

FIVE ESTUARIES OFFSHORE WIND FARM

10.62.1 UPDATE TO 10.62 NOTE ON DDCO DRAFTING – APPLICANT'S POSITION ON PROTECTIVE PROVISIONS

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In preparation of this document Five Estuaries Wind Farm Ltd has made reasonable efforts to ensure that the content is accurate, up to date and complete for purpose.

| Revision | Date | Status/Reason for Issue | Originator | Checked | Approved |
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| A | Mar 25 | Deadline 8a | Burges Salmon | VEOWF | VEOWF |

1 PROTECTIVE PROVISIONS DRAFTING

- 1.1 This document sets out the final (Deadline 8a) Applicant's understanding of what has, and has not, been agreed on the protective provisions (PPs) included in the dDCO submitted at Deadline 7. This document is an update to REP7-090, 10.62 Note on dDCO Drafting Applicant's Position on Protective Provisions.
- 1.2 Where the party to be protected has not confirmed whether any drafting is agreed or not, it has been assumed it is not agreed, but the ExA's attention will be drawn to such drafting in each case.

AGREED PROTECTIVE PROVISIONS

1.3 The following are agreed:

Agreed at Deadline 7:

- (a) **Cadent**: the protective provisions as included in the dDCO at Deadline 8a are agreed (these were omitted at deadline 7 in error but were agreed)
- (b) **North Falls**: the protective provisions as included in the dDCO at Deadline 7 are agreed.
- (c) **Port of London Authority (onshore):** the protective provisions as included in the dDCO at Deadline 7 are agreed.

Agreed post deadline 7:

- (d) **Environment Agency**: the parties have now agreed wording on the outstanding points between and the protective provisions as included in the dDCO at Deadline 8a (revision I) are agreed. This agreement means that the Agency has also agreed to consent to the disapplication of regulation 12 of the Environmental Permitting Regulations 2016 and that agreement is confirmed in the SoCG submitted at Deadline 8a.
- (e) **Essex County Council as drainage authority**: the parties have now reached agreement and the protective provisions as included in the dDCO at Deadline 8a (revision I) are agreed. This agreement means that the Agency has also agreed to consent to the disapplication of section 23 of the Land Drainage Act, and that agreement is confirmed in the SoCG submitted at Deadline 8a.
- (f) Essex County Council as local highway authority: the Applicant understands that the Council is content with the drafting of the provisions as set out in Revision I of the dDCO submitted at Deadline 8a. The Applicant understands that the Council is still seeking a framework highway agreement which the Applicant maintains is unnecessary.
- (g) **National Grid Electricity Transmission**: following completion of the confidential agreement between the parties the protective provisions are now agreed and are included in revision I of the dDCO at Deadline 8a.
- (h) **National Highways:** the protective provisions as included in the dDCO at Deadline 8a are agreed. Following submission of the dDCO at Deadline 7, the parties have now agreed the provisions in the form shown in revision I of the dDCO.

NOT AGREED PROTECTIVE PROVISIONS

2 AFFINITY

2.1 Since Deadlines 7 and 8, the Applicant has continued to engage with Affinity Water on the drafting of the protective provisions, including a meeting on 12 March 2025. Whilst some progress has been made by the Applicant conceding on points, in general the Applicant's view is that Affinity has not been willing to engage meaningfully on the drafting to find reasonable compromises or to ensure the drafting is accurate and precise.

2.2 A copy of the Applicant's draft of the Protective Provisions showing in track the changes made by Affinity is set out in appendix 1.

Definition of specified works

- 2.1 The Applicant cannot accept the inclusion of "or any easement or other property interest held or used by Affinity" into the definition of "specified works". Instead, the Applicant requires wording in blue to be inserted. This is required since specified works should capture any works that adversely affects Affinity's apparatus. This provision is reasonable and is not necessary to prevent a serious detriment arising.
- 2.2 In relation to sub-paragraph (b)(iv), the Applicant cannot accept the following wording requested by Affinity "such agreement not to be unreasonably withheld or delayed by either party".—The Applicant has replaced it with—"unless otherwise agreed in writing with Affinity Water (acting reasonably)". It is sufficient that parties are held to the reasonableness standard and going further than this is not necessary for the purposes of this provision.
 - "specified works" means any authorised works under the Order (including any works of maintenance) that—
 - (a) may in any way adversely affect any easement or other property interest held or used by Affinity Water's apparatus;
 - (b) are within the following distances of Affinity Water's apparatus measured from the outer surface of such apparatus, the removal of which has not been required by the undertaker under paragraph 8 (2) or otherwise—
 - (i) where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres:
 - (ii) where the apparatus is a pipe, 3 metres where the diameter of the pipe is between 150 and 450 millimetres;
 - (iii) where the apparatus is a pipe, 4 metres where the diameter of the pipe exceeds 450 millimetres; and
 - (iv) 4 metres of any other apparatus, unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld or delayed by either party; or (acting reasonably).

On street apparatus

2.3 Please see our submission made in the following document REP7-090.

Protective works to buildings

2.4 The Applicant cannot accept the amendment requested by Affinity in red and requires the wording to be included in blue:

The undertaker, in the case of the exercise of the powers conferred by article 20 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to, or maintenance of any apparatus (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

| Affinity's preferred wording | Applicant's preferred wording |
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| | |
| The undertaker, in the case of the exercise | The undertaker, in the case of the exercise |
| of the powers conferred by article 20 | of the powers conferred by article 20 |
| (protective work to buildings), must | (protective work to buildings), must |
| exercise those powers so as not to | exercise those powers so as not to obstruct |
| obstruct or render less convenient the | or render less convenient the access to, |

access to, or maintenance of any apparatus unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld any apparatus (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

2.5 The purpose of this article is to prevent the Applicant from exercising its powers in a way that obstructs or renders less convenient access to Affinity's apparatus (not the ability for Affinity to maintain its apparatus). The Applicant has included wording in blue which captures any access needed for maintenance. This alternative drafting provides more clarity and ensures that access needed for maintenance is not obstructed or rendered less convenient which is what (the Applicant believes) Affinity wishes to achieve with their original drafting.

Acquisition of land

2.6 The Applicant requires the following wording in blue to be included. The Applicant is taking an access right over land that the Applicant understands Affinity to also hold a right in, the appropriate protection is that the Applicant will not extinguish any of Affinity's rights, covered by sub-paragraph (c), and maintain Affinity's access, covered by paragraph 5 of the Protective Provisions. The wording in blue specifies that the interest in land must be held by Affinity Water and any apparatus must also be held by Affinity Water. Therefore, it is reasonable and appropriate in the circumstances to include the wording in blue.

Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire any interest in land held by Affinity Water or take temporary possession of any apparatus held by Affinity Water or (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water.

Powers under Schedule 13 of the Water Industry Act

2.7 Anglian Water have powers under Schedule 13 of the Water Industry Act 1991 to carry out works/maintain the apparatus but Affinity cannot do this without the Applicant's consent. Affinity requires that the Applicant provides any future consents if applicable. The Applicant cannot consent in advance without knowing what the works/interference is, however, the Applicant can agree to the principle of consenting but subject to the fact that Affinity can't injuriously affect the Applicant's cables. This position is reasonable because Schedule 13 of the Water Industry Act 1991 provides the following.

Nothing in this Act conferring power on a relevant undertaker to carry out any works shall confer power to do anything, except with the consent of the persons carrying on an undertaking protected by this paragraph, which, whether directly or indirectly, so interferes or will so interfere—

- (a) with works or property vested in or under the control of the persons carrying on that undertaking, in their capacity as such; or
- (b) with the use of any such works or property,
- as to affect injuriously those works or that property or the carrying on of that undertaking.
- As a result of the above, the Applicant considers that it is reasonable that where Affinity carried out any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables further, specific written prior consent must be sought by Affinity from the Applicant. Such consent will be provided without unreasonably delay and will not be unreasonably withheld. In addition, it is reasonable that Affinity should comply with any reasonable conditions by the Applicant since conditions may

need to be enforced which need to guarantee safety of the cables or other equipment. This provision is reasonable and is not necessary to prevent a serious detriment arising.

2.9 As a result, the Applicant cannot accept the amendments requested by Affinity in red and require the wording to be included in blue below

Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire any interest in land held by Affinity Water or take temporary possession of any apparatus held by Affinity Water or (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water. (2) Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to)(a) provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require; and. (b) where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result of any appropriation, acquisition, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably withheld or delay) and subject to any reasonable

Affinity's preferred wording

Applicant's preferred wording

6. (1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire or take temporary possession of any (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water. (2) Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to)(a) provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require; and. (b) where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result of any appropriation, acquisition, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable provisions signifying in advance any necessary consent by the undertaker that

7. Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire any interest in land held by Affinity Water or take temporary possession of any apparatus held by Affinity Water or (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result acquisition, of any appropriation, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus

provisions signifying in advance necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably withheld or delay) and subject to any reasonable

Removal of apparatus

2.10 The Applicant requires the following text in blue be included:

Affinity's preferred wording

Such rights will include reasonable provisions signifying in advance an necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus. PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably withheld or delay) and subject to any reasonable conditions).

Applicant's preferred wording

2.11 Please note that the same reasoning applies to this amendment as above.

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| Such rights will include reasonable provisions signifying in advance an necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus. | Such rights will include reasonable provisions signifying in advance an necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably |

| withheld or delay) and subject to any reasonable conditions). |
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Removal of apparatus Access over plots 05-004, 05-006 and 05-005

2.12 The Applicant requires that paragraph 8 which deals with the removal or relocation of the apparatus does not apply to plots 05-004, 05-006, 05-005 where paragraph 5 of the Protective Provisions applies which deals with access (please see above). It is necessary to expressly exclude these plots from the operation of paragraph 8 as these plots will not be relevant or applicable to the provisions of paragraph 8 in connection with the removal of any apparatus.

Notice period

2.13 Under the Protective Provisions, as is common practice, where (for the purposes of carrying out works) the Applicant requires the removal of any apparatus, the undertaker must give to Affinity Water written notice of that requirement together with the relevant plans and the position of the alternative apparatus that will be provided. The Applicant cannot accept Affinity's request that such notice period must be 56 days. The Applicant notes that 28 days is reasonable and provides sufficient amount of time for Affinity to review the information provided. 28 days is precedented in other DCOs and it is not necessary to prevent a serious detriment arising.

| Affinity's preferred wording in blue | Applicant's preferred wording in blue |
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| If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Affinity Water_56 days' written notice of that requirement | If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Affinity Water 28 days' written notice of that requirement |

Consents etc

2.14 In addition, the Applicant cannot accept the preferred wording requested by Affinity as shown below:

| Affinity's preferred wording | Applicant's preferred wording in blue |
|--|---|
| Affinity Water will, on receipt of a written notice to that effect from the undertaker take reasonable steps to obtain the necessary facilities and rights and consents in the land in which the alternative apparatus is to be constructed, and any required statutory permits. | Affinity Water will, on receipt of a written notice to that effect from the undertaker, as soon as reasonably practicable use its reasonable endeavours to obtain the necessary facilities and rights and consents in the land in which the alternative apparatus is to be constructed, and any required statutory permits. |

2.15 The Applicant requires Affinity to "as soon as reasonable practicable" to "use its reasonable endeavours to obtain" the relevant consents. This is a reasonable requirement that ensures that there is no undue delay on the part of Affinity to obtain the consents which may impact timescales of the project. In addition, by requiring Affinity to "use its reasonable endeavours" to obtain ensures that Affinity is acting reasonably in its obligation to obtain the

relevant consents and acts in good faith (ie going as far as reasonable to obtain consents rather than just taking "reasonable steps" to do so).

- 2.16 In addition, further to the Applicant's position outlined in document REP7-090, where the Applicant noted that the Protective Provisions (as is a standard position) provide for the ability of the Applicant to remove or relocate the apparatus belonging to statutory undertakers over or within any of the Order land is required. The Applicant cannot agree to the principle that where the removal of the apparatus is required, such works must be executed by Affinity. It is standard practice that these works will be carried out by the Applicant pursuant to the powers afforded to it in the dDCO. The reason for why the works need to be carried out by the Applicant is because the Applicant need to control how these works are executed as it will be the Applicant will be held liable for any breached under the DCO.
- 2.17 The Applicant has sought a compromise position with Affinity whereby Affinity will be able to carry any works in connection with the removal or construction with the apparatus. However, such works must be subject to the Applicant's consent (acting reasonably) without unnecessary delay. In addition, these works should be subject to the approval of the risk assessment and method statement by the undertaker for the works (or agreement this is not required) and subject to any reasonable conditions required by the undertaker. The works must be carried out in accordance with plans. All of these requirements are reasonable because the Applicant needs to control how these works are executed as it will be the Applicant will be held liable for any breached under the DCO.
- 2.18 The Applicant cannot accept the amendments requested by Affinity in red and require the wording to be included in blue in paragraph 9(6) of the Protective Provisions.
 - (6) Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with subparagraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water PROVIDED THAT (7) Regardless of anything in sub-paragraph (5) but if the undertaker If Affinity gives notice in writing to Affinity Water that the undertaker that Affinity desires itself to execute any work, or part of any work, works in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by Affinity Water the undertaker, may be executed by the undertaker Affinity, with the prior written consent of Affinity Water (which must not be unreasonably withhold or delayed and is to be the undertaker (acting reasonably), without unnecessary delay, and subject to the approval of the risk assessment and method statement by the undertaker for the works (or agreement this is not required) and subject to any reasonable conditions as are reasonable and proper to protect the apparatus)required by the undertaker) and in accordance with plans and in a position agreed between Affinity Water and the undertaker, or in default of agreement determined by arbitration expert determination in accordance with article 47 (arbitration), without unnecessary delay under the superintendence, if given, and to the reasonable approval of Affinity Water. 17.

