

SCHEDULES

SCHEDULE 9

PROTECTIVE PROVISIONS

PART 3

FOR THE PROTECTION OF THE ENVIRONMENT AGENCY AND DRAINAGE AUTHORITIES

Application

18. The following provisions of this Part of this Schedule have effect for the protection of a drainage authority unless otherwise agreed in writing between the undertaker and the drainage authority.

Commencement Information

II Sch. 9 para. 18 in force at 8.9.2022, see [art. 1](#)

Interpretation

19. In this Part of this Schedule—

“the agency” means the Environment Agency;

“access route” means an access route used by the drainage authority prior to the commencement of construction of a specified work for accessing a drainage work;

“construction” includes execution, placing, altering, replacing, relaying and removal and excavation and “construct” and “constructed” are to be construed accordingly;

“drainage authority” means—

(a) in relation to an ordinary watercourse, the drainage board concerned, within the meaning of section 23 (prohibitions of obstructions etc in watercourses) of the Land Drainage Act 1991(1); and

(b) in relation to a main river, the Environment Agency;

“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 or flood defence and any ancillary works constructed as a consequence of works carried out for drainage purposes;

“emergency” means an occurrence which presents a risk of—

(a) serious flooding;

(1) 1991 c. 59. Section 23(1B), which sets out the meaning of “drainage board concerned”, was inserted by section 49(3) of, and paragraph 32(3) of Schedule 2 to, the Flood Water Management Act 2010 (c. 29). There is an amendment to that subsection which is not relevant to this Order.

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- (b) serious detrimental impact on drainage; or
- (c) serious harm to the environment;

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

“main river” means all watercourses shown as such on the statutory main river maps held by the Environment Agency and the Department for Environment, Food and Rural Affairs including any structure or appliance for controlling or regulating the flow of water in or out of the channel;

“maintenance” has the same meaning as in article 2(1) (interpretation);

“ordinary watercourse” has the meaning given in the Land Drainage Act 1991(2);

“plans” includes all designs, sections, drawings, risk assessments, soil reports, drainage reports, specifications calculations and method statements and other documents that are reasonably necessary in the opinion of the undertaker to properly and sufficiently to describe the works to be executed;

“specified work” means so much of any work or operation authorised by this Order as is in, on, under, over or within 8 metres of a drainage work or is otherwise likely to—

- (a) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;
- (b) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;
- (c) cause obstruction to the free passage of fish or damage to any fishery;
- (d) affect the conservation, distribution or use of water resources; or
- (e) affect the conservation value of the main river and habitats in its immediate vicinity; and

“watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, basins, sewers and passages through which water flows except a public sewer.

Commencement Information

12 Sch. 9 para. 19 in force at 8.9.2022, see [art. 1](#)

Construction of specified works

20.—(1) Before beginning to construct any specified work, the undertaker must submit to the drainage authority plans of the specified work and such further particulars available to it as the drainage authority may within 28 days of the receipt of the plans reasonably require.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the drainage authority, or determined under paragraph 29.

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

- (a) must not be unreasonably withheld or delayed;
- (b) in relation to specified works to a main river is deemed to have been refused if it is neither given nor refused within 2 months of the submission of the plans, ignoring any time period commencing when the agency make a request for further particulars until those particulars have been provided and, in the case of a refusal, accompanied by a statement of the grounds of refusal;

(2) [1991 c. 59](#). Section 72 of that Act contains the definition.

- (c) in relation to specified works to an ordinary watercourse is deemed to have been approved if it is neither given nor refused within 2 months of the submission of the plans or receipt of further particulars if such particulars have been requested by the drainage authority for approval and, in the case of a refusal, accompanied by a statement of the grounds of refusal; and
- (d) may be given subject to such reasonable requirements as the drainage authority may make for the protection of any drainage work, fishery or water resources or for the prevention of flooding or pollution or in the discharge of its environmental duties including those under the Environment Act 1995(3), the Natural Environment and Rural Communities Act 2006(4) and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017(5).

