph.

(2) The undertaker must repay to the Canal & River Trust all reasonable and proper fees, costs, charges and expense reasonably incurred by the 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.

**34.** If at any time during or after the completion of a specified work or a protective work, the Canal & River Trust gives notice to the undertaker informing it that the state of maintenance the work appears to be such waterway that the work is causing or likely to cause detriment, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not to cause such detriment.

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

- (a) by reason of the existence, construction or maintenance of a specified work or protective work; or

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(2) 1968 c.73.

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- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon the construction of a specified work or protective work,

and the undertaker must indemnify and keep indemnified the Canal & River Trust from and against all claims and demands arising out of or in connection with any of the matters referred to in paragraph 35(1)(a) and (b). The fact that any act or thing may have been done by the 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 supervisions or in accordance with any directions or awards of an arbitrator is not (if it was done without negligence on the part of the Canal & River Trust or any person in its employ or of its contractors or agents) to relieve the undertaker from any liability under the provision of this sub-paragraph.

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

**36.** The 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 of this Schedule and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim or to be made pursuant to this Part of this Schedule.

**37.** In the assessment of any sums payable to the Canal & River Trust under this Part of this Schedule, there must not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by the 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 of this Schedule or increasing the sums so payable.

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

- (a) any Canal & River Trust property shown on the works and/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) and rights and obligations (whether or not statutory) of the Canal & River Trust relating to any of the Canal & River Trust property or any lands, works or other property referred to in this paragraph.

**39.** This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and the statutory undertaker are regulated by the provisions of Part 3 of the 1991 Act.

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

- (a) in constructing any part of a specified work on behalf of the undertaker or in constructing any protective works under the provisions of paragraph 27(5) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by him of the construction of a specified work or any protective works;

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- (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 or any protective works;
- (d) in respect of any additional temporary lighting of the Canal & River Trust property in the vicinity of the specified works or any protective works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or protective work; and
- (e) In bringing the specified works or any protective works to the notice of users of the Canal & River Trust's network.

**41.**—(1) If any permanent or temporary alterations or additions to the Canal & River Trust property are reasonably necessary in consequence of the construction of a specified work, or during a period of 24 months after the completion of that work in order to ensure the safety of the Canal & River Trust property, the continued safe operation of the waterway or the prevention of a detriment such alterations and additions may be carried out by the Canal & River Trust and if the 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 the 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 the Canal & River Trust in maintaining, working and, when necessary, renewing any such alternations or additions.

(2) If during the construction of a specified work by the undertaker, the Canal & River Trust gives notice to the undertaker that the Canal & River Trust desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of the Canal & River Trust property or the safe operation of any waterway then, if the undertaker decided that part of the specified work is to be constructed, the Canal & River Trust shall assume construction of that part of the specified work under paragraph 27(4), pay to the Canal & River Trust all reasonable expenses to which the Canal & River Trust may be put and compensation for any loss which it may suffer my reason of the execution by the Canal & River Trust of that specified work.

(3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 27, 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 the Canal & River Trust property is reduced in consequence of any such alterations or additions, a capitalised sum representing such saving is to be set off against any sum payable by the undertaker to the Canal & River Trust under this paragraph.

**42.** Any additional expenses which the Canal & River Trust may reasonably incur in altering, reconstructing or maintaining the waterway under any powers existing at the date when this Order was made by reason of the existence of a specified work shall, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to the Canal & River Trust.

**43.**—(1) The fact that any act or thing may have been done by the 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 or in accordance with any directions or awards of an arbitrator shall not (if it was done without negligence on the part of the Canal & River Trust or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.



(2) Nothing in sub-paragraph (2) shall impose any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the neglect or wilful default of the Canal & River Trust, its officers, servants, contractors or agents.

**44.** Any difference arising between the undertaker and the Canal & River Trust under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) shall be referred to and settled by arbitration in accordance with article 40 (arbitration) of this Order.

**45.** Any capitalised sum which is required to be paid under this Part of this Schedule shall be calculated by multiplying the cost of the maintenance or renewal works to the waterway necessitated as a result of the operation of the authorised development by the number of times that the maintenance or renewal works will be required during the operation of the authorised development.