Affinity's preferred wording

(7) Regardless of anything in subparagraph (5) but if the undertaker gives notice in writing to Affinity Water that the undertaker desires itself to execute any work, or part of any work, in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by Affinity Water, may be executed by the undertaker, with the prior written consent of Affinity Water (which must not be unreasonably withheld or delayed and is to

Applicant's preferred wording

Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with sub-paragraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without

be subject to any conditions as are reasonable and proper to protect the apparatus) in accordance with plans and in a position agreed between Affinity Water and the undertaker, or in default of agreement determined by arbitration in accordance with article 47 (arbitration), without unnecessary delay under the superintendence, if given, and to the reasonable approval of Affinity Water. Following such approval given in writing by Affinity Water, any alternative apparatus will be deemed to be adopted by Affinity Water as though it had been adopted under s.51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991 on the date 28 days after the giving of such approval or such later date as is agreed in writing between Affinity Water and the undertaker.

- 10) (1) In carrying out any work under subparagraph (7), the undertaker must comply with all statutory obligations which would have been applicable had the works been carried out by Affinity.
- (10) (2) Nothing in sub-paragraph (7) authorises the undertaker to:
- (a) execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any excavation and filling around any apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or

(b)carry out any works in relation to any water mains.

unnecessary delay and to the reasonable satisfaction of Affinity Water.

PROVIDED THAT

If Affinity gives notice in writing to the undertaker that Affinity desires itself to in connection with the execute works construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by the undertaker, may be executed by the Affinity, with the prior written consent of the undertaker (acting reasonably), without unnecessary delay, and subject to the approval of the risk assessment and method statement by the undertaker for the works (or agreement this is not required) and subject to any reasonable conditions required by the undertaker) and in accordance with plans and in a position agreed between Affinity Water and the undertaker, or in default of agreement determined bv expert determination in accordance with article 17.

Following such approval given in writing by Affinity Water, any alternative apparatus will be deemed to be adopted by Affinity Water as though it had been adopted under s.51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991 on the date 28 days after the giving of such approval or such later date as is agreed in writing between Affinity Water and the undertaker

Deemed approval

- 2.19 Please refer to our submissions made in Document REP7-090.
- 2.20 Under the Protective Provisions (as is standard) where Affinity fails to either reasonably to approve or to provide reasons for its failure to approve along with an indication of what would be required to make acceptable, any proposed details relating to required removal works under this paragraph within 28 days of receiving a notice of the required works from the undertaker, then such details are deemed to have been approved. The Applicant rejects the amendment in this paragraph for deemed approval to be deleted. The delivery of an NSIP should not be unduly delayed by Affinity where Affinity do not deal with an application in a timely manner. The sub-paragraph provides for 28 days which is sufficient time for Affinity to review any information supplied.
- 2.21 The Applicant cannot accept Affinity's alternative wording that if Affinity does not comply with the 28 day timescales that such matter should go through the arbitration as this will

significantly delay the works and the delivery of NSIP. This amendment is not justified and what the Applicant is proposing by deemed approval is precented and reasonable.

2.22 Please see the Applicant's preferred wording below.

Affinity's preferred wording Applicant's preferred wording Affinity Water fails either reasonably to Affinity Water fails either reasonably to approve, or to provide reasons for its failure approve, or to provide reasons for its failure to approve along with an indication of what to approve along with an indication of what would be required to make acceptable, any would be required to make acceptable, any proposed details relating to required proposed details relating to required removal works under sub-paragraph (2) removal works under sub-paragraph (2) within 28 days of receiving a notice of the within 28 days of receiving a notice of the required works from the undertaker, then required works from the undertaker, then the undertaker shall have recourse to such details are deemed to have been arbitration in accordance with article 48 approved (arbitration).

2.23 In addition, the Applicant cannot accept the preferred wording requested by Affinity as shown below

| Affinity's preferred wording | Applicant's preferred wording |
|---|---|
| Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker shall , before taking or which will trigger the need for those substitution works, use all reasonable endeavours to comply with Affinity Water's reasonable requests for a reasonable period of time to enable Affinity Water to: | Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker <u>must</u> , before taking or requiring any further steps in such substitution works, use all reasonable endeavours to comply with Affinity Water's reasonable requests for a reasonable period of time to enable Affinity Water to |
| (a) make network contingency arrangements; or | (a) make network contingency arrangements; or |
| (b) bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question. | (b) bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question. |

2.24 The Applicant cannot accept Affinity's preferred language because it is not clear what "will trigger" means. The Applicant has proposed alternative wording by requiring "further steps" to be taken which provides greater certainty in connection with the operation of this provision and compliance.

Statutory Permits

2.25 The Applicant cannot agree to Affinity requiring the Applicant to grant or transfer benefit of any statutory permits granted to the undertaker in respect of the apparatus in question (whether under the Environmental Permitting Regulations 2010 or other legislation). This is because the Applicant cannot apply for a permit for another party. The guidance provided by the Environment Agency provides that "Only the person who has control over the operation of a regulated facility may obtain or hold an environmental permit" (Environmental permitting: Core guidance. For the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154). Therefore, it is unreasonable to ask the undertaker to commit to doing something that it is prevented from doing.

2.26 In addition, the Applicant requires that the Applicant is required to grant or transfer any necessary facilities and rights only where the Applicant has a "reasonable" ability to do so. This ensures that the Applicant is not required to make any transfers where it may be prevented from doing so through legislation or other means.

Facilities and rights for alternative apparatus

Affinity's preferred wording

- 2.27 The Applicant cannot accept the amendments requested by Affinity in red and require the wording to be included in blue:
- 2.28 Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to Affinity Water facilities and rights for the construction, use, maintenance and protection of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and Affinity Water and must be no less favourable on the whole to Affinity Water than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by Affinity Water or in default of agreement settled by expert determination in accordance with (sub-paragraph 17 (expert determination) unless otherwise agreed in writing by the parties.
- 2.29 Under the Protective Provisions, Applicant can grant Affinity facilities and rights for the construction, use, maintenance or alternative apparatus in substitution for apparatus to be removed. The Applicant is not clear what this amendment is trying to add to the provision since this provision deals with the removal of the apparatus and not maintenance. Therefore, this change is not needed and is not necessary to prevent a serious detriment arising.

Applicant's preferred wording

(1) Where, in accordance with the (1) Where, in accordance with provisions of this Part of this Schedule, the provisions of this Part of this Schedule, the undertaker affords to Affinity Water undertaker affords to Affinity Water facilities facilities and rights for the construction, and rights for the construction, use, use, maintenance and protection of maintenance of alternative apparatus in alternative apparatus in substitution for substitution for apparatus to be removed, apparatus to be removed, those facilities those facilities and rights must be granted and rights must be granted upon such upon such terms and conditions as may be terms and conditions as may be agreed agreed between the undertaker and Affinity between the undertaker and Affinity Water Water and must be no less favourable on and must be no less favourable on the the whole to Affinity Water than the facilities whole to Affinity Water than the facilities and rights enjoyed by it in respect of the and rights enjoyed by it in respect of the apparatus to be removed unless otherwise apparatus to be removed unless otherwise agreed by Affinity Water or in default of agreed by Affinity Water or in default of agreement settled by expert determination agreement settled by expert determination in accordance with sub-paragraph 17 in accordance with (sub-paragraph 16 (expert determination) unless otherwise (expert determination) unless otherwise agreed in writing by the parties. agreed in writing by the parties.

Specified works

2.30 Under the Protective Provisions, the Applicant cannot commence any specified works until the plan has been approved by Affinity. As part of giving its consent, Affinity may require that any part of specified works comprising of the matters listed below is carried out by Affinity Water.

- 2.31 The Applicant requires the following amendment in blue to be included in order to give the parties the flexibility to make alternative arrangement if necessary.
- 2.32 Affinity Water may as part of giving its approval under sub-paragraph (3) require that any part of specified works comprising of the matters listed below is carried out by Affinity Water, not the undertaker unless otherwise agreed by parties
- 2.33 Under the Protective Provisions, the Applicant is prevented from executing certain works (as defined in the Protective Provisions) which will be undertaken by Affinity. The Applicant requires the following amendment in blue to be included:
- 2.34 Nothing in sub-paragraph (11) authorises the undertaker to carry out the works comprising of the matters listed in sub-paragraph (6) and should any such works need to be undertaken they will be undertaken by Affinity Water, not the undertaker <u>unless otherwise agreed by parties.</u>
- 2.35 This amendment is required in order to give the parties the flexibility to make alternative arrangement if necessary. this will include situations where it may be agreed by the parties that it is appropriate for the undertaker to carry out these works in special circumstances.
- 2.36 In addition, the Applicant cannot accept the amendments in red and require the wording to be included in blue:
 - Where Affinity requires (acting reasonably) any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity's apparatus (whether of a temporary or permanent nature) such, Affinity must specify what these protective works are, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, and the protective works must be carried out to Affinity's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement (in writing) for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency). and in that written notice Affinity must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably)
- 2.37 Under the Protective Provisions, Affinity has power to carry out any protective works in order to protect the safety of Affinity apparatus. The Applicant requires that Affinity must act reasonably when carrying out these works in order to make sure that any works that are carried are appropriate and proportionate. It is not unreasonable to require this amendment to be included.

Submission of a new plan under the specified works provision

2.38 Please refer to our submissions made in Document REP7-090.

Expenses and Costs

Payment of anticipated costs

2.39 The Applicant requires the following text in blue be included:

In relation to any anticipated costs to be payable by the undertaker to Affinity Water pursuant to paragraph 11(1) ("the Affinity costs") of the Protective Provisions, Affinity Water must provide the undertaker, on receipt of a request from the undertaker, with a schedule showing its estimate and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to paragraph 10 of the Protective Provisions.

- (9) Affinity Water must give the undertaker a final account of the Affinity costs referred to in sub-paragraph 8(1) and within 30 days of the issue of the final account:
 - (a) if the final account shows a further sum as due to Affinity Water the undertaker must pay to Affinity Water the sum shown due to it; and

- (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by Affinity Water, Affinity Water must refund the difference to the undertaker.
- (10) Where the undertaker does not agree that an estimate provided by Affinity Water under this paragraph is reasonable, the undertaker must notify Affinity Water of that within 15 days of receiving the estimate. The undertaker and Affinity Water will escalate the estimate internally and will each nominate a senior officer to attend a discussion on the estimate. Where the parties fail to reach agreement following such discussion, any difference or dispute over reasonableness of any excess sum shall be determined by expert determination in accordance with paragraph 17.
- 2.40 The Applicant has agreed to pay Affinity's anticipated costs as a concession. In order for this to be acceptable to the Applicant, the Applicant requires that additional wording is to be included which deals with repayment and reconciliation of any payment. This is a reasonable and standard provision.

Payment of reasonable costs

Affinity's preferred wording

2.41 Under the Protective Provisions, the Applicant is required to pay Affinity's charges, costs and expenses. The Applicant requires that such charges, costs and expenses must be reasonable. This means that any costs that are incurred are relevant and appropriate under the provisions of this paragraph.

Indemnity

2.42 The Applicant requires the wording in blue to be included as shown in the table below. The Applicant has accepted the principle of payment of Affinity's third party costs under the indemnity provision. The Applicant requires the following amendment which ensures that payment relates to any third-party liability incurred by Affinity in connection with the provisions of this paragraph only. This provides clarity to both Affinity and the Applicant in relation to the operations of this provision.

Applicant's preferred wording

| (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, operation or maintenance of any of the authorised works or any such works referred to in paragraphs 8(1) or 8(2), or by reason of any subsidence resulting from such development of works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of Affinity Water, or there is any interruption in any service provided, or in the supply of any goods, by Affinity Water, or Affinity Water becomes liable to pay any amount to any third party, the undertaker must— | (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, operation or maintenance of any of the authorised works or any such works referred to in paragraphs 8(1) or 8(2), or by reason of any subsidence resulting from such development of works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of Affinity Water, or there is any interruption in any service provided, or in the supply of any goods, by Affinity Water, or Affinity Water becomes liable to pay any reasonable amount to any third party incurred in accordance with the provisions of this paragraph 12, the undertaker must— |
|--|---|

Indemnity cap

2.43 The Applicant cannot agree to an unlimited indemnity requested by Affinity Water as unlimited indemnity is not necessary or justified by the interaction of this project with Affinity's assets. Inclusion of uncapped indemnity creates an unjustified risk to the Applicant and it is not necessary to prevent a serious detriment arising. Following assessment of assets and potential liability arising in connection with Affinity Water's Protective Provisions, the Applicant has included a £50 million indemnity cap which is more than sufficient to cover any loss arising.

