

Dated 30 April 2025

**APPLICATION BY NORTH FALLS OFFSHORE WIND FARM LIMITED FOR AN ORDER
GRANTING DEVELOPMENT CONSENT FOR THE NORTH FALLS OFFSHORE WIND FARM
SCHEME**

PLANNING INSPECTORATE REFERENCE NUMBER: E010119

REGISTRATION IDENTIFICATION NUMBER: 20051006

RESPONSES TO EXQ2
submitted on behalf of Affinity Water Limited

1 Introduction

This submission is made on behalf of Affinity Water Limited (**Affinity**) in relation to the proposed North Falls Offshore Wind Farm Scheme promoted by North Falls Offshore Wind Limited (**Applicant**) and in response to the Examining Authority's second round of written questions (**ExQ2**) issued on 13 May 2025.

2 Responses to ExQ2

Examiner Question		Response from Affinity
Q6.012	<p>Objections to the grant of powers of compulsory acquisition and temporary possession</p> <p>The Affinity Water Limited D2 response [REP2-029] explains that the bespoke provisions in relation to right of access to the Affinity site at East Clacton Reservoir and Pumping Station have not yet been agreed and highlights other areas of concern. The Land Rights Tracker [REP4-020] states that the applicant continues to negotiate bespoke protective provisions with Affinity Water and is confident that the parties can reach agreement before the end of examination. Please set out and explain any outstanding issues in relation to the drafting of protective provisions, with each party providing preferred drafting of</p>	<p>Affinity acknowledges that significant progress has been made on the protective provisions since Deadline 2 and the parties are engaged in active discussions to reach an agreed position. Notwithstanding this, the outstanding issues below remain to be agreed. These comments are based on what Affinity understands to be the version of the Affinity protective provisions that the Applicant will seek to include in its draft DCO submitted at Deadline 5 (Applicant D5 Protective Provisions).</p> <p>Affinity's required set of protective provisions are appended to this submission in clean copy at Appendix 1 which includes the proposed amendments referred to below. A tracked changes version is appended at Appendix 2 comparing Affinity's Appendix 1 version with Applicant D5 Protective Provisions to show the outstanding points between the parties.</p> <p><u>Paragraph 6(1)(b)(ii) (Acquisition of land) and paragraph 7(2) (Removal of apparatus)</u></p> <p>The wording proposed by the Applicant does not provide any benefit to Affinity beyond the process already set out at Schedule 13 and therefore Affinity seeks to amend the drafting.</p> <p>It is critical to keep in mind that the purpose of the protective provisions is to protect Affinity's assets and, in this particular regard, to set the conditions on which it consents to the acquisition of its operational land and rights. Having had unrestricted access to its apparatus pursuant to its existing rights and easements, that access will reduced or fettered once the property is acquired or used by the Applicant. The amendments that Affinity seek at paragraphs 6 and 7 are therefore to minimise the extent of that impact.</p> <p>These paragraphs provide for an expedited process in relation to Affinity obtaining any consents from the undertaker as required under Schedule 13 Water Industry Act 1991. Schedule 13 provides that certain</p>

