

SCHEDULE 6

PROTECTIVE PROVISIONS

PART 4

FOR THE PROTECTION OF CANAL & RIVER TRUST

Interpretation

34.—(1) For the protection of the Trust the following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and the Trust.

(2) In this Part of this Schedule—

“Code of Practice” means the Code of Practice for Works Affecting the Canal & River Trust (April 2018) as amended from time to time;

“construction”, in relation to any specified work or protective work undertaken as part of the authorised development includes—

- (a) the execution and placing of that work; and
- (b) any relaying, renewal, or maintenance of that work as may be carried out during the period of 24 months from the completion of that work; and “construct” and “constructed” have corresponding meanings;

“detriment” means any damage to the waterway or any other property of the Trust caused by the presence of the authorised development and, without prejudice to the generality of that meaning, includes—

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

“the engineer” means an engineer appointed by the Trust for the purpose in question;

“plans” includes sections, designs, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), programmes and details of the extent, timings and duration of any proposed use or occupation of the waterway;

“protective work” means a work constructed under paragraph 36(2)(a) and “protective works” is to be construed accordingly;

“specified work” means so much of the authorised development as is situated upon, across, under, over or within 150 metres of, or may in any way affect the waterway and “specified works” is to be construed accordingly;

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“towpath” means the towpath forming part of the waterway;

“the Trust” means the Canal & River Trust;

“the Trust’s network” means the Trust’s network of waterways; and

“the waterway” means the Montgomery Canal, and includes any works, lands or premises belonging to the Trust, or under its management or control, and held or used by the Trust in connection with that navigation.

(3) Where the Code of Practice applies to any works or matter that are part of the authorised development or that form part of the protective works and there is an inconsistency between these protective provisions and the Code of Practice, the part of the Code of Practice that is inconsistent with these protective provisions will not apply and these protective provisions will apply.

Powers requiring the Trust’s consent

35.—(1) The undertaker must not in the exercise of the powers conferred by this Order obstruct or interfere with pedestrian or vehicular access to the waterway or towpath unless such obstruction or interference with such access is with the consent of the Trust.

(2) The undertaker must not exercise any power conferred by this Order to discharge water into the waterway under article 15 (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 Trust.

(3) The undertaker must not exercise the powers conferred by article 16 (authority to survey and investigate land) or section 11(3) of the 1965 Act (powers of entry), in relation to the waterway unless such exercise is with the consent of the Trust.

(4) The undertaker must not exercise the powers conferred by this Order to temporarily stop up streets or public rights of way under article 11 (temporary prohibition or restriction of use of streets and public rights of way) so as to divert any right of access to or any right of navigation along the waterway but such right of access may be diverted with the consent of the Trust.

(5) The consent of the Trust pursuant to sub-paragraphs (1) to (4) must not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions including any condition requiring compliance with the Code of Practice or any applicable part thereof and any condition which required the payment of such charges/fees/costs as are typically charged by the Trust and in the case of article 15 it is reasonable to impose the following non-exhaustive conditions—

- (a) requiring the payment of such charges as are typically charged by the Trust;
- (b) specifying the maximum volume water which may be discharged in any period; and
- (c) authorising the Trust on giving reasonable notice (except in an emergency, when the 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 Trust, to the extent that any discharge of water by the undertaker is into the waterway.

(6) The undertaker must not exercise the powers conferred by this Order to abstract water from the Montgomery Canal unless such abstraction is with the consent of the Trust. Such consent may be given subject to reasonable terms and conditions including specifying the maximum velocity of the flow of water which may be abstracted at right angles to the waterway at any time.

(7) Where the undertaker is required to obtain the Trust’s consent in accordance with this Order such consent must be obtained in writing.

(8) The undertaker must not move the location of any pole structure within a specified work without the consent of the Trust.

(9) The undertaker must comply with the code of practice in relation to the construction and operation of a specified work or protective work.

(10) The undertaker must not deviate vertically from the levels of the authorised development set out in Table 1 of requirement 3 in respect of any specified work without the consent of the Trust.

(11) The undertaker must not exercise the power conferred by article 31 (felling or lopping of trees and removal of hedgerows) in respect of any tree, shrub or hedgerow within an area of a specified work unless such power is exercised with the consent of the Trust.

(12) The construction hours in respect of any specified work must be agreed in writing with the Trust.

(13) In the event that any contamination which could impact upon the waterway is found when carrying out the authorised development, the undertaker must notify the Trust immediately and must agree with the Trust the remediation require to be undertaken. The undertaker must complete the remediation works at its own cost in accordance with timescales agreed with the Trust.

(14) Except in the case of emergencies, the undertaker must provide the Trust with 28 days written notice before interfering with the waterway for the purposes of maintaining or inspecting the authorised development and must comply with any reasonable conditions which the Trust may impose in accordance with the Code of Practice.

Approval of plans, protective works etc.