Unlawful or unreasonable act

2.44 The Applicant cannot agree to the removal of the following wording from paragraph 12(3) of the Protective Provisions:

Nothing in sub-paragraph (1) imposes any liability on the undertaker in respect of any damage or interruption to the extent that it is attributable to the unlawful or-unreasonable act, neglect or default of Affinity Water, its officers, servants, contractors or agents.

- 2.45 This is because the Applicant cannot be held liable for any damage which has been caused by "unreasonable" act by the Affinity. It is reasonable to exclude these breaches which is reasonable and well-precedented. The Applicant has provided precedents to Affinity for their attention.
- 2.46 In addition, the Applicant cannot accept Affinity's preferred wording as shown below. The Applicant requires the wording as shown in the table.

| Affinity's preferred wording | Applicant's preferred wording |
|--|--|
| indemnify Affinity against all liabilities, claims, demands, losses, damages, proceedings, penalty or costs which may be made or taken against or recovered from or incurred by Affinity | make reasonable compensation to Affinity Water for any other expenses, loss, damages, penalty or costs incurred by Affinity Water |

2.69 The Applicant cannot agree to Affinity replacing "the undertaker must make reasonable compensation" with "the undertaker must indemnify". The requirement on the Applicant to provide reasonable compensation is precedented and it is not unreasonable to ensure that any claim made by Affinity must be reasonable. This is because any claim for compensation under the indemnity should be relevant and reasonable to the damage, costs etc incurred. This is precedented and it is not unreasonable to include this.

Claims and settlements under the indemnity provision

2.70 Please note that submissions have been provided in relation to this provision in Document REP7-090.

Expert Determination

- 2.71 Under the Protective Provisions, some matters (where specified in the Protective Provision) may be referred to and settled by an expert. Such persons will be agreed by the parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers.
- 2.72 The Applicant cannot accept the following amendment by Affinity in red because it is not clear what other appropriate body would be apart from the President of the Institution of Civil Engineers. This is standard provision and is not controversial.
 - (1) Article 48 (arbitration) of the Order does not apply to paragraph 9 (facilities and rights for alternative apparatus) of this Part of this Schedule.

(2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers (or another appropriate person).

Access

- 2.73 The Applicant has agreed to include a general access provision for the benefit of Affinity.
- 2.74 This is in addition to the bespoke access provision which the Applicant has included in the PPs for the benefit of Affinity. Please see our full submission on this point in document REP7-090.
- 2.75 The Applicant requires the following change to be made in blue and cannot accept the following changer requested by Affinity in red. Applicant requires that this provision should only apply whereby access is materially restricted such that access is not possible and alternative access needs to be provided. Any interference to a lesser extent will not be reasonable. In addition, the Applicant cannot accept the amendment in red because the Applicant needs the flexibility to provide any alternative rights and means of access including after such obstruction is made. This is because it may not be possible to ascertain whether an act by the Applicant will cause a material obstruction before such act takes places such as a vehicle reversing. These amendments are reasonable.

If in consequence of any agreement reached in accordance with paragraph 6 or the powers conferred by this Order, the access to any of Affinity's apparatus is materially obstructed, prior to obstructing such access, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Affinity to maintain or use the apparatus no less effectively than was possible before such obstruction.

3 ANGLIAN WATER

- 3.1 The following provisions were agreed with by Anglian Water
- 3.2 Paragraph 17 (Access) Anglian Water has accepted the bespoke access provision of the Protective Provissions which have been included for the benefit of Anglian Water in REP.
- 3.3 Anglian Water have also accepted paragraph 13 (Cooperation) which ensures that any consent, agreement or approval required by Anglian Water must not be unreasonably withheld or delayed.
- 3.4 Paragraph 25(5) Costs and expenses Anglian has accepted the paragraph which deals with the renewal apparatus.
- 3.5 Please note that Anglian Water have not accepted further changes requested by the Applicant and the Applicant maintains its position that agreement is required and maintains its position on that as set out in REP7-090. This Applies to the following provisions:
 - (a) Stopping up distances Anglian is seeking to amend the stand-off distance from any apparatus to [to be "agreed on a case-by-case basis] for [a pipe exceeding 400 millimetres]. The Applicant requires certainty on what the relevant distance is in order to ascertain if the works are happening within the restricted distance of Anglian Water's apparatus. The amendment sought by Anglian is uncertain which is unacceptable where a breach of a DCO is an offence.
 - (b) Cap The Applicant cannot agree to an unlimited indemnity requested by Anglian Water as unlimited indemnity is not necessary or justified by the interaction of this project with Anglian's assets which are affected only by the proposed use of the existing access at Manor Way. The Applicant has included a £30 million indemnity cap which is more than sufficient to cover any loss arising

4 LONDON GATEWAY PORT

4.1 There is no change to the position as set out at Deadline 7 in REP7-090.

5 NETWORK RAIL

The terms of the Protective Provisions for the protection of Network Rail have not been agreed. Network Rail is submitting that its 'standard' protective provisions must be included in the dDCO unaltered and without any negotiated amendments being included. This position is directly contrary to the relevant DCO guidance which provides;

Most statutory undertakers have now developed their own preferred form of protective provisions which is very helpful to the preparation of the draft DCO. However, these must be adapted as necessary so they accurately reflect the proposed development.

- ... Examining Authorities are expected to ensure that the final form of a recommended DCO contains protective provisions which are bespoke to the application under consideration. ¹
- The Applicant notes that is has now received technical approval for its works from Network Rail for its works which involve trenchless installing the cables under the railway line and no direct interference with the railway. Given that and that the Applicant's drafting provides sufficient protection to Network Rail to ensure that no detriment would arise, the Applicant does not agree that the 'standard' drafting is necessary or appropriate.

Definition of "protective works"

5.3 The Applicant has provided a standard definition of "protective works" to provide both clarity and certainty to Network Rail and the Applicant as to what works constitute "protective works". The definition included by the Applicant is:

"protective works" means the underpinning, strengthening and any other works the purpose of which is to prevent damage that may be caused by the carrying out, maintenance or"

5.4 The definition must be included to provide clarity to the parties as to the meaning of "protective works", which is used in paragraph 4, 9 and 10 of the Applicant's preferred Protective Provisions.

Compulsory acquisition powers

- 5.5 The Applicant cannot agree to the disapplication of the CA powers and other powers in the absence of a suitable voluntary land rights agreement. That a voluntary agreement has not yet been concluded demonstrates why these powers are required to ensure delivery of the NSIP.
- 5.6 Network Rail is looking to include the following provision:
 - (1) The undertaker must not exercise the powers conferred by—
 - (a) article 3 (development consent granted by the Order);
 - (b) [article [x] (maintenance of authorised project);]
 - (c) article 17 (discharge of water);
 - (d) article 18 (authority to survey and investigate the land onshore);
 - (e) article 21 (compulsory acquisition of land);
 - (f) article 23 (compulsory acquisition of rights);
 - (g) article 27 (acquisition of subsoil only or airspace only);

¹ Paragraph 12 of Planning Act 2008: Content of a Development Consent Order required for Nationally Significant Infrastructure Projects.

- (h) [article [x] (power to override easements and other rights)]
- (i) article 30 (temporary use of land for carrying out the authorized project);
- (j) article 31 (temporary use of land for maintaining the authorised project);
- (k) article 32 (statutory undertakers);
- (I) article 25 (private rights);
- (m) article 36 (felling or lopping of trees and removal of hedgerows);
- (n) article 37 (trees subject to tree preservation orders);
- (o) the powers conferred by section 11(3) (power of entry) of the 1965 Act;
- (p) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;
- (q) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;
- (r) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;

in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.

The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third-party property, except with the consent of Network Rail.

- 5.7 The Applicant objects to the inclusion of these provisions because in the absence of a suitable land rights agreement, seeking disapplication of CA powers at this stage will place the Applicant in a ransom position on the voluntary land agreement, which the Applicant has been seeking to negotiate with Network Rail for a considerable period of time. Network Rail has declined to engage in this negotiation pending technical approval despite the Applicant seeking to progress. Not having access to compulsory powers could impede the timeous delivery of the authorised development).
- The disapplication of CA powers in this context is not appropriate and it is not in line with the guidance that states the following:
 - [Protective Provisions] should also not simply negate other provisions of the DCO, particularly concerning proposed compulsory acquisition of statutory undertakers' land.
- 5.9 Disapplication of CA powers is not necessary to prevent serious detriment as the technical approval of all the works to protect the railway will still be required from Network Rail and the Applicant has agreed to Protective Provisions further securing the need for approval of works outside the separate technical approval process.
- 5.10 Additionally, Network Rail is seeking to amend sub-paragraph (4) as set out in blue below.

Network Rail's preferred wording Applicant's preferred wording The undertaker must not exercise the The undertaker must not exercise the powers conferred by sections 271 or 272 of powers conferred by sections 271 or 272 of the 1990 Act, article 32 (statutory the 1990 Act or article 33 (statutory undertakers), [article [x] (power to override undertakers) or article 26 (private rights), in easements and other rights or private relation to any right of access of Network rights of way)] or article 25 (private rights), Rail to railway property, but such right of in relation to any right of access of Network access may be diverted with the consent of Network Rail. Rail to railway property, but such right of

| access may be diverted with the consent of | |
|--|--|
| Network Rail. | |

5.11 The Applicant cannot agree to include the wording sought by Network Rail because the dDCO does not include the article referenced. The reference to this article has been included in the Network Rail's standard template and is not relevant to this dDCO. This has been noted to Network Rail but they are still seeking the insertion. Therefore, the reference to this article needs to be deleted as this reference is redundant.

Safe running of the railway

- 5.12 Under the Protective Provisions, the Applicant must not do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.
- 5.13 The Applicant's preferred Protective Provisions differ from Network Rail's preferred Protective Provisions with the inclusion of the word 'directly' at sub-paragraph (6), as set out in blue below.

| Network Rail's preferred wording | Applicant's preferred wording |
|--|---|
| The undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway. | The undertaker must not under the powers of this Order do anything which would directly result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway. |

5.14 The Applicant must include the word 'directly' in this sub-paragraph to make it clear that the restriction would only apply to any act of the Applicant which would have a direct consequence of affecting the safe running of trains on the railway. This is important to avoid ambiguity and ensure that the restriction is not cast too widely.

Network rail to provide consent

5.15 Where consent from Network Rail is required under this paragraph, subsection (7) sets out the basis on which it must be granted. The Applicant requires the inclusion of wording to ensure that where consent is granted subject to reasonable conditions, it would never be unreasonable to impose conditions which would be necessary to ensure operational or railway safety. This is considered to be a reasonable provision and it is also noted that these matters are expressed to be in Network Rail's absolute discretion. The Applicant also requires the use of 'must' over 'shall' as this provides certainty and in light of the recent guidance which requires 'must' to be used over shall.

| Network Rail's preferred wording | Applicant's preferred wording |
|--|---|
| Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it shall never be unreasonable to withhold consent for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion). | Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it must never be unreasonable to withhold consent for reasons of operational or railway safety or impose conditions necessary to ensure operational or railway safety (such matters to be in Network Rail's absolute discretion) |
| , | to be in Network Rail's absolute discretion). |

Construction of specified works

- 5.16 Under the Protective Provisions, Network Rail may give notice to the undertaker that Network Rail desires to construct any part of a specified work itself which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail. The Applicant requires that before such works are commenced, Network Rail must seek consent from the Applicant (who must act reasonably) to construct the works. A simple notification of the works is not appropriate or sufficient and the Applicant requires approval to ensure it know what the works are, to allow the Applicant to exercise control over the works and to ensure that the works are carried out in accordance with various obligations under the dDCO.
- 5.17 Where Network Rail notifies the undertaker of their desire to construct any part of a specified work which may affect the stability of the railway property, or the safe operation of traffic on the railways of Network Rail, the Protective Provisions require that this is done without delay. The Applicant's preferred Protective Provisions requires that Network Rail must construct the specified work without 'unreasonable' delay whereas Network Rail's preferred Protective Provisions provide that Network Rail must construct the specified work without 'unnecessary' delay.
- 5.18 There are multiple instances in the Protective Provisions where the Applicant requires the word 'unreasonable' whereas Network Rail prefers the word 'unnecessary'. In each instance, the word 'unreasonable' is preferred to 'unnecessary' because what is reasonable in any given case will depend on the specific circumstances of that case. This ensures that any action taken will be appropriate in the circumstances.