	<p>those clauses and giving reasons for that preference</p>	<p>protected undertakings (here the Applicant) must give their consent to interference with their works or property which would injuriously affect those works, property or undertaking by other undertakers (here Affinity). There is no mandated process for obtaining this consent and in practice it can take a significant period for agreement to be reached which adversely affects Affinity's ability to undertake critical works to its network and infrastructure.</p> <p>Therefore, Affinity seeks provisions to provide for this process, obtaining the Applicant's advanced consent where possible and, where not possible, the application of the Schedule 13 process according to specified timescales.</p> <p>Affinity awaits comments from North Falls in relation to its most recently proposed drafting.</p> <p><u>Paragraph 7(10) (Removal of apparatus)</u></p> <p>Affinity does not agree to the addition of the following wording in red to paragraph 7(10) by the Applicant:</p> <p><i>"(10) 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 to the extent that the undertaker is legally able to comply with them."</i></p> <p>Affinity is concerned that this drafting could lead to Affinity being required to take apparatus onto its network that does not comply with legal obligations that would have to have been complied with if Affinity had constructed it itself putting the greater network at risk. Any water apparatus constructed must be compliant with all relevant statutory obligations applicable to water infrastructure, irrespective of whether it is constructed by the Applicant or Affinity; the amendment suggested by the Applicant suggests that by virtue of it being constructed by the Applicant the apparatus would not need to meet the same safety and regulatory standards. If the Applicant is not capable of fulfilling any such statutory obligations, it should be left to Affinity to undertake the works.</p> <p><u>Paragraph 10 (Expenses and costs)</u></p> <p>Affinity is willing to agree to exclusion of consequential and indirect losses subject to the amendments at paragraph 10(2)(h) to make clear that Affinity should not be liable for costs arising from penalties or fines</p>
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		<p>from their regulator that have been incurred as a result of, for example, damage caused to pipelines by the authorised works.</p> <p>Affinity awaits comments from North Falls in relation to its most recently proposed drafting.</p> <p><u>Paragraph 11 (Indemnity)</u></p> <p>Affinity is not willing to agree to a blanket exclusion of consequential and indirect losses in its indemnity. It is willing, however, to agree to the amendments at paragraph 11(1)(b) to exclude loss of profit, which Affinity anticipates is the main concern to the Applicant, and make clear that any penalties, fines, levies and surcharges to which Affinity would be subject would be recoverable. Paragraph 11(1)(a) has also been amended to make clear that, for the avoidance of doubt, the indemnity should also cover ensuring continuity of supply.</p> <p>Affinity awaits comments from North Falls in relation to its most recently proposed drafting.</p>
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Addleshaw Goddard LLP on behalf of Affinity Water Limited

30 April 2025

Appendix 1

Affinity Water Limited Protective Provisions

SCHEDULE 9 PART

[TBC]

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 wholly- owned subsidiary (as defined in section 1159 of the Companies Act 2006⁽¹⁾);

“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’s apparatus” means:

- (a) mains, pipes, connections, reservoirs, or any other apparatus belonging to or maintained by Affinity Water for the purposes of water supply; and
- (b) mains, pipes, connections or any other apparatus that is the subject of an agreement to adopt by Affinity Water made under section 51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991⁽²⁾

“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)) ([https://www.hauc-uk.org.uk/resources/diversionary- works-calculator](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 Affinity Water’s apparatus or alternative apparatus in land, includes a reference to Affinity Water’s 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;

“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 Water’s apparatus by the carrying out, maintenance, construction or use of the authorised works;

⁽¹⁾ 2006 c.46

⁽²⁾ 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)

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

- (c) may in any way adversely affect Affinity Water’s apparatus;
- (d) 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 (acting reasonably).
- (e) outside the distances referred to in (b) will or may have electromagnetic or high voltage effects on any of Affinity Water’s 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.

On street apparatus

3. Except for paragraphs 4 (*apparatus in stopped up streets*), 9 (*specified works*), 10 (*expenses*) and 11 (*indemnity*) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights of Affinity Water or of Affinity Water’s apparatus, the other provisions of this Part 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.

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 12 (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 of Affinity Water’s apparatus which at the time of the stopping up or diversion was in that street.

Protective works to buildings

5. The undertaker, in the case of the exercise of the powers conferred by article 18 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access (including access required for maintenance) to, or maintenance of, any of Affinity Water’s apparatus unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

Acquisition of land

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 any interest in land held by Affinity Water or take temporary possession of any of Affinity Water’s apparatus or
- (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or Affinity Water’s 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):
 - (i) 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 reasonably require; and

(ii) 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 by Affinity Water that will involve actual works to cables belonging to the undertaker or interrupt the transmission of electricity through such cables without the further specific written prior consent of the undertaker (which may be subject to reasonable conditions).