36.—(1) Before commencing construction of any specified works including any temporary works, the undertaker must supply to the Trust proper and sufficient plans of that work, the form and application fee which is ordinarily required by the Trust's engineer in accordance with the Code of Practice and such further particulars available to it as the Trust may within 28 days of the submission of the plans reasonably require for the approval of the engineer and must not commence such construction of a specified work until plans of that work have been approved in writing by the engineer or settled by arbitration and for the avoidance of doubt the approval of the engineer may be subject to any reasonable conditions including a requirement that the specified work is undertaken at a reasonable time specified by the engineer.

(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld or delayed. When signifying approval of the plans the engineer may specify on land held or controlled by the Trust or the undertaker and subject to such works being authorised by the Order or being development permitted by an Act of Parliament or general development order made under the 1990 Act—

- (a) any protective work (whether temporary or permanent) which in the reasonable opinion of the engineer should be carried out before the commencement of a specified work to prevent detriment; and
- (b) such other requirements as may be reasonably necessary to prevent detriment;

and such protective works must be constructed by the undertaker or by the Trust at the undertaker's request with all reasonable dispatch and the undertaker must not commence the construction of a specified work until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction such consent not to be unreasonably withheld or delayed.

(3) The undertaker must pay to the 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 (2) 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 renewal of the waterway, is reduced in consequence of any such works, a capitalised sum representing such reasonable saving is to be set off against any sum payable by the undertaker to the Trust under this paragraph.

(4) In the event that the undertaker fails to complete the construction of, or part of, the specified works the Trust may, if it is reasonably required in order to avoid detriment, serve on the undertaker

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a notice in writing requesting that construction be completed. Any notice served under this subparagraph must state the works that are to be completed by the undertaker and lay out a reasonable timetable for the works' completion. If the undertaker fails to comply with this notice within 35 days, the 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 or make such works and the undertaker must reimburse within 28 days to the Trust all costs, fees, charges and expenses it has reasonably incurred in carrying out such works.

Design of works

37. Without prejudice to its obligations under the foregoing provisions of this Part of this Schedule the undertaker must consult, collaborate and respond constructively to any reasonable approach, suggestion, proposal or initiative made by the Trust on—

- (a) the design and appearance of the specified works or protective works including the materials to be used for their construction; and
- (b) the environmental effects of those works; and must have regard to such views as may be expressed by the Trust in response to such consultation pursuant in particular to the requirements imposed on the Trust by section 22 (general environmental and recreational duties) of the British Waterways Act 1995(1) and to the interest of the Trust in preserving and enhancing the environment of its waterways.

Notice of works

38. The undertaker must give to the engineer 28 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 Trust may where appropriate arrange for the publication of notices bringing those works to the attention of users of the Trust's network.

Construction of specified works

39.—(1) Any specified or protective works must, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled as aforesaid and with any specifications made under paragraph 36 and paragraph 37 of this Part;
- (b) under the supervision (if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little detriment as is reasonably practicable;
- (d) in such manner as to cause as little inconvenience as is reasonably practicable to the Trust, its officers and agents and all other persons lawfully using the waterways, except to the extent that temporary obstruction has otherwise been agreed by the Trust;
- (e) in such a manner so as to ensure that no materials are discharged or deposited into the waterway otherwise than in accordance with article 15 (discharge of water); and
- (f) in compliance with the Code of Practice, if relevant.

(2) Nothing in this Order authorises the undertaker to make or maintain any permanent works 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 Trust is required by section 105(1)(b) and (2) of the Transport Act 1968(2) (maintenance of waterways) to maintain the waterway.

(1) 1995 c.i.

(2) 1968 c.73, amended by S.I. 2012/1659.

(3) Following the completion of the construction of the specified works, the undertaker must 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 Trust.

Prevention of pollution

40. The undertaker must not in the course of constructing the authorised development 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 must take such steps as the engineer may reasonably require to avoid or make good any breach of its obligations under this paragraph.

Access to work – provision of information

- 41.**—(1) The undertaker on being given reasonable notice must—
- (a) at all reasonable times allow 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.
- (2) The Trust on being given reasonable notice must—
- (a) at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by the Trust under this Part of this Schedule during their construction; and
 - (b) 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 must reimburse the Trust's reasonable costs in relation to the supply of such information.

Alterations to the waterway

42.—(1) If during the construction of a specified work or a protective work or during a period of 12 months after the completion of those works any alterations or additions, either permanent or temporary, to the waterway are reasonably necessary in consequence of the construction of the specified work or the protective work in order to avoid detriment, and provided that the Trust gives to the undertaker 56 days' notice of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to the Trust the reasonable costs of those alterations or additions including, in respect of any such alterations or 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 Trust in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If the cost of maintaining, working or renewing the waterway 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 Trust under this paragraph.

