

THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

**APPLICATION BY H2 TEESSIDE LIMITED FOR AN ORDER GRANTING DEVELOPMENT
CONSENT FOR THE PROPOSED H2TEESSIDE DEVELOPMENT**

PINS REFERENCE: EN070009

**RESPONSE ON BEHALF OF NET ZERO NORTH SEA STORAGE LIMITED (NZNSS) TO
THE SECRETARY OF STATE'S LETTER DATED 13 JUNE 2025 REQUESTING