Removal of apparatus

7.—(1) 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 of Affinity Water's apparatus is placed or over which any access to any of Affinity Water's 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:

- (a) 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
- (b) facilities and rights have been secured for that alternative apparatus in accordance with paragraph 9 (facilities and rights for alternative apparatus).

(2) 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 of Affinity Water's apparatus placed in that land, the undertaker must give to Affinity Water 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 by Affinity Water that will involve actual works to cables belonging to the undertaker or interrupt the transmission of electricity through such cables without the further specific written prior consent of the undertaker (which may be subject to reasonable conditions).

(3) 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, or the benefit of any statutory permits granted to the undertaker, Affinity Water will, on receipt of a written notice to that effect from the undertaker, as soon as reasonably practicable use its reasonable endeavours 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.

(4) 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).

(5) 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 42 (arbitration).

(6) Affinity Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 42 (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 42 (arbitration) to construct and bring into operation the alternative apparatus and subsequently to remove any of Affinity Water's 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 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 Affinity Water's 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 be subject to any conditions as are reasonable and proper to protect Affinity Water's 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 42 (arbitration), without unnecessary delay under the superintendence, if given, and to the reasonable approval of Affinity Water.

(8) 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.

(9) 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 the undertaker shall have recourse to arbitration in accordance with article 42 (arbitration).

(10) 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.

(11) 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 of Affinity Water's apparatus, or execute any excavation and filling around any of Affinity Water's apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or
- (c) carry out any works in relation to any water mains.

(12) Whenever alternative apparatus is to be or is being substituted for existing Affinity Water's apparatus, the undertaker must, before taking any steps 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:

- (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.

Facilities and rights for alternative apparatus

8.—(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 Affinity Water's 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 Affinity Water's apparatus to be removed unless otherwise agreed by Affinity Water or in default of agreement settled by expert determination in accordance with sub-paragraph 13 (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—

- (a) 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 adaptations of the alternative apparatus which may be required to prevent interference with the proposed works of the undertaker; and
- (b) 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 Affinity Water's 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 Affinity Water's 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

9.—(1) 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) The plan must provide details of—

- (a) the exact position, including level, of the specified works and of all Affinity Water's apparatus;
- (b) a method statement describing the manner of their construction or renewal including details of excavation and positioning of plant;
- (c) detailed drawings showing every alteration proposed to be made to or close to any such apparatus;
- (d) 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 of Affinity Water's apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and
- (e) any intended maintenance regimes.

(2) The undertaker must not commence any specified works until the plan has been approved by Affinity Water.

(3) 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 (5)(a); and
- (b) must not be unreasonably withheld or delayed.

(4) Affinity Water may require—

- (a) such modifications to be made to the plan as may be reasonably necessary for the purpose of securing Affinity Water's 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 Affinity Water's apparatus; and
- (b) 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.

(5) 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, and in which case Affinity Water must proceed with such part of the specified works in accordance with a programme that has been agreed or settled by arbitration in accordance with article 42 (arbitration)

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

(7) (b) any works in relation to any water mains.

(8) 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.

(9) 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 42 (arbitration).

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

- (a) the plan submitted under sub-paragraph (1), as approved or as amended from time to time by agreement between the undertaker and Affinity Water or as otherwise settled by arbitration under sub-paragraph (8); and
- (b) all conditions imposed under sub-paragraph (4)(a),

and Affinity Water 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.

(11) Where Affinity Water requires (acting reasonably) any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity Water's apparatus (whether of a temporary or permanent nature), Affinity Water 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. The protective works must be carried out to Affinity Water's reasonable satisfaction prior to the commencement of any specified works for which protective works are required and Affinity Water 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 Water must specify what the protective works are and how these ensure the safety of Affinity Water's apparatus (Affinity Water acting reasonably) .