Network Rail's preferred wording

If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unnecessary delay on behalf of and to the reasonable of satisfaction the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.

Applicant's preferred wording

If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, subject to Network Rail seeking consent from the undertaker (undertaker acting reasonably) if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unreasonable delay 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 (where appropriate and if given) of the undertaker.

Approval of the works

- 5.19 Under the Protective Provisions, the Applicant must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for the approval of the engineer.
- 5.20 The Applicant requires that the engineer's opinion as to the protective works that should be carried out must be 'reasonable the addition of the word 'reasonable' is considered to be appropriate and ensures that the protective works that are specified are necessary, appropriate and relevant.

- 5.21 Under the Protective Provision, the protective woks are carried out at the Applicant's expense. The Applicant requires that any protective works that must be carried by the Applicant must be carried out using 'reasonable' expense this ensure that any costs that are incurred are relevant, appropriate and proportionate and are incurred in connection with the works.
- 5.22 The Applicant also requires the inclusion of sub-paragraph (5) because it is not appropriate for the Applicant to be under a requirement to supply plans to the engineer in respect of any specified works where there is an emergency. Response in an emergency should not be delayed by the engineer approving the plans in writing before the works can. This is reasonable given that any works which are required in response to any emergency may need to be done without the delay which would occur if Network Rail were required to approve the plans. Any plans will be submitted for approval as soon as reasonably practicable. This is a reasonable and appropriate when dealing with an emergency situation where there is a risk to damage to property or risk to life.
- 5.23 The word 'unreasonable' in this sub-paragraph is preferred to the word 'unnecessary' for the reasons given above.

Network Rail's preferred wording

(4) When signifying their approval of the plans the engineer may specify any protective works (whether temporary of permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including relocation deany commissioning and removal of works. apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to their reasonable satisfaction.

Applicant's preferred wording

- (4) When signifying their approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in their reasonable opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation decommissioning and removal of works. apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the reasonable expense of the undertaker in either case without unreasonable delay 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 their reasonable satisfaction.
- (5) The undertaker must not be required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to Network Rail notice as soon as is reasonably practicable, and in addition to that notice must provide a plan, section and description of those works as soon as reasonably practicable subsequently.

Construction of specified works and protective works

5.24 In sub-paragraph (4), the word 'unreasonable' is preferred to the word 'unnecessary' for the reasons given above.

Network Rail's preferred wording

Any specified work and any protective works to be constructed by virtue of paragraph 5(4) must, when commenced, be constructed—

- (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 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 damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

Applicant's preferred wording

Any specified work and any protective works to be constructed by virtue of paragraph 4 must, when commenced, be constructed—

- (a) without unreasonable delay in accordance with the plans approved or deemed to have been approved or settled under paragraph [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 damage as is possible to railway property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the use by passengers of railway property.

Compensation for damages to railway property

- 5.25 Under the Protective Provisions, the Applicant is required to make good damage to railway property, and to pay reasonable expenses and compensation to Network Rail for the losses sustained by such damage, interference or obstruction.
- 5.26 Network Rail requires this paragraph to include damage caused 'in consequence of' the construction of a specified work. The Applicant is not able to accept this as would create uncertainty which is necessary in order for the Applicant to comply with the provisions of this paragraph. This is because it would be difficult to identify whether damage, interference or obstruction of railway property is caused 'as a consequence of' the construction of a specified work, which would in any case have been approved by Network Rail under paragraph 4.
- 5.27 The Applicant requires that the obligation to pay compensation for the loss which Network Rail suffers due to the damage, interference or obstruction should be limited to 'reasonable' compensation this ensure that any compensation is proportionate and relevant and is made in direct connection to the damage caused.
- 5.28 The Applicant requires consequential and indirect loss to be carved out from the indemnity provided to Network Rail. The purpose of the indemnity is to cover any costs and losses incurred or suffered by Network Rail in connection with the works carried out by the Applicant. This indemnity should not cover consequential or indirect losses as such losses do not naturally result from the breach and are not reasonably foreseeable. Inclusion of indirect and consequential losses is not reasonable and not necessary to prevent a serious detriment arising.

Network Rail's preferred wording

If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

Applicant's preferred wording

If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and reasonable compensation for any loss which it may sustain by reason of any such damage, interference or obstruction but always excluding any consequential loss or indirect loss.

Availability of facilities for works

- 5.29 Paragraph 7 requires Network Rail to afford reasonable facilities to the undertaker and its agents for access to works carried out by Network Rail during their construction.
- 5.30 The Applicant requires the inclusion of the wording in blue below so that access must also be granted to the Applicant's employees and contractors. This amendment has been made to ensure clarity and reflect the practicalities of those who may be required to access works carried out by Network Rail on behalf of the Applicant.

Network Rail's preferred wording

Network Rail must at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by Network Rail under this Part 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.

Applicant's preferred wording

Network Rail must at all times afford reasonable facilities to the undertaker and its employees, contractors or agents for access to any works carried out by Network Rail under this Part 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.

Alterations or additions to railway property

- 5.31 The Protective Provisions require that where permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction of the specified work, these must be carried out by Network Rail. If Network Rail provides 56 days notice of the intention to carry out such works the Applicant must pay to Network Rail the reasonable cost of such works.
- 5.32 The Applicant requires that this provision is limited so that it applies only to alterations or additions to railway property which are reasonably required as a result of the construction of a specified work. However, Network Rail requires that this provision would also apply as a result of 'or completion; of a specified work (please see in blue below). In practice, Any alterations and additions to the railway property and that widening the scope of this provision to include the completion of specified works is unreasonable when the alterations and additions will need to be paid for by the Applicant.
- 5.33 Additionally, the Applicant requires that the 56 days' notice given by Network Rail is given in writing. This is reasonable as it ensures that the parties are certain as to when notice was given and provides an audit trail should a dispute arise.

| Network Rail's preferred wording | Applicant's preferred wording | |
|----------------------------------|-------------------------------|--|
| | | |

If any permanent or temporary alterations or additions to railway property are reasonably necessary in consequence of the construction or completion of a specified work in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker 56 days' notice (or in the event of an emergency or safety critical issue such notice as is reasonable in the circumstances) of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail 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 Network Rail in maintaining, working and, when necessary, renewing any such alterations or additions.

If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction of a specified work, in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker 56 days' written notice (or in the event of an emergency or safety critical issue such notice as is reasonable in the circumstances) of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail 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 Network Rail in maintaining, working, and when necessary, renewing any such alterations or additions.

Constructed of Specified works by Network Rail

- 5.34 The protective provisions enable Network Rail to carry out the construction of a specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail. In doing so Network Rail may recover certain costs from the Applicant.
- 5.35 The Applicant requires that it must provide its consent (acting reasonably) to Network Rail carrying out the specified work. This is a reasonable provision as it will allow the Applicant to know what the works are, exercise control over the works and ensure that the works are carried out in accordance with various obligations under the dDCO.
- 5.36 The protective provisions allow Network Rail to recover compensation from the Applicant for losses suffered by Network Rail as a result of their execution of the specified works. The Applicant requires that any compensation should be reasonable this ensures that any compensation due is appropriate and is proportionate to the loss. The requirement for compensation to be reasonable is especially important in this instance as it is Network Rail that would be carrying out the specified works.
- 5.37 The Applicant requires that Network Rail must take reasonable steps to mitigate its loss. This is a reasonable requirement and is based on the standard legal position that any party making a claim under an indemnity must act reasonably to mitigate its own loss. This is not a novel or controversial position, and the same principle applies across payments under this and many other DCOs, including for example compensation payments where a claimant must also act reasonably to mitigate their own losses.
- 5.38 The Applicant has also introduced wording that removes the ability for Network Rail to claim consequential loss or indirect loss. Please see the reasoning above.

| Network Rail's preferred wording | Applicant's preferred wording |
|--|--|
| If during the construction of a specified work by the undertaker, Network Rail gives | If during the construction of a specified work by the undertaker, Network Rail gives |
| notice to the undertaker that Network Rail | notice to the undertaker that Network Rail |
| desires itself to construct that part of the | desires itself to construct that part of the |

specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work is to be constructed, Network Rail must assume construction of that part of the specified work and the undertaker must, notwithstanding any such approval of a specified work under paragraph 5(3), pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work.

specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work is to be constructed and provides its consent (acting reasonably), Network Rail must assume construction of that part of the specified work and the undertaker must, notwithstanding any such approval of a specified work under paragraph [5](3), pay to Network Rail all reasonable expenses to which Network Rail may be put and reasonable compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work provided that at all times Network Rail will be under an obligation to take reasonable steps to mitigate its loss and always excluding any consequential loss or indirect loss...

Indemnity

- 5.39 The protective provisions require the Applicant to indemnify Network Rail for all reasonable costs, charges, damages and expenses which are occasioned or reasonable incurred by Network Rail.
- 5.40 The Applicant requires Network Rail to be under an obligation to take reasonable steps to mitigate its loss. Please see the reasoning above.
- 5.41 The Applicant requires consequential and indirect loss to be carved out from the indemnity provided to Network Rail. Please see the reasoning provided above.
- 5.42 The Applicant preferred Protective Provisions also include a separate subsection (2) this is a formatting change which is intended to aid clarity and aid in understanding the provision.

Network Rail's preferred wording

The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (subject to article 45 (no double recovery) which may be occasioned to or reasonably incurred by Network Rail—

[...]

 (e) in respect of costs incurred by Network Rail in complying with any railway operational procedures or obtaining any regulatory consents which procedures are required to be followed or consents obtained to facilitate the carrying out or operation of the authorised development;

and the undertaker must indemnify and keep indemnified Network Rail from and

Applicant's preferred wording

The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses (but always excluding any consequential or indirect loss not otherwise provided for in this Part of this Schedule (subject to article 46 (no double recovery)) which may be occasioned to or reasonably incurred by Network Rail—

[...]

 (e) in respect of costs incurred by Network Rail in complying with any railway operational procedures or obtaining any regulatory consents which procedures are required to be followed or consents obtained to facilitate the construction or operation of the authorised development; against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission: and the fact that any act or thing may have been done by Network Rail 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 shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.

and the undertaker must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission, provided Network Rail will be under an obligation to take reasonable steps to mitigate its loss and always excluding any consequential loss or indirect loss.

(2) The fact that any act or thing may have been done by Network Rail 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 their supervision must not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under this Part.

5.43 This paragraph requires Network Rail to, upon request, provide written estimates of various liabilities for which the Applicant is or will be liable for under the protective provisions, including the costs incurred under the indemnity in paragraph 14. The Applicant's preferred Protective Provisions refer to the costs as being those that are 'reasonably incurred' for consistency with the indemnity itself, which requires that costs are reasonable.

Network Rail's preferred wording

Network Rail must, on receipt of a 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 (including the amount of the relevant costs mentioned in paragraph 15) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).

Applicant's preferred wording

Network Rail must, on receipt of a 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 (including the amount of the relevant costs reasonably incurred and mentioned in paragraph 14) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).

Definition of "the relevant costs"

- 5.44 The Applicant's preferred Protective provisions differ from Network Rail's preferred Protective Provisions in how it defines the term 'the relevant costs'
- The Applicant cannot accept the definition preferred by Network Rail because the costs need to relate to the restriction of the use of railway network as a direct result of the specified works. The definition of "the relevant costs" without this amendment being included is well-precedented and Network Rail was made aware of these precedents. Inclusion of this amendment is not relevant and it is not necessary to prevent a serious detriment arising. The Applicant provided these comments to Network Rail but has never received a response and they are therefore not agreed.

Network Rail's preferred wording

"the relevant costs" means the costs, losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any specified work including but not limited to any restriction of the use of Network Rail's railway network as a result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

Applicant's preferred wording

"the relevant costs" means the costs, losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail's railway network as a direct result of the construction, maintenance or failure of a specified work or any such act or omission as mentioned in subparagraph (1); and

6 PLA (OFFSHORE)

6.1 There is no change to the position as set out at Deadline 7 in REP7-090.

Appendix 1

Affinity Water

The drafting below shows the Applicant's preferred drafting with changes by Affinity in track and drafting which is not agreed or rejected in a box.

FOR THE PROTECTION OF AFFINITY WATER LIMITED

Application

1. The following provisions have effect for the protection of Affinity Water, unless otherwise agreed in writing between the undertaker and Affinity Water.