(4) The drainage authority must use its reasonable endeavours to respond to the submission of any plans before the expiration of the period mentioned in sub-paragraph (3)(b) and (3)(c).

Commencement Information

I3 Sch. 9 para. 20 in force at 8.9.2022, see [art. 1](#)

21. Without limitation on the scope of paragraph 20, but subject always to the provisions of that paragraph as to reasonableness, the requirements which the drainage authority may make under that paragraph include conditions requiring the undertaker at its own expense to construct such protective works, whether temporary or permanent, before or during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work against damage; or
- (b) 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.

Commencement Information

I4 Sch. 9 para. 21 in force at 8.9.2022, see [art. 1](#)

22.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the drainage authority under paragraph 21, must be constructed—

- (a) without unreasonable delay;
- (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 drainage authority,

and an officer of the drainage authority is entitled to watch and inspect the construction of such works.

(3) 1995 c. 25.
(4) 2006 c. 16.
(5) S.I. 2017/407.

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(2) The undertaker must give to the drainage authority not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days after the date on which it is completed.

(3) If the drainage authority reasonably requires, the undertaker must construct all or part of the protective works so that they are in place prior to the construction of any specified work to which the protective works relate.

(4) If any part of a specified work or any protective work required by the drainage authority is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the drainage authority may by notice in writing require the undertaker at the undertaker's own expense to comply with the requirements of this Part of this Schedule or (if the undertaker so elects and the agency in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent and within such limits as the drainage authority reasonably requires.

(5) Subject to sub-paragraph (6) if, within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (4) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the drainage authority may execute the works specified in the notice and any expenditure reasonably incurred by the drainage authority in so doing is recoverable from the undertaker.

(6) 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 that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the drainage authority must not except in the case of an emergency exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 29.

Commencement Information

15 Sch. 9 para. 22 in force at 8.9.2022, see [art. 1](#)

23.—(1) Subject to sub-paragraph (6), the undertaker must from the commencement of the construction of a specified work, maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by the undertaker for the purposes of or in connection with the specified work, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the drainage authority, the drainage authority may by notice in writing require the person liable for maintenance to repair and restore the work, or any part of such work, or (if the person liable for maintenance so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the work and restore the site to its former condition, to such extent and within such limits as the drainage authority reasonably requires.

(3) Subject to sub-paragraph (5), if, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the person liable for maintenance, that person has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the drainage authority may do what is necessary for such compliance and any expenditure reasonably incurred by the drainage authority in so doing shall be recoverable from that person.

(4) If there is any failure by the undertaker to obtain consent or comply with conditions imposed by the drainage authority in accordance with these protective provisions the drainage authority may serve written notice requiring the undertaker to cease all or part of the specified works and

the undertaker must cease the specified works or part of them until it has obtained the consent or complied with the condition unless the cessation of the specified works or part of them would cause greater damage than compliance with the written notice.

(5) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the drainage authority must not except in the case of an emergency exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined in accordance with paragraph 29.

(6) This paragraph does not apply to—

- (a) drainage works which are vested in the drainage authority, or which the drainage authority or another person, including the highway authority, is liable to maintain and is not proscribed by the powers of this Order from doing so; and
- (b) any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule.

Commencement Information

16 Sch. 9 para. 23 in force at 8.9.2022, see [art. 1](#)

24. Subject to paragraph 27, if by reason of the construction of any specified work or of the failure of any such work the efficiency of any drainage work for flood defence purposes is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by the undertaker to the reasonable satisfaction of the drainage authority and if the undertaker fails to do so, the drainage authority may make good the impairment or damage and recover any expenditure reasonably incurred by the drainage authority in doing so from the undertaker.

Commencement Information

17 Sch. 9 para. 24 in force at 8.9.2022, see [art. 1](#)

25. If by reason of construction of a specified work the drainage authority's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the undertaker must provide such alternative means of access that will allow the drainage authority to access the flood defence or equipment no less effectively than was possible before the obstruction within 24 hours of the undertaker becoming aware of such obstruction.