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

(13) Nothing in this paragraph precludes the undertaker from submitting a new plan instead of the plan previously submitted, and the provisions of this paragraph apply to and in respect of the new plan provided that:

- (a) where the new plan is materially different from the plan previously submitted, this new plan shall be submitted at least 56 days before commencing the execution of any works; and
- (b) where the new plan is not materially different from the plan previously submitted, this new plan shall be submitted at least 28 days before commencing the execution of any works,
- (c) unless otherwise agreed with Affinity Water acting reasonably.

(14) 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 reasonable requirements of Affinity Water in so far as is reasonably practicable in the circumstances.

(15) 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 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.

(16) 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.

(17) 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 Affinity Water's apparatus and can recover any such costs in line with paragraph 11 (expenses and costs).

Expenses and costs

10.—(1) 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 but excluding any consequential loss or indirect loss, in, or in connection with—

- (a) the supervision, inspection, removal, relaying, replacing, alteration or protection of any of Affinity Water's 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) the consideration and approval of any plan as required by this Part of this Schedule.

(2) The costs as referred to in sub-paragraphs (1)(a) and (1)(b) are to include but not be limited to—

- (a) 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;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 7(3); or

- (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting Affinity Water;
- (b) 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;
- (c) the cutting off of any of Affinity Water's apparatus from any other of Affinity Water's apparatus or the making safe of redundant apparatus;
- (d) the approval of plans;
- (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (f) 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;
- (g) any costs reasonably necessary in consequence of the execution of any such works as are referred to in this Part of this Schedule; and
- (h) any costs incurred as a result of any penalties or fines imposed on Affinity Water by any regulator

(3) The value of any of Affinity Water's 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.

(4) If in accordance with the provisions of this Part of this Schedule—

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed by Affinity Water in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed by Affinity Water 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.

(5) For the purposes of sub-paragraph (4)—

- (a) 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;
- (b) 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
- (c) 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.

(6) 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.

(7) 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—

- (a) 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
- (b) 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 10(1) 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 this paragraph 10.

(9) Affinity Water must give the undertaker a final account of the costs in relation to which a schedule has been provided under 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 sub-paragraph (8) is reasonable, the undertaker must notify Affinity Water of that within 15 days of receiving the schedule of 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

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 the authorised works or such works, any damage is caused to any of Affinity Water's apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal pursuant to paragraph 7) 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 incurred in accordance with the provisions of this paragraph, the undertaker must—

- (1) bear and pay the cost reasonably incurred by Affinity Water, accompanied by an invoice, in making good such damage, restoring the supply or ensuring continuity of supply; and
- (2) indemnify Affinity Water against all liabilities, claims, demands, losses (excluding any loss of profit), damages, proceedings, penalties, fines, levies, surcharges, 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.

(3) 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 under paragraph 9 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.

(4) 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 act, neglect or default of Affinity Water, its officers, servants, contractors or agents.

(5) 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.

(6) 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.

(7) 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.

Cooperation

12.—(1) Where in consequence of the proposed construction of any of the authorised works, the undertaker or Affinity Water requires the removal of Affinity Water's apparatus under paragraph 7(2) or Affinity Water makes requirements for the protection or alteration of Affinity Water's 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) 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.

(2) 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.

(3) 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 of Affinity Water's apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

(4) 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

13.—(1) Article 42 (*arbitration*) of the Order does not apply to paragraph 8 (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.

(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.

(5) 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;

(ii) 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.

(6) 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 42 (*arbitration*).

(7) 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.

Access

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

Appendix 2

Affinity Water Limited Protective Provisions as compared to Applicant D5 Protective Provisions

SCHEDULE 9 PART

[TBC]

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 wholly-owned subsidiary (as defined in section 1159 of the Companies Act 2006⁽¹⁾);

“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's apparatus” means:

- (a) mains, pipes, connections, reservoirs, or any other apparatus belonging to or maintained by Affinity Water for the purposes of water supply; and
- (b) mains, pipes, connections or any other apparatus that is the subject of an agreement to adopt by Affinity Water made under section 51A (agreements to adopt water main or service pipe at future date) of the Water Industry Act 1991⁽²⁾

“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)) (<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 Affinity Water's apparatus or alternative apparatus in land, includes a reference to Affinity Water's 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;

“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 Water's apparatus by the carrying out, maintenance, construction or use of the authorised works;

(1) 2006 c.46

(2) 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)

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

- (a) may in any way adversely affect 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 (acting reasonably).
- (c) outside the distances referred to in (b) will or may have electromagnetic or high voltage effects on any of Affinity Water’s 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.