Interpretation

2. In this Part of this Schedule-

"Affinity Water" means Affinity Water Limited (Company Registration No. 02546950) whose registered office address is at Tamblin Way, Hatfield, Hertfordshire. AL10 9EZ or any whollyowned subsidiary (as defined in section 1159 of the Companies Act 2006(2);

"alternative apparatus" means alternative apparatus adequate to enable Affinity Water to fulfil its statutory functions in a manner no less efficient than previously;

Affinity Water Property" means the [East Clacton Reservoir and Pumping Station at [TBC]] in the vicinity of Plots [05-004, 05-006, 05-005]

"apparatus" means:

mains, pipes, connections, reservoirs, or any other apparatus belonging to or maintained by Affinity for the purposes of water supply; and

mains, pipes, connections or any other apparatus that is the subject of an agreement to adopt made under section 51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991(3)

"authorised works" means "authorised development" and "ancillary works" as both are defined in article [2] of the Order together with the use and maintenance of such authorised development or ancillary works, which for the avoidance of doubt includes the construction, use and maintenance of any works pursuant to this Schedule;

"commence" and "commencement" includes the first carrying out of any below ground surveys, monitoring, work operations, remedial work in respect of any contamination or other adverse ground condition, the receipt and erection of construction plant and equipment, intrusive investigations for the purpose of assessing ground conditions, and the first implementation of environmental mitigation, including planting;

"functions" includes powers and duties;

"HAUC Advice Note" means HAUC Advice Note No 2010/01 (available at https://static.hauc-uk.org.uk/downloads/Advice_Note_No_2010-01.pdf), including the Diversionary Works Calculator HAUC(UK) (hauc-uk.org.uk) (https://www.hauc-uk.org.uk/resources/diversionary-works-calculator) referred to at paragraph 29.4 of that advice note;

"in", in a context referring to apparatus or alternative apparatus in land, includes a reference to apparatus or alternative apparatus under, over or upon land;

"plan" includes all descriptions, designs, sections, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe the works to be executed;

^{(2) 2006} c.46

⁽³⁾ 1991 c. 56. Section 51A was amended by sections 10(2)(a) - (c) of the Water Act 2014 (c. 21) and sections 92(1) and 105(3) of the Water Act 2003 (c. 37)

"protective works" means the underpinning, strengthening and any other reasonable works the purpose of which is to prevent damage that may be caused to Affinity's apparatus by the carrying out, maintenance, construction or use of the authorised works;

"specified works" means any authorised works under the Order (including any works of maintenance) that—

- (a) may in any way adversely affect <u>any easement or other property interest held or used by</u>
 Affinity Water's apparatus Water;
- are within the following distances of Affinity Water's apparatus measured from the outer surface of such apparatus, the removal of which has not been required by the undertaker under paragraph <u>87(2)</u> or otherwise—

where the apparatus is a pipe, 2 metres where the diameter of the pipe is less than 150 millimetres:

where the apparatus is a pipe, 3 metres where the diameter of the pipe is between 150

and 450 millimetres;

where the apparatus is a pipe, 4 metres where the diameter of the pipe exceeds 450 millimetres; and

4 metres of any other apparatus,

unless otherwise agreed in writing with Affinity Water (acting reasonably). , such agreement not to be unreasonably withheld or delayed by either party; or

outside the distances referred to in (b) will or may have electromagnetic or high voltage effects on any apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and

"water main" has the meaning given in the Water Industry Act 1991.

Affinity's preferred wording Applicant's preferred wording "specified works" means any authorised "specified works" means any authorised works under the Order (including any works under the Order (including any works works of maintenance) thatof maintenance) thatmay in any way adversely affect may in any way adversely affect or any easement or other property interest Affinity Water's apparatus; held or used by Affinity Water are within the following distances of (b) Affinity Water's apparatus measured from are within the following distances of Affinity Water's apparatus measured the outer surface of such apparatus, the from the outer surface of such apparatus, removal of which has not been required by the removal of which has not been required the undertaker under paragraph 87(2) or by the undertaker under paragraph 87(2) otherwiseor otherwisewhere the apparatus is a pipe, 2 where the apparatus is a pipe, 2 metres where the diameter of the pipe is metres where the diameter of the pipe is less than 150 millimetres; less than 150 millimetres; where the apparatus is a pipe, 3 metres where the diameter of the pipe is where the apparatus is a pipe, 3 between 150 and 450 millimetres: metres where the diameter of the pipe is between 150 and 450 millimetres; where the apparatus is a pipe, 4 metres where the diameter of the pipe where the apparatus is a pipe, 4 (iii) metres where the diameter of the pipe exceeds 450 millimetres; and exceeds 450 millimetres; and 4 metres of any other apparatus, (iv) (iv) 4 metres of any other apparatus, unless otherwise agreed in writing with Affinity Water (acting reasonably).

unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld or delayed by either party; or

- (c) outside the distances referred to in (b) will or may have electromagnetic or high voltage effects on any apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and
- (c) outside the distances referred to in (b) will or may have electromagnetic or high voltage effects on any apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and

On street apparatus

3 This Except for paragraphs [] (apparatus in stopped up streets), [] (retained apparatus: protection), [] (expenses) and [] (indemnity) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of Affinity Water, the other provisions of this ScheduleThis Part of this Schedule does do not apply to apparatus in respect of which the relations between the undertaker and Affinity Water are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

| reet works in England and wales) of the 1991 | //ot. |
|---|--|
| Affinity's preferred wording | Applicant's preferred wording |
| Except for paragraphs [] (apparatus in stopped up streets), [] (retained apparatus: protection), [] (expenses) and [] (indemnity) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights and apparatus of Affinity, the other provisions of this Schedule do not apply to apparatus in respect of which the relations between the undertaker and Affinity Water are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act. | This Part of this Schedule does do not apply to apparatus in respect of which the relations between the undertaker and Affinity Water are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act. |

Apparatus in stopped up streets

4. Regardless of the temporary stopping up, alteration, diversion or restriction of use of any street under the powers conferred by article 14 (temporary restriction of use of streets), Affinity Water is at liberty at all times to take all necessary access across any such stopped up street and to execute and do all such works and things in, upon or under any such street as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that street.

Access

<u>5.</u>Access for Affinity Water to the Affinity Water Property over plots [05-004, 05-006, 05-005] must not be unreasonably restricted or delayed by the undertaker during the construction and/or maintenance of the authorised works. Where any part of the access to the Affinity Water Property is restricted or controlled by the undertaker, the undertaker will, on request of Affinity Water, take steps (as soon as reasonably practicable) to allow access to and from the Affinity Water Property through or around that restriction or control.

Protective works to buildings

6.- The undertaker, in the case of the exercise of the powers conferred by [article 20] (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to, or maintenance of, any apparatus (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

| Affinity's preferred wording | Applicant's preferred wording |
|--|---|
| The undertaker, in the case of the exercise of the powers conferred by article 20 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to, or maintenance of any apparatus unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld | The undertaker, in the case of the exercise of the powers conferred by article 20 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to, any apparatus (including access required for maintenance) unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld. |

Acquisition of land

7...(1)Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire any interest in land held by Affinity Water or take temporary possession of any apparatus held by Affinity Water or (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water.

| Affinity's preferred wording | Applicant's preferred wording |
|---|--|
| Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire or take temporary possession of any apparatus (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water. | Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire any interest in land held by Affinity Water or take temporary possession of any apparatus held by Affinity Water or (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water |

(2)-Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to)

(a)-provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require; and.

(b) where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result of any appropriation, acquisition, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus PROVIDED THAT—such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably withheld or delay) and subject to any reasonable conditions.

Affinity's preferred wording

Applicant's preferred wording

6. (1) Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire or take temporary possession of any (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water. (2) Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to)(a) provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require; and. (b) where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result of any appropriation, acquisition, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus

7. Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not (a) appropriate or acquire any interest in land held by Affinity Water or take temporary possession of any apparatus held by Affinity Water or (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or its apparatus has the benefit otherwise than with prior written consent of Affinity Water. Such consent may be subject to such conditions as Affinity Water may reasonably require and such conditions may include (but not be limited to) provisions to ensure the creation, grant or transfer of such alternative easements, interests or rights for the benefit of Affinity Water's apparatus (including any alternative apparatus) as Affinity Water may require where Affinity Water's apparatus is to remain in, on, under or over any works or property of the undertaker that is to be present as a result of any appropriation, acquisition, extinguishment, interference or overriding within sub-paragraph 6(1)(b), reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to such undertaker's works or property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of such apparatus PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent

| not to be unreasonably withheld or delay) and subject to any reasonable |
|--|
| |

Removal of apparatus

8.—<u>b) (1)</u> Except in relation to plots 05-004, 05-006, 05-005 where paragraph 5 applies, if If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in or possesses temporarily any land in which any apparatus is placed or over which any access to any apparatus is enjoyed and requires that Affinity Water's apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule, and any right of Affinity Water to maintain that apparatus in that land and to gain access to it must not be extinguished, until:

alternative apparatus has been constructed and is in operation, and access to it has been granted to the reasonable satisfaction of Affinity Water in accordance with sub-paragraphs (2) to (9); and

facilities and rights have been secured for that alternative apparatus in accordance with paragraph 998 (facilities and rights for alternative apparatus).

If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Affinity Water 28-56 days' written notice of that requirement, together with a plan of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed. In that case (or where, in consequence of the exercise of any of the powers conferred by this Order, Affinity Water reasonably needs to remove any of its apparatus) the undertaker must, subject to [sub-paragraph (3)], afford to Affinity Water, in so far as the undertaker has the ability to reasonably grant or transfer them, the necessary facilities and rights and consents. and the benefit of any statutory permits granted to the undertaker in respect of the apparatus in question (whether under the Environmental Permitting Regulations 2010 or other legislation), for the construction of alternative apparatus in other land of the undertaker and subsequently for the maintenance of that apparatus. Such rights will include reasonable provisions signifying in advance any necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably withheld or delay) and subject to any reasonable conditions)...

| Affinity's preferred wording in blue | Applicant's preferred wording in blue |
|--|--|
| If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Affinity Water 56 days' written notice of that requirement | If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to Affinity Water 28 days' written notice of that requirement |

| Affinity's preferred wording | Applicant's preferred wording |
|------------------------------|-------------------------------|
| | |
| | |

Such rights will include reasonable provisions signifying in advance an necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus.

Such rights will include reasonable provisions signifying in advance an necessary consent by the undertaker that might otherwise be required from the undertaker under Schedule 13 to the Water Industry Act 1991 in respect of any interference to the undertaker's property resulting from the carrying out of any works or the exercise of any other powers by Affinity Water in respect of the alternative apparatus PROVIDED THAT such consent will not allow any activity which would result in injurious affection of the cables or any interruption of the transmission of electricity through the cables without further, specific written prior consent of the undertaker (such consent not to be unreasonably withheld or delay) and subject to any reasonable conditions).

If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker or land secured by the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed, <u>ror the benefit of any statutory permits granted to the undertaker</u>. Affinity Water will, on receipt of a written notice to that effect from the undertaker, <u>as soon as reasonably practicable use itstake</u> reasonable <u>endeavourssteps to</u> obtain the necessary facilities and rights and consents in the land in which the alternative apparatus is to be constructed, and any required statutory permits.

Affinity's preferred wording in blue Applicant's preferred wording in blue Affinity Water will, on receipt of a written Affinity Water will, on receipt of a written notice to that effect from the notice to that effect from the undertaker, as undertaker take reasonable steps soon as reasonably practicable use its to obtain the necessary facilities reasonable endeavours to obtain the and rights and consents in the land necessary facilities and rights and in which the alternative apparatus consents in the land in which the is to be constructed, and any alternative apparatus is to be constructed. required statutory permits. and any required statutory permits.

Affinity Water will have an absolute discretion whether or not to use or seek any powers of compulsory acquisition that may be available to Affinity Water for the purposes of [sub-paragraph (3)].

Any alternative apparatus to be constructed in land of, or land secured by, the undertaker under this Part of this Schedule must be constructed in such manner and in accordance with such plans as may be agreed between Affinity Water and the undertaker or in default of agreement settled by arbitration in accordance with [article 4847 (arbitration)].

Affinity Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with [article 4847] (arbitration), and subject to any written diversion agreement having been entered into between the parties and after the grant to Affinity Water of any such facilities and rights or statutory permits as are referred to in [sub-paragraphs (2) or (3)], proceed in accordance with a programme that has been agreed or settled by arbitration in accordance with article 4847 (arbitration) to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(7) Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with sub-paragraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water

PROVIDED THAT

(2) If Affinity Regardless of anything in sub-paragraph (5) but if the undertaker gives notice in writing to Affinity Water-that the undertaker that Affinity desires itself to execute works any work, or part of any work, in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by the undertaker Affinity Water, may be executed by the Affinity undertaker, with the prior written consent of the undertaker (acting reasonably), without unnecessary delay, and subject to the approval of the risk assessment and method statement by the undertaker for the works (or agreement this is not required) and Affinity Water (which must not be unreasonably withheld or delayed and is to be subject to any reasonable conditions required by the undertaker) and as are reasonable and proper to protect the apparatus) in accordance with plans and in a position agreed between Affinity Water and the undertaker, or in default of agreement determined by expert determination arbitration in accordance with article 17.