Commencement Information

18 Sch. 9 para. 25 in force at 8.9.2022, see [art. 1](#)

Commencement Information

13 Sch. 9 para. 20 in force at 8.9.2022, see [art. 1](#)

14 Sch. 9 para. 21 in force at 8.9.2022, see [art. 1](#)

15 Sch. 9 para. 22 in force at 8.9.2022, see [art. 1](#)

16 Sch. 9 para. 23 in force at 8.9.2022, see [art. 1](#)

17 Sch. 9 para. 24 in force at 8.9.2022, see [art. 1](#)

18 Sch. 9 para. 25 in force at 8.9.2022, see [art. 1](#)

Works on the adopted highway

26. Except in an emergency nothing in paragraphs 22(5), 23(3) and 24 authorises the drainage authority to execute works on or affecting a highway maintainable at the public expense without the prior consent in writing of the undertaker or the relevant highway authority, whichever is the highways authority for the adopted highway in question, such consent is not to be unreasonably withheld or delayed.

Commencement Information

I9 Sch. 9 para. 26 in force at 8.9.2022, see [art. 1](#)

Expenses

27. The undertaker must pay to the drainage authority all costs, charges and expenses which the drainage authority may reasonably incur or which it may sustain in—

- (a) the examination or approval of plans under this Part of this Schedule;
- (b) the inspection of the construction of the specified works or any protective works required by the drainage authority under this Part of this Schedule; and
- (c) the carrying out of any surveys or tests by the drainage authority which are reasonably required in connection with the construction of the specified works.

Commencement Information

I10 Sch. 9 para. 27 in force at 8.9.2022, see [art. 1](#)

28.—(1) Without prejudice to the other provisions of this Part of this Schedule, the undertaker is responsible for and must make reasonable compensation to the drainage authority for all costs and losses not otherwise provided for in this Part of this Schedule which may be reasonably incurred or suffered by the drainage authority by reason of—

- (a) the construction of any specified works comprised within the authorised works; or
- (b) any act or omission of the Applicant, its employees, contractors or agents or others whilst engaged upon the construction of the authorised works.

(2) For the avoidance of doubt, in sub-paragraph (1), “costs” includes—

- (a) expenses and charges;
- (b) staff costs and overheads;
- (c) legal costs;
- (d) liabilities, claims and demands;

and “losses” includes physical damage.

(3) For the avoidance of doubt, in sub-paragraph (2), liabilities includes—

- (a) contractual liabilities;
- (b) tortious liabilities;
- (c) liabilities to pay statutory compensation for breach of statutory duty;
- (d) liabilities to pay statutory penalties imposed on the basis of strict liability (but does not include liabilities to pay other statutory penalties).

(4) The drainage authority must give to the undertaker reasonable notice of any such claim or demand and no settlement or compromise shall be made without the agreement of the undertaker which agreement shall not be unreasonably withheld or delayed.

(5) The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved by the drainage authority, or to its satisfaction, or in accordance with any directions or award of an arbitrator, does not relieve the undertaker from any liability under the provisions of this Part of this Schedule.

(6) The drainage authority must not compromise or settle any such claim or make any admission which might be prejudicial to the claim without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.

(7) The drainage authority must, at all times take reasonable steps to prevent and mitigate any such claims, demands, proceedings, costs, damages, expenses or loss.

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Commencement Information

I11 Sch. 9 para. 28 in force at 8.9.2022, see [art. 1](#)

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Commencement Information

I10 Sch. 9 para. 27 in force at 8.9.2022, see [art. 1](#)

I11 Sch. 9 para. 28 in force at 8.9.2022, see [art. 1](#)

Arbitration

29. Any dispute arising between the undertaker and the drainage authority under this Part of this Schedule, may if the parties agree, be determined by arbitration under article 50 (arbitration) but may otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs and the Secretary of State for Transport acting jointly on a reference to them by the undertaker or the drainage authority, after notice in writing by one to the other.

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Commencement Information

I12 Sch. 9 para. 29 in force at 8.9.2022, see [art. 1](#)

Changes to legislation:

There are currently no known outstanding effects for the The A428 Black Cat to Caxton Gibbet Development Consent Order 2022, PART 3.