On street apparatus

3. Except for paragraphs 4 (*apparatus in stopped up streets*), 9 (*specified works*), 10 (*expenses*) and 11 (*indemnity*) of this Schedule which will apply in respect of the exercise of all or any powers under the Order affecting the rights of Affinity Water or of Affinity Water's apparatus, the other provisions of this Part 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.

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 12 (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 of Affinity Water’s apparatus which at the time of the stopping up or diversion was in that street.

Protective works to buildings

5. The undertaker, in the case of the exercise of the powers conferred by article 18 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access (including access required for maintenance) to, or maintenance of, any of Affinity Water's apparatus unless otherwise agreed in writing with Affinity Water, such agreement not to be unreasonably withheld.

Acquisition of land

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 any interest in land held by Affinity Water or take temporary possession of any of Affinity Water's apparatus or
- (b) appropriate, acquire, extinguish, interfere with or override any easement or other interest or right of which Affinity Water or Affinity Water's 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):

(i) 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 reasonably require; and

(ii) where Affinity Water's apparatus is to remain in, on, under or over any authorised works or property of the undertaker that ~~is~~are 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~~in respect of the 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~~authorised works or property of the undertaker 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 by Affinity Water that will involve works which may adversely affect the authorised works or interrupt the transmission of electricity through the authorised works without the further specific written prior consent of the undertaker (which may be subject to reasonable conditions)~~of Affinity Water's apparatus.

(2) The reasonable provisions in paragraph (1)(b)(ii) may include requirements for the undertaker and Affinity Water to determine no later than the date of completion of the authorised works, works or exercise of powers or categories of works or exercise of powers the carrying out or exercise of which by Affinity Water is capable of being consented to in advance by the undertaker. In respect of such works or powers that are capable of being consented to in advance by the undertaker, that advance consent under Schedule 13 of the Water Industry Act 1991 will be given by the undertaker on completion of the authorised works. In respect of those works or powers the carrying out or exercise of which by Affinity Water is not capable of being consented to in advance, the reasonable provisions will set out a process for the giving of the consent under Schedule 13 within specified expedited timescales following any request for such consent by Affinity Water.

Removal of apparatus

7.—(3) 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 of Affinity Water's apparatus is placed or over which any access to any of Affinity Water's 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:

- (a) 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
- (b) facilities and rights have been secured for that alternative apparatus in accordance with paragraph 9 (facilities and rights for alternative apparatus).

(2) 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 of Affinity Water's apparatus placed in that land, the undertaker must give to Affinity Water 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 and consents will include reasonable provisions ~~signifying in advance any~~in respect of the 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 authorised works or 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 by Affinity Water that will involve works to which may adversely affect the authorised works or interrupt the transmission of electricity through such authorised works without the further specific written prior consent of the undertaker (which may be subject to reasonable conditions).~~

(3) The reasonable provisions in paragraph (2) may include requirements for the undertaker and Affinity Water to determine no later than the date of completion of the authorised works, works or exercise of powers or categories of works or exercise of powers the carrying out or exercise of which by Affinity Water is capable of being consented to in advance by the undertaker. In respect of such works or powers that are capable of being consented to in advance by the undertaker, that advance consent under Schedule 13 of the Water Industry Act 1991 will be given by the undertaker on completion of the authorised works. In respect of those works or powers the carrying out or exercise of which by Affinity Water is not capable of being consented to in advance, the reasonable provisions will set out a process for the giving of the consent under Schedule 13 within specified expedited timescales following any request for such consent by Affinity Water.