2.47 (arbitration), without unnecessary delay under the superintendence, if given, and to the reasonable approval of Affinity Water. Following such approval given in writing by Affinity Water, any alternative apparatus will be deemed to be adopted by Affinity Water as though it had been adopted under s.51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991 on the date 28 days after the giving of such approval or such later date as is agreed in writing between Affinity Water and the undertaker.

3.

Affinity's preferred wording

Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in anv land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with subparagraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water

- 10) (1) In carrying out any work under sub-paragraph (7), the undertaker must comply with all statutory obligations which would have been applicable had the works been carried out by Affinity.
- (10) (2) Nothing in sub-paragraph (7) authorises the undertaker to:
- (a) execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any excavation and filling around any apparatus (where the apparatus is

Applicant's preferred wording

Regardless of anything in sub-paragraph (6), if Affinity Water gives notice in writing to the undertaker that it desires the undertaker to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker or to the extent that Affinity Water fails to proceed with that work in accordance with sub-paragraph (6) or the undertaker and Affinity Water otherwise agree, that work, instead of being executed by Affinity Water, must be executed by the undertaker without unnecessary delay and to the reasonable satisfaction of Affinity Water.

PROVIDED THAT

If Affinity gives notice in writing to the undertaker that Affinity desires itself to execute works in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by the undertaker, may be executed by the Affinity, with the prior written consent of the undertaker (acting reasonably), without unnecessary delay, and subject to the approval of the risk assessment and method statement by the undertaker for the works (or agreement this is not required) and subject to any reasonable

laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or

(b)carry out any works in relation to any water mains.

conditions required by the undertaker) and in accordance with plans and in a position agreed between Affinity Water and the undertaker, or in default of agreement determined by expert determination in accordance with article 17.

Following such approval given in writing by Affinity Water, any alternative apparatus will be deemed to be adopted by Affinity Water as though it had been adopted under s.51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991 on the date 28 days after the giving of such approval or such later date as is agreed in writing between Affinity Water and the undertaker

(8)

(8) If Affinity Water fails either reasonably to approve, or to provide reasons for its failure to approve along with an indication of what would be required to make acceptable, any proposed details relating to required removal works under sub-paragraph (2) within 28 days of receiving a notice of the required works from the undertaker, then such details are deemed to have been approved the undertaker shall have recourse to arbitration in accordance with article 47 (arbitration).

| Affinity's preferred wording | Applicant's preferred wording |
|--|--|
| Affinity Water fails either reasonably to approve, or to provide reasons for its | Affinity Water fails either reasonably to approve, or to provide reasons for its |
| failure to approve along with an indication | failure to approve along with an indication |
| of what would be required to make | of what would be required to make |
| acceptable, any proposed details relating | acceptable, any proposed details relating |
| to required removal works under sub- | to required removal works under sub- |
| paragraph (2) within 28 days of receiving | paragraph (2) within 28 days of receiving |
| a notice of the required works from the | a notice of the required works from the |
| undertaker, then the undertaker shall have | undertaker, then such details are deemed |
| recourse to arbitration in accordance with | to have been approved |

(9) In carrying out any work under sub-paragraph (7), the undertaker must comply with all statutory obligations which would have been applicable had the works been carried out by Affinity Water.

(10) Nothing in sub-paragraph (7) authorises the undertaker to:

(a) execute any work of connection to, or disconnection from, Affinity Water's operational network;

(b) execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any excavation and filling around any apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or

(a) (c) carry out any works in relation to any water mains...

(2) (9) (11) Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker must, before taking or requiring any further steps in such which will trigger the need for those substitution works, use all reasonable endeavours to comply with Affinity Water's reasonable requests for a reasonable period of time to enable Affinity Water to:

make network contingency arrangements; or

article 48 (arbitration).

bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question.

| | Affinity's preferred | wording in blue | Applicant's preferred wording in blue |
|---|-----------------------|--|---|
| Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker must before taking or which will trigger the need for those substitution works, use all reasonable endeavours to comply with Affinity Water's reasonable requests for a reasonable period of time to enable Affinity Water to: | | d for existing apparatus, st before taking or which ed for those substitution asonable endeavours to lity Water's reasonable sonable period of time to | Whenever alternative apparatus is to be or is being substituted for existing apparatus, the undertaker must, before taking or requiring any further steps in such substitution works, use all reasonable endeavours to comply with Affinity Water's reasonable requests for a reasonable period of time to enable Affinity Water to |
| | (a) make arrangeme | network contingency ents; or | (a) make network contingency arrangements; or |
| | consider r | ch matters as it may easonably necessary to on of end users of the destion. | (b) bring such matters as it may consider reasonably necessary to the attention of end users of the utility in question. |

Facilities and rights for alternative apparatus

4.9.—s)(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to Affinity Water facilities and rights for the construction, use, maintenance and protection-of alternative apparatus in substitution for apparatus to be removed, those facilities and rights must be granted upon such terms and conditions as may be agreed between the undertaker and Affinity Water and must be no less favourable on the whole to Affinity Water than the facilities and rights enjoyed by it in respect of the apparatus to be removed unless otherwise agreed by Affinity Water or in default of agreement settled by expert determination in accordance with _(sub-paragraph 1716 (expert determination) unless otherwise agreed in writing by the parties.

(1) (2) In settling those terms and conditions in respect of alternative apparatus to be constructed in the land of the undertaker, any expert will—

- give effect to all reasonable requirements of the undertaker for ensuring the safety and efficient operation of the authorised works and for securing any subsequent alterations or adaptions of the alternative apparatus which may be required to prevent interference with the proposed works of the undertaker; and
- so far as it may be reasonable and practicable to do so in the circumstances of the particular case, give effect to the terms and conditions, if any, applicable to the apparatus for which the alternative apparatus is to be substituted.

(2)—(3) If the facilities and rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the expert less favourable on the whole to Affinity Water than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the expert must make such provision for the payment of compensation by the undertaker to Affinity Water as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Specified works

<u>5.10.</u>—<u>d)(1)</u> Not less than 56 days before commencement of any specified works, the undertaker must submit to Affinity Water a plan in respect of the specified works to be executed.

(1)(2) The plan must provide details of—

the exact position, including level, of the specified works and of all apparatus;

- a method statement describing the manner of their construction or renewal including details of excavation and positioning of plant;
- detailed drawings showing every alteration proposed to be made to or close to any such apparatus;
- all expected physical impacts (including but not limited to electromagnetic or high voltage effects) that the construction, maintenance or operation of the specified works may have on any apparatus,
- (d) the removal of which has not been required by the undertaker under paragraph 8(2) or otherwise; and

any intended maintenance regimes.

- (2) (3) The undertaker must not commence any specified works until the plan has been approved by Affinity Water.
- (3) (4) Any approval of Affinity Water given under sub-paragraph (3)—
 - (a) may be given subject to reasonable conditions for any purpose mentioned in sub-paragraph (7)(a); and

must not be unreasonably withheld or delayed.

(54) (4) Affinity Water may require—

- such modifications to be made to the plan as may be reasonably necessary for the purpose
 of securing its apparatus against interference or risk of damage or for the provision of
 protective works or for the purpose of providing or securing reasonable means of access to
 its apparatus; and
- the undertaker to re-submit the plan as modified, for approval to Affinity Water, and Affinity Water must advise the undertaker within 14 days of submission of the revised plan whether it is approved.
- (65) Affinity Water may as part of giving its approval under sub-paragraph (3) require that any part of specified works comprising of the matters listed below is carried out by Affinity Water, not the undertaker unless otherwise agreed by parties:
 - (a) the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any excavation and filling around any apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or
 - (b) any works in relation to any water mains.

Affinity's preferred wording Applicant's preferred wording Affinity Water may as part of giving its Affinity Water may as part of giving its approval under sub-paragraph (3) approval under sub-paragraph (3) require that any part of specified works require that any part of specified works comprising of the matters listed below is comprising of the matters listed below is carried out by Affinity Water, not the carried out by Affinity Water, not the undertaker undertaker unless otherwise agreed by parties: (a) the placing, installation, bedding, packing, removal, connection (a) the placing, installation, bedding, disconnection of any apparatus, or packing, removal, connection execute any excavation and filling disconnection of any apparatus, or around any apparatus (where the execute any excavation and filling around any apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be apparatus is laid in a trench) within 600 retained in situ; or millimetres of any apparatus to be retained in situ: or (b) any works in relation to any water mains. (b) any works in relation to any water mains.

(76) (5) If the revised plan is not approved within 14 days, the undertaker may require a meeting to be held between the chief engineers of the undertaker and Affinity Water to agree the plan.

(87) (6) If the undertaker and Affinity Water fail to reach an agreement on the plan, the dispute shall be settled by arbitration in accordance with article 4847 (arbitration).

(7) (8) Specified works must only be executed in accordance with—

the plan submitted under sub-paragraph (1), as approved or as amended from time to time by agreement between the undertaker and Affinity; and

all conditions imposed under sub-paragraph (454)(a),

and Affinity will be entitled to supervise and inspect the execution of those works where reasonably practicable to do so and in accordance with any relevant health and safety legislation.

(8) (9)-Where Affinity requires (acting reasonably) any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity's apparatus (whether of a temporary or permanent nature) such, Affinity must specify what these protective works are, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, and the protective works must be carried out to Affinity's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement (in writing) for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency) and in that written notice Affinity must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably).

Affinity's preferred wording

Applicant's preferred wording

Where Affinity requires —any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity's apparatus (whether of a temporary or permanent nature) . Affinity must specify what these protective works are, inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, and the protective works must be carried out to Affinity's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement (in writing) for such works within 42 days of the date of submission of a plan pursuant this paragraph (except in an emergency) and in that written notice Affinity must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably

Where Affinity requires (acting reasonably) any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity's apparatus (whether of a temporary or permanent nature) such, Affinity must specify what these protective works are , inclusive of any measures or schemes required and approved as part of the plan approved pursuant to this paragraph, and the protective works must be carried out to Affinity's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and Affinity must give notice of its requirement (in writing) for such works within 42 days of the date of submission of a plan pursuant to this paragraph (except in an emergency), and in that written notice Affinity must specify what the protective works are and how these ensure the safety of Affinity's apparatus (Affinity acting reasonably

(9) (10) If Affinity Water in accordance with this paragraph 59 and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, [paragraphs 1 to 3] and [7 to 8] apply as if the removal of the apparatus had been required by the undertaker under [paragraph 8(2)].

(10) (11) Nothing in this paragraph precludes the undertaker from submitting a new plan (which is materially different to the plan previously submitted) instead of the plan previously submitted, and provided that this the new plan is submitted at least 28-56 days before commencing the execution of any works (unless otherwise agreed with Affinity Water acting reasonably), the provisions of this paragraph apply to and in respect of the new plan.

| Affinity's preferred wording | Applicant's preferred wording |
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| Nothing in this paragraph precludes the undertaker from submitting a new plan instead of the plan previously submitted, and provided that the new plan is submitted at least 56 days before commencing the execution of any works (unless otherwise agreed with Affinity Water), the provisions of this paragraph apply to and in respect of the new plan. | Nothing in this paragraph precludes the undertaker from submitting a new plan (which is materially different to the plan previously submitted) instead of the plan previously submitted, and provided that this new plan is submitted at least 28 days before commencing the execution of any works (unless otherwise agreed with Affinity |

(11) (12) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency works, but in that case must give to Affinity Water notice as soon as is reasonably practicable and a plan of those works as soon as reasonably practicable subsequently and must comply with any reasonable requirements of Affinity in so far as is reasonably practicable in the circumstances.

(12) Nothing in sub-paragraph (11) (13) authorises the undertaker to carry out the works comprising of the matters listed in sub-paragraph (6) and should any such works need to be undertaken they will be undertaken by Affinity Water, not the undertaker unless otherwise agreed by parties.

| Affinity's preferred wording | Applicant's preferred wording |
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| Nothing in sub-paragraph (13) authorises the undertaker to carry out the works comprising of the matters listed in sub-paragraph (6) and should any such works need to be undertaken they will be undertaken by Affinity Water, not the undertaker. | Nothing in sub-paragraph (11) authorises the undertaker to carry out the works comprising of the matters listed in sub-paragraph (6) and should any such works need to be undertaken they will be undertaken by Affinity Water, not the undertaker unless otherwise agreed by parties. |

(13) (14) In this paragraph, "emergency works" means works which, at the time when they are executed are required in order to put an end to, or to prevent the occurrence of, existing or imminent

6. circumstances (or which the person responsible for the works believes on reasonable grounds to be existing or imminent) which are likely to cause danger to persons or property.

(1) (15) As soon as reasonably practicable after any ground subsidence event attributable to the authorised works the undertaker shall implement an appropriate ground mitigation scheme save that Affinity Water retains the right to carry out any further necessary protective works for the safeguarding of its apparatus and can recover any such costs in line with paragraph 110 (expenses and costs).