Maintenance of works

43. If at any time after the completion of a specified work or a protective work, not being a work vested in the Trust, the Trust gives notice to the undertaker informing it that it reasonably considers that the state of maintenance of the work appears to be such 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 the work in such state of maintenance as not to cause such detriment

Repayment of the Trust's fees, etc.

44.—(1) The undertaker must repay to the Trust in accordance with the Code of Practice all fees, costs, charges and expenses reasonably incurred by the Trust—

- (a) in constructing any protective works under the provisions of paragraphs 36(2)(a) or 36(4);
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction or repair of a specified work and any protective works;
- (c) in respect of the employment during the construction of the specified works or any protective works of any inspectors, watchmen and other persons whom it is reasonably necessary to appoint for inspecting, watching and lighting any waterway and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of the specified works or any protective works;
- (d) in bringing the specified works or any protective works to the notice of users of the Trust's network; and
- (e) in constructing or carrying out any measures related to any specified works or protective works which are reasonably required by the Trust to ensure the safe navigation of the waterway save that nothing is to require the Trust to construct or carry out any measures.

(2) If the Trust considers that a fee, charge, cost or expense will be payable by the undertaker pursuant to sub-paragraph (1), the Trust will first provide an estimate of that fee, charge, cost or expense and supporting information in relation to the estimate to the undertaker along with a proposed timescale for payment for consideration and the undertaker may, within a period of 21 days—

- (a) provide confirmation to the Trust that the estimate is agreed and pay to the Trust, by the date stipulated, that fee, charge, cost or expense; or
- (b) provide confirmation to the Trust that the estimate is not accepted along with a revised estimate and a proposal as to how or why the undertaker considers that the estimate can be reduced and or paid at a later date.

(3) The Trust must take into account any representations made by the undertaker and must, within 21 days of receipt of the information pursuant to sub-paragraph (1), confirm the amount of the fee, charge, cost or expense to be paid by the undertaker (if any) and the date by which this is to be paid.

(4) The Trust must, when estimating and incurring any charge, cost or expense pursuant to sub-paragraph (1), do so with a view to being reasonably economic and acting as if the Trust were itself to fund the relevant fee, charge, cost or expense.

Making good of detriment; compensation and indemnity, etc.

45.—(1) The undertaker must be responsible for and make good to the Trust all 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 Trust—

- (a) by reason of any detriment caused by the construction of a specified work or a protective work or the failure of such a work; or
- (b) by reason of any act of 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 subject to sub-paragraph (2) the undertaker must effectively indemnify and hold harmless the Trust from and against all claims and demands arising out of or in connection with any of the matters referred to in Part 4 of this Schedule save that

the Trust will not be entitled to recover any consequential losses which are not reasonably foreseeable.

(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the neglect, act or default of the Trust, its officers, servants, contractors or agents. The fact that any act or thing may be done by the 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 must not (if it was done without negligence on the part of the 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.

(3) The Trust must give the undertaker reasonable notice of any such claim or demand as aforesaid and no settlement or compromise of such a claim or demand is to be made without the prior consent of the undertaker.

Arbitration

46. Any difference arising between the undertaker and the Trust under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) must be referred to and settled by arbitration in accordance with article 38 (arbitration) of this Order.

Capitalised sums

47. Any capitalised sum which is required to be paid under this Part of this Schedule must 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.

Vehicles, plant and machinery

48. The undertaker must not use any land or property of the Trust forming part of the waterway for the passage or siting of vehicles, plant or machinery employed in the construction of the specified works other than—

- (a) with the consent in writing of the engineer whose consent must not be unreasonably withheld or delayed and such consent may be subject to conditions including any condition which requires the payment of a fee; and
- (b) subject to compliance with such reasonable and necessary requirements as the engineer may from time to time specify—
 - (i) for the prevention of detriment; or
 - (ii) in order to avoid or reduce any inconvenience to the Trust, its officers and agents or the users of the waterway.

Fencing

49. Where so required by the engineer and where that requirement has been evidenced in writing the undertaker must to the reasonable satisfaction of the engineer and upon providing reasonable notice of not less than 28 days fence off a specified work or a protective work or take such other steps as the engineer may reasonably require to be taken for the purpose of separating a specified work or a protective work from the waterway, whether on a temporary or permanent basis or both.

Survey of waterway

50.—(1) Before the commencement of construction of any part of the specified works and again following practical completion of the specified works the undertaker will appoint a surveyor (“the surveyor”) at the undertaker’s cost, to be approved by the Trust and the undertaker, who must undertake a survey including a dip-survey to measure the depth of the waterway (“the survey”) or so much of the waterway and of 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 must—

- (a) on being given reasonable notice (save in case of emergency, when immediate access must 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 waterway 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 must 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 Part 4 of this Schedule will 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 must be provided to both the Trust and the undertaker at no cost to the Trust.

Further engagement

51. The undertaker will continue to engage with the Trust in relation to the acquisition of the necessary rights and interests from the Trust by private treaty.