(4) ~~(3)~~ 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, or the benefit of any statutory permits granted to the undertaker, Affinity Water will, on receipt of a written notice to that effect from the undertaker, as soon as reasonably practicable use its reasonable endeavours 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.

(5) ~~(4)~~ 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 ~~(34)~~.

(6) ~~(5)~~ 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 42 (arbitration).

(7) ~~(6)~~ Affinity Water must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 42 (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 ~~(34)~~, proceed in accordance with a programme that has been agreed or settled by arbitration in accordance with article 42 (arbitration) to construct and bring into operation the alternative apparatus and subsequently to remove any of Affinity Water's apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(8) ~~(7)~~ Regardless of anything in sub-paragraph ~~(67)~~ 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 Affinity Water's 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 be subject to any conditions as are reasonable and proper to protect Affinity Water's 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 42 (arbitration), without unnecessary delay under the superintendence, if given, and to the reasonable approval of Affinity Water.

(9) ~~(8)~~ 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) ~~(9)~~ 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 the undertaker shall have recourse to arbitration in accordance with article 42 (arbitration).

~~(11) (10)~~ In carrying out any work under sub-paragraph ~~(78)~~, the undertaker must comply with all statutory obligations which would have been applicable had the works been carried out by Affinity Water ~~to the extent that the undertaker is legally able to comply with them.~~

~~(12) (11)~~ Nothing in sub-paragraph ~~(78)~~ 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 of Affinity Water's apparatus, or execute any excavation and filling around any of Affinity Water's apparatus (where the apparatus is laid in a trench) within 600 millimetres of any apparatus to be retained in situ; or
- (c) carry out any works in relation to any water mains.

~~(13) (12)~~ Whenever alternative apparatus is to be or is being substituted for existing Affinity Water's apparatus, the undertaker must, before taking any steps 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:

- (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.

Facilities and rights for alternative apparatus

8.—(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 Affinity Water's 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 Affinity Water's apparatus to be removed unless otherwise agreed by Affinity Water or in default of agreement settled by expert determination in accordance with sub-paragraph 13 (expert determination) unless otherwise agreed in writing by the parties.

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

- (a) 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 adaptations of the alternative apparatus which may be required to prevent interference with the proposed works of the undertaker; and
- (b) 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 Affinity Water's apparatus for which the alternative apparatus is to be substituted.

(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 Affinity Water's 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

9.—(1) 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.

(2) The plan must provide details of—

- (a) the exact position, including level, of the specified works and of all Affinity Water's apparatus;
- (b) a method statement describing the manner of their construction or renewal including details of excavation and positioning of plant;
- (c) detailed drawings showing every alteration proposed to be made to or close to any such apparatus;
- (d) 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 of Affinity Water's apparatus, the removal of which has not been required by the undertaker under paragraph 7(2) or otherwise; and
- (e) any intended maintenance regimes.

(3) The undertaker must not commence any specified works until the plan has been approved by Affinity Water.

(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 (5)(a); and
- (b) must not be unreasonably withheld or delayed.

(5) Affinity Water may require—

- (a) such modifications to be made to the plan as may be reasonably necessary for the purpose of securing Affinity Water's 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 Affinity Water's apparatus; and
- (b) 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.

(6) 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, and in which case Affinity Water must proceed with such part of the specified works in accordance with a programme that has been agreed or settled by arbitration in accordance with article 42 (arbitration)

- (a) the placing, installation, bedding, packing, removal, connection or disconnection of any of Affinity Water's apparatus, or execute any excavation and filling around any of Affinity Water's 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.

(7) 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.

(8) 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 42 (arbitration).

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

- (a) the plan submitted under sub-paragraph (1), as approved or as amended from time to time by agreement between the undertaker and Affinity Water or as otherwise settled by arbitration under sub-paragraph (8); and
- (b) all conditions imposed under sub-paragraph (4)(a),

and Affinity Water 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.