Expenses and costs

<u>11.19.</u>—<u>e)(1)</u> Subject to the following provisions of this paragraph, the undertaker must pay to Affinity Water_within 30 days of receipt of an itemised invoice or claim from Affinity Water all reasonable charges, costs and expenses reasonably anticipated within the following three months or reasonably-and properly incurred by Affinity Water in, or in connection with—

| Affinity's preferred wording | Applicant's preferred wording | |
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Subject to the following provisions of this paragraph, the undertaker must pay to Affinity Water_within 30 days of receipt of an itemised invoice or claim from Affinity Water all charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by Affinity Water in, or in connection with—

Subject to the following provisions of this paragraph, the undertaker must pay to Affinity Water within 30 days of receipt of an itemised invoice or claim from Affinity Water all reasonable charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by Affinity Water in, or in connection with—

- the supervision, inspection, removal, relaying, replacing, alteration or protection of any apparatus or the supervision, inspection, adoption and construction of any new apparatus or alternative apparatus which may be required in connection with the authorised works; and
- (b) (b) the consideration and approval of any plan as required by this Part of the Schedule.
- (2) The costs as referred to in sub-paragraphs (1)(a) and (1)(b) are to include but not be limited to:
 - any costs reasonably incurred by or compensation properly paid by Affinity Water in connection with the acquisition of rights or the exercise of statutory powers for such apparatus including without limitation all costs incurred by Affinity Water as a consequence of Affinity Water;
 - using its own compulsory purchase powers to acquire any necessary rights under paragraph 8(3); or
 - exercising any compulsory purchase powers in the Order transferred to or benefitting Affinity Water;
 - in connection with the cost of the carrying out of any diversion work or the provision of any alternative apparatus, where no written diversion agreement is otherwise in place;
 - the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;
 - the approval of plans;
 - the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
 - the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works as referred to in this Part of this Schedule; and
 - any costs reasonably necessary in consequence of the execution of any such works as are referred to in this Part of this Schedule.

The value of any apparatus that is removed and re-used by Affinity Water, or any value recovered by Affinity Water from the scrapping of any apparatus removed and not re-used, under the provisions of this Part of this Schedule must be deducted from any sum payable under sub-paragraph (1), that value being calculated after removal.

If in accordance with the provisions of this Part of this Schedule—

- apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 47 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to Affinity Water by virtue of sub-paragraph (1) must be reduced by the amount of that excess.

For the purposes of [sub-paragraph $\frac{9}{4}$]—

- an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus;
- where it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or to place it at the existing depth, the capacity, dimensions and depth of the apparatus is to be treated as if it has been agreed or so determined; and
- where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of an inspection chamber is to be treated as if it also had been agreed or had been so determined.

An amount which apart from this sub-paragraph would be payable to Affinity Water in respect of works by virtue of sub-paragraph (1) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on Affinity Water any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

The amount of the reduction under sub-paragraph (6) must be calculated using the methodology set out in paragraph 29 of HAUC Advice Note and—

- the 1991 Act and any regulations made under that Act (including the cost-sharing regulations made under section 85 (Sharing of cost of necessary measures) of that Act), and
- any other codes of practice or guidance issued under the 1991 Act or regulations made under that Act,

do not apply in respect of any such calculation under sub-paragraph (6).

- (8) In relation to any anticipated costs to be payable by the undertaker to Affinity Water pursuant to paragraph 11(1) ("the Affinity costs") of the Protective Provisions, Affinity Water must provide the undertaker, on receipt of a request from the undertaker, with a schedule showing its estimate and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to paragraph 10 of the Protective Provisions.
- (9) Affinity Water must give the undertaker a final account of the Affinity costs referred to in subparagraph 8(1) and within 30 days of the issue of the final account:
 - (a) if the final account shows a further sum as due to Affinity Water the undertaker must pay to Affinity Water the sum shown due to it; and
 - (b) if the account shows that the payment or payments previously made by the undertaker have exceeded the costs incurred by Affinity Water, Affinity Water must refund the difference to the undertaker.
- (10) Where the undertaker does not agree that an estimate provided by Affinity Water under this paragraph is reasonable, the undertaker must notify Affinity Water of that within 15 days of receiving the estimate. The undertaker and Affinity Water will escalate the estimate internally and will each nominate a senior officer to attend a discussion on the estimate. Where the parties fail to reach agreement following such discussion, any difference or dispute over reasonableness of any excess sum shall be determined by expert determination in accordance with paragraph 17.

Indemnity

12. 11. (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, operation or maintenance of any of the authorised works or any such works referred to in paragraphs 8(1) or 8(2), or by reason of any subsidence resulting from such development or works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of Affinity Water, or there is any interruption in any service provided, or in the supply of any goods, by Affinity Water, or Affinity Water becomes liable to pay any reasonable amount to any third party-incurred in accordance with the provisions of this paragraph 12, the undertaker must—

| Affinity's preferred wording | Applicant's preferred wording | ì |
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- (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, operation or maintenance of any of the authorised works or any such works referred to in paragraphs 8(1) or 8(2), or by reason of any subsidence resulting from such development of works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of Affinity Water, or there is any interruption in any service provided, or in the supply of any goods, by Affinity Water, or Affinity Water becomes liable to pay any amount to any third party, the undertaker must—
- (1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, operation or maintenance of any of the authorised works or any such works referred to in paragraphs 8(1) or 8(2), or by reason of any subsidence resulting from such development of works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of Affinity Water, or there is any interruption in any service provided, or in the supply of any goods, by Affinity Water, or Affinity Water becomes liable to pay any reasonable amount to any third party incurred in accordance with the provisions of this paragraph 12, the undertaker must-
- (a) bear and pay the cost reasonably incurred by Affinity Water, accompanied by an invoice, in making good such damage or restoring the supply; and

make reasonable compensation to indemnify Affinity Water for any other expenses, loss against all liabilities, claims, demands, losses, damages, proceedings, penalty or costs which may be made or taken against or recovered from or incurred by Affinity Water,

by reason or in consequence of any such damage or interruption;

| | Affinity's preferred wording | Applicant's preferred wording |
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| • | indemnify Affinity against all liabilities, claims, demands, losses, damages, proceedings, penalty or costs which may be made or taken against or recovered from or incurred by Affinity | make reasonable compensation to Affinity Water for any other expenses, loss, damages, penalty or costs incurred by Affinity Water |

The fact that any act or thing may have been done by Affinity Water on behalf of the undertaker or in accordance with a plan approved by Affinity Water or in accordance with any requirement of Affinity Water or under its supervision does not, subject to sub-paragraph (3), excuse the undertaker from liability under the provisions of sub-paragraph (1) unless Affinity Water fails to carry out and execute the works properly with due care and attention and in a skilful and professional like manner or in a manner that does not accord with the approved plan.

Nothing in sub-paragraph (1) imposes any liability on the undertaker in respect of any damage or interruption to the extent that it is attributable to the unlawful or unreasonable act or default of Affinity Water, its officers, servants, contractors or agents.

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| İ | Nothing in sub-paragraph (1) imposes any | Nothing in sub-paragraph (1) imposes any |
| | liability on the undertaker in respect of any | liability on the undertaker in respect of any |
| | damage or interruption to the extent that it | damage or interruption to the extent that it |

is attributable to the unlawful act or, neglect or default of Affinity Water, its officers, servants, contractors or agents.

is attributable to the unlawful or unreasonable act or, neglect or default of Affinity Water, its officers, servants, contractors or agents.

Affinity Water must give the undertaker reasonable notice of any such claim or demand and, unless payment is required in connection with a statutory compensation scheme, no settlement or compromise is to be made without the consent of irst consulting the undertaker (such consent not to be unreasonably withheld or delayed) who, if withhelding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demandand considering their representations.

| Affinity's preferred wording | Applicant's preferred wording |
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| Affinity Water must give the undertaker reasonable notice of any such claim or demand and, unless payment is required in connection with a statutory compensation scheme, no settlement or compromise is to be made,— without first consulting the undertaker and considering their representations | Affinity Water must give the undertaker reasonable notice of any such claim or demand and, unless payment is required in connection with a statutory compensation scheme, no settlement or compromise is to be made,— without the consent of the undertaker (such consent not to be unreasonably withheld or delayed) who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand. |

Affinity Water must, in respect of any matter covered by the indemnity given by the undertaker in this paragraph, at all times act reasonably and in the same manner as it would as if settling third party claims on its own behalf from its own funds.

Affinity Water must use reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands and penalties to which the indemnity under this paragraph applies where it is within Affinity Water's reasonable ability and control to do so but those endeavours expressly exclude any obligation to mitigate liability arising from third parties which is outside of Affinity Water's control. If reasonably requested to do so by the undertaker Affinity Water must provide an explanation of how the claim has been mitigated, where relevant.

(3) The total amount which would be payable to Affinity Water arising out of or in connection with this Part of the Schedule in relation to any costs, compensation, expenses, losses, damages, penalties or any other liabilities is subject to the total liability cap of £50,000,000 (thirty million pounds).

Cooperation

13. 12. g)(1) Where in consequence of the proposed construction of any of the authorised works, the undertaker or Affinity Water requires the removal of apparatus under [paragraph 8(2)] or Affinity Water makes requirements for the protection or alteration of apparatus under paragraph 9, the undertaker must use all reasonable endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised works and taking into account the need to ensure the safe and efficient operation of Affinity Water's undertaking, using existing processes where requested by Affinity Water, provided it is appropriate to do so, and Affinity Water must use all reasonable endeavours to co-operate with the undertaker for that purpose.

- (1) (2) (1) For the avoidance of doubt whenever Affinity Water's consent, agreement or approval is required in relation to plans, documents or other information submitted by the undertaker or the taking of action by the undertaker, it must not be unreasonably withheld or delayed.
- **14.** Where the undertaker identifies any apparatus which may belong to or be maintainable by Affinity Water but which has not previously been indicated by Affinity Water as being apparatus belonging to it, the undertaker shall inform Affinity Water of the existence and location of the apparatus as soon as reasonably practicable. If Affinity Water confirms that it owns or maintains the apparatus, that apparatus shall then be afforded the same protection under this Part of this Schedule as other apparatus belonging to Affinity Water.
- **15.** Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and Affinity Water in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.
- **16.** The undertaker and Affinity Water may by written agreement substitute any periods of time set out in this Part of this Schedule for any other period of time.

Expert Determination

- —(1) Article [48] (arbitration) of the Order does not apply to paragraph 98 (facilities and rights for alternative apparatus) of this Part of this Schedule.
- (2) Any difference under this Part of this Schedule may be referred to and settled by a single independent and suitable person who holds appropriate professional qualifications and is a member of a professional body relevant to the matter in dispute acting as an expert, such person to be agreed by the differing parties or, in the absence of agreement, identified by the President of the Institution of Civil Engineers (or another appropriate person).
- (3) On notification by either party of a dispute, the parties must jointly instruct an expert within 14 days of notification of the dispute.
- (4) All parties involved in settling any difference must use best endeavours to do so within 21 days from the date that an expert is appointed.

The expert must—

- (i)invite the parties to make submission to the expert in writing and copied to the other party to be received by the expert within 7 days of the expert's appointment;
- (iii) permit a party to comment on the submissions made by the other party within 7 days of receipt of the submission:
- (iii) issue a decision within 7 days of receipt of the submissions under sub-paragraph (b); and
- (iv)give reasons for the decision.
- (5) Any determination by the expert is final and binding, except in the case of manifest error in which case the difference that has been subject to expert determination may be referred to and settled by arbitration under article [48] (arbitration).
- (6) The fees of the expert are payable by the parties in such proportions as the expert may determine or, in the absence of such determination, equally.

18. Access

<u>16.</u> If in consequence of any agreement reached in accordance with paragraph 6 or the powers conferred by this Order, the access to any of Affinity's apparatus is <u>materially</u> obstructed, <u>prior to obstructing such access</u>, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Affinity to maintain or use the apparatus no less effectively than was possible before such obstruction.

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If in consequence of any agreement reached in accordance with paragraph 6 or the powers conferred by this Order, the access to any of Affinity's apparatus is obstructed, prior to obstructing such access, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Affinity to maintain or use the apparatus no less effectively than was possible before such obstruction.

If in consequence of any agreement reached in accordance with paragraph 6 or the powers conferred by this Order, the access to any of Affinity's apparatus is materially obstructed, the undertaker must provide such alternative rights and means of access to such apparatus as will enable Affinity to maintain or use the apparatus no less effectively than was possible before such obstruction.

Network Rail

The drafting below shows the Applicant's preferred drafting with changes by Network Rail in track.

PART [TBC]

For the protection of Network Rail Infrastructure Limited

- 1. The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and Network Rail and, in the case of paragraph 18,[15] of this Part of this Schedule any other person on whom rights or obligations are conferred by that paragraph.
- 2. In this Part of this Schedule—
 - "asset protection agreement" means an agreement to regulate the construction and maintenance of the specified work in a form prescribed from time to time by Network Rail;
 - "_construction" includes execution, placing, alteration and reconstruction and "construct" and "constructed" have corresponding meanings;
 - the engineer means an engineer appointed by Network Rail for the purposes of this Order;
 - "_network licence" means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of their powers under section 8 (1)(licences) of the Railways Act 19931993;
 - ""Network Rail" means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1-Eversholt Street Waterloo General Office, London NW1-2DNSE1 8SW) and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition "associated company" means any company which is (within the meaning of section 1159 of the Companies Act 2006) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited and any successor to Network Rail Infrastructure Limited's railway undertaking;
 - "plans" includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;
 - "protective works" means the underpinning, strengthening and any other works the purpose of which is to prevent damage that may be caused by the carrying out, maintenance or;
 - "railway operational procedures" means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;
 - "railway property" means any railway belonging to Network Rail and-
 - (a) (a) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and

- (b) (b) any easement or other property interest held or used by Network Rail or a tenant or licencee of Network Rail for the purposes of such railway or works, apparatus or equipment;
- "regulatory consents" means any consent or approval required under:
- (a) (a) the Railways Act 1993;
- (b) the network licence; and/or
- (c) any other relevant statutory or regulatory provisions;

by either the Office of Rail and Road or the Secretary of State for Transport or any other competent body including change procedures and any other consents, approvals of any access or beneficiary that may be required in relation to the authorised development;

- "_specified work" means so much of any of the authorised development as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property, and for the avoidance of doubt, includes the maintenance of such works under the powers conferred by article 64 (power to maintain the maintenance of authorised development project) in respect of such works.
- 3. a)(1) Where under this Part of this Schedule Network Rail is required to give its consent or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute.
 - (1)-(2) In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail must—
 - (a) (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 those procedures; and
 - (b) (b) use their reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development pursuant to this Order.
- 4. (1) The undertaker must not exercise the powers conferred by—
 - (a) article 3 (development consent granted by the Order);
 - (b) [article [x] (maintenance of authorised project);]
 - (c) article 17 (discharge of water);
 - (d) article 18 (authority to survey and investigate the land onshore);
 - (e) article 21 (compulsory acquisition of land);
 - (f) article 23 (compulsory acquisition of rights);

- (g) article 27 (acquisition of subsoil only or airspace only);
- (h) [article [x] (power to override easements and other rights)]
- (i) article 30 (temporary use of land for carrying out the authorized project);
- (j) article 31 (temporary use of land for maintaining the authorised project);
- (k) article 32 (statutory undertakers);
- (I) article 25 (private rights);
- (m) article 36 (felling or lopping of trees and removal of hedgerows);
- (n) article 37 (trees subject to tree preservation orders);
- (o) the powers conferred by section 11(3) (power of entry) of the 1965 Act;
- (p) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;
- (q) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;
- <u>(r)</u> any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;
 - in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.
- (2) (2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.
- (3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act—or, article 3332 (statutory undertakers), [article [x] (power to override easements and other rights or private rights of way)] or article 2625 (private rights), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.
- (4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.
- (4).

 (5) (5) The undertaker must not under the powers of this Order do anything which would directly result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.
 - (6)_(6)_Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it must-shall never be unreasonable to withhold consent for reasons of operational or railway safety or impose conditions necessary to ensure operational or railway safety (such matters to be in Network Rail's Rail's absolute discretion).
 - (7)-(7) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

4. — b)(1) The undertaker must before commencing construction of any specified work supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article 48 (arbitration).

(1)—(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated their disapproval of those plans and the grounds of their such disapproval, the undertaker may serve upon the engineer written notice requiring the engineer to intimate their approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated their approval or disapproval, they must the engineer shall be deemed to have approved the plans as submitted.

(2) (3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, subject to Network Rail seeking consent from the undertaker (undertaker acting reasonably) if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unreasonable unnecessary delay 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 (where appropriate and if given) of the undertaker.

(3) (4) When signifying their approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in their reasonable the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at reasonable expense of the undertaker in either case without unreasonableunnecessary delay 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 their reasonable satisfaction.

(4) The undertaker must not be required to comply with sub-paragraph (1) in a case of emergency but in that case it must give to Network Rail notice as soon as is reasonably practicable, and in addition to that notice must provide a plan, section and description of those works as soon as reasonably practicable subsequently.

5. c)(1) Any specified work and any protective works to be constructed by virtue of paragraph [4]5(4) must, when commenced, be constructed—

<u>6.</u>

(a) (a) without unreasonable unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph [5];

(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;

(c) (c) in such manner as to cause as little damage as is possible to railway property; and (d) (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic thereon and the

use by passengers of railway property.

(2)-(2) If any damage to railway property or any such interference or obstruction shall be caused by the carrying out of, or in consequence of the construction of a specified work, the undertaker must, notwithstanding any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and reasonable compensation for any loss which it may sustain by reason of any such damage, interference or obstruction but always excluding any consequential loss or indirect loss.

(3)—(3) 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 negligence of Network Rail or its employeesservants, contractors or agents or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or its employeesservants, contractors or agents.

7. 6. The undertaker must-

- (a) (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) (b) supply the engineer with all such information as they may reasonably require with regard to a specified work or the method of constructing it.
- 8. 7. Network Rail must at all times afford reasonable facilities to the undertaker and its employees, contractors or agents for access to any works carried out by Network Rail 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.
- 8. d)(1) If any permanent or temporary alterations or additions to railway property, are reasonably necessary in consequence of the construction or completion of a specified work, in order to ensure the safety of railway property or the continued safe operation of the railway of Network Rail, such alterations and additions may be carried out by Network Rail and if Network Rail gives to the undertaker 56 days' written notice (or in the event of an emergency or safety critical issue such notice as is reasonable in the circumstances) of its intention to carry out such alterations or additions (which must be specified in the notice), the undertaker must pay to Network Rail 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 Network Rail in maintaining, working, and, when necessary, renewing any such alterations or additions.

(1)-(2) If during the construction of a specified work by the undertaker, Network Rail gives notice to the undertaker that Network Rail desires itself to construct that part of the specified work which in the opinion of the engineer is endangering the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker decides that part of the specified work is to be constructed and provides its consent (acting reasonably). Network Rail must assume construction of that part of the specified work and the undertaker must, notwithstanding any such approval of a specified work under paragraph [5](3), pay to Network Rail all reasonable expenses to which Network Rail may be put and reasonable compensation for any loss which it may suffer by reason of the execution by Network Rail of that specified work provided that at all times Network Rail will be under an obligation to take reasonable steps to mitigate its loss and always excluding any consequential loss or indirect loss...

(2) (3) The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 10(a) provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

(3)—(4) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving must be set off against any sum payable by the undertaker to Network Rail under this paragraph.

<u>9.</u> The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—

(a) (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph $\frac{1}{2}$ (3) or in constructing any protective works under the provisions of paragraph $\frac{45}{2}$ (4) 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 themthe engineer of the construction of a specified work;

(c) in respect of the employment or procurement of the services of any inspectors, signallers, guards watch-persons and other persons whom it shall be reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work;

(d) (d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or from the substitution of services which may be reasonably necessary for the same reason; and

(e) (e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work.

10.

11. (1) In this paragraph-

"EMI" means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of Network Rail's apparatus; and

"Network Rail's apparatus" means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

- (2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail's apparatus carried out after approval of plans under paragraph 5(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).
- (3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.
- (4) In order to facilitate the undertaker's compliance with sub-paragraph (3)-
- (a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail's apparatus which may be at risk of EMI, and thereafter must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 5(1)) in order to identify all potential causes of EMI and the measures required to eliminate them:
- (b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified pursuant to sub-paragraph (a); and
- (c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified pursuant to sub-paragraph (a).

- (5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution must be selected in the reasonable discretion of Network Rail, and in relation to such modifications paragraph 5(1) has effect subject to the sub-paragraph.
- (6) Prior to the commencement of operation of the authorised development the undertaker shall test the use of the authorised development in a manner that shall first have been agreed with Network Rail and if, notwithstanding any measures adopted pursuant to subparagraph (3), the testing of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.
- (7) In the event of EMI having occurred –
- (a) the undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the investigation of such EMI;
- (b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI;
- (c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI; and
- (d) the undertaker shall not allow the use or operation of the authorised development in a manner that has caused or will cause EMI until measures have been taken in accordance with this paragraph to prevent EMI occurring.
- (8) Where Network Rail approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6) –
- (a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;

- (b) any modifications to Network Rail's apparatus approved pursuant to those subparagraphs must be carried out and completed by the undertaker in accordance with paragraph 6.
- (9) To the extent that it would not otherwise do so, the indemnity in paragraph 15(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.
- (10) For the purpose of paragraph 10(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.
- (11) In relation to any dispute arising under this paragraph the reference in article 47 (Arbitration) to the Institution of Civil Engineers shall be read as a reference to the Institution of Engineering and Technology.
- 11. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail gives notice to the undertaker informing it that the state of maintenance of any part of the specified work appears to be such as that it adversely affects the operation of railway property, 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 adversely to affect railway property.
- 13. 12. The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail unless it has first consulted Network Rail and it must comply with Network Rail's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.
- 14. Any additional expenses which Network Rail may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work must, 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 Network Rail.
- 15. 14. —e) (1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses (but always excluding any consequential or indirect loss not otherwise provided for in this Part of this Schedule (subject to article 4645 (no double recovery)) which may be occasioned to or reasonably incurred by Network Rail—

(a) (a) by reason of the undertaker's construction, maintenance or operation of a specified work or the failure thereof; or

(b) by reason of any act or omission of the undertaker or of any person in its employmentemploy or of its contractors or others whilst engaged upon a specified work;

(c) by reason of any act or omission of the undertaker or any person in its employmentemploy or of its contractors or others whilst accessing to or egressing from the authorised development;

(d) (d) in respect of any damage caused to or additional maintenance required to, railway property or any such interference or obstruction or delay to the operation of the railway as a result of access to or egress from the authorised development by the undertaker or any person in its employ or of its contractors or others; and

(e) (e) in respect of costs incurred by Network Rail in complying with any railway operational procedures or obtaining any regulatory consents which procedures are required to be followed or consents obtained to facilitate the construction carrying out or operation of the authorised development;

and the undertaker must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission, provided Network Rail will be under an obligation to take reasonable steps to mitigate its loss and always excluding any consequential loss or indirect loss.

(2): and the The fact that any act or thing may have been done by Network Rail 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 their the engineer's supervision must shall not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this Part sub-paragraph.

(3) (2) Network Rail must =

(a) give the undertaker reasonable written notice of any such claims or demand and no-demands

(b) not make any settlement or compromise of such a claim or demand must be made without the prior consent of the undertaker. Network Rail must; and

(c) take such steps as are within its control and are reasonable in the circumstances to mitigate any liabilities relating to such claims or demands.

(4) (3) The sums payable by the undertaker under sub-paragraph (1) must shall if relevant include a sum equivalent to the relevant costs.

(5) (4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(6) (5) The obligation under sub-paragraph (3) to pay Network Rail the relevant costs must shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub paragraph (4).

(7) (6) In this paragraph—

- "_the relevant costs" means the costs, losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any specified work including but not limited to any restriction of the use of Network specified work or any such act or omission as mentioned in subparagraph (1); and
- "train operator" means any person who is authorised to act as the operator of a train by a licence under section 8 of the Railways Act 1993.
- 16. 15. Network Rail must, on receipt of a 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 (including the amount of the relevant costs reasonably incurred and mentioned in paragraph 1415) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Part of this Schedule (including any claim relating to those relevant costs).
- 17. 16. In the assessment of any sums payable to Network Rail 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 Network Rail 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.
- 18. 17. The undertaker and Network Rail may, subject in the case of Network Rail to compliance with the terms of its network licence, enter into, and carry into effect, agreements for the transfer to the undertaker of—
 - (a) (a) any railway property shown on the works and land plans and described in the book of reference;
 - (b) any lands, works or other property held in connection with any such railway property; and
 - (c) (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property or any lands, works or other property referred to in this paragraph.
- 19. 18. Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part I of the Railways Act 1993.
- 20. 19. The undertaker must give written notice to Network Rail if any application is proposed to be made by the undertaker for the Secretary of State's Consent, under article 7 (transfer of benefit of the Order) of this Order and any such notice must be given no later

than 28 days before any such application is made and must describe or give (as appropriate)—

- (a) (a) the nature of the application to be made;
- (b) the extent of the geographical area to which the application relates; and
- (c) (c) the name and address of the person acting for the Secretary of State to whom the application is to be made.
- 21. 20. The undertaker must no later than 28 days from the date that the plans submitted to and certified by the Secretary of State in accordance with article 4443 (certification of plans, etc.) are certified by the Secretary of State, provide a set of those plans to Network Rail in a format specified by Network Rail (acting reasonably).
 - 22. 21. [In relation to any dispute arising under this part of this Part of this Schedule (except for those disputes referred to in paragraph 11) the provisions of article 48 (arbitration) do47 (Arbitration) shall not apply and any such dispute, unless otherwise provided for, must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) to the President of the Institution of Civil Engineers.



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