(10) Where Affinity Water requires (acting reasonably) any protective works to be carried out by itself or by the undertaker to ensure the safety of Affinity Water's apparatus (whether of a temporary or permanent nature), Affinity Water 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. The protective works must be carried out to Affinity Water's reasonable satisfaction prior to the

commencement of any specified works for which protective works are required and Affinity Water 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 Water must specify what the protective works are and how these ensure the safety of Affinity Water's apparatus (Affinity Water acting reasonably) .

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

(12) Nothing in this paragraph precludes the undertaker from submitting a new plan instead of the plan previously submitted, and the provisions of this paragraph apply to and in respect of the new plan provided that:

- (a) where the new plan is materially different from the plan previously submitted, this new plan shall be submitted at least 56 days before commencing the execution of any works; and
- (b) where the new plan is not materially different from the plan previously submitted, this new plan shall be submitted at least 28 days before commencing the execution of any works,

unless otherwise agreed with Affinity Water acting reasonably.

(13) 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 reasonable requirements of Affinity Water in so far as is reasonably practicable in the circumstances.

(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 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.

(15) 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.

(16) 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 Affinity Water's apparatus and can recover any such costs in line with paragraph 11 (expenses and costs).

Expenses and costs

10.—(1) 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 but excluding any consequential loss or indirect loss, in, or in connection with—

- (a) the supervision, inspection, removal, relaying, replacing, alteration or protection of any of Affinity Water's 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) the consideration and approval of any plan as required by this Part of this Schedule.

(2) The costs as referred to in sub-paragraphs (1)(a) and (1)(b) are to include but not be limited to—

- (a) 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;
 - (i) using its own compulsory purchase powers to acquire any necessary rights under paragraph 7(3); or

- (ii) exercising any compulsory purchase powers in the Order transferred to or benefitting Affinity Water;
- (b) 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;
- (c) the cutting off of any of Affinity Water's apparatus from any other of Affinity Water's apparatus or the making safe of redundant apparatus;
- (d) the approval of plans;
- (e) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (f) 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~~
- (g) any costs reasonably necessary in consequence of the execution of any such works as are referred to in this Part of this Schedule; ~~and~~
- (h) any costs incurred as a result of any penalties or fines imposed on Affinity Water by any regulator

(3) The value of any of Affinity Water's 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.

(4) If in accordance with the provisions of this Part of this Schedule—

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed by Affinity Water in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed by Affinity Water 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.

(5) For the purposes of sub-paragraph (4)—

- (a) 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;
- (b) 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
- (c) 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.

(6) 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.

(7) 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—

- (a) 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
- (b) 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 10(1) 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 this paragraph 10.

(9) Affinity Water must give the undertaker a final account of the costs in relation to which a schedule has been provided under 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 sub-paragraph (8) is reasonable, the undertaker must notify Affinity Water of that within 15 days of receiving the schedule of 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

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 the authorised works or such works, any damage is caused to any of Affinity Water's apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal pursuant to paragraph 7) 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 incurred in accordance with the provisions of this paragraph, 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 or ensuring continuity of supply; and
- b) indemnify Affinity Water against all liabilities, claims, demands, losses (excluding any loss of profit), damages, proceedings, ~~penalty~~penalties, fines, levies, surcharges, 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 ~~but excluding any consequential loss or indirect loss.~~

(2) 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 under paragraph 9 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.

(3) 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 =act, neglect or default of Affinity Water, its officers, servants, contractors or agents.

(4) 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.

(5) 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.

(6) 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.

Cooperation

12.—(1) Where in consequence of the proposed construction of any of the authorised works, the undertaker or Affinity Water requires the removal of Affinity Water's apparatus under paragraph 7(2) or Affinity Water makes requirements for the protection or alteration of Affinity Water's 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.

(2) 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.

(3) 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.

(4) 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 of Affinity Water's apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

(5) 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

13.—(1) Article 42 (*arbitration*) of the Order does not apply to paragraph 8 (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.

(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.

(5) 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;
 - (ii) 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.
- (6) 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 42 (*arbitration*).
- (7) 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.

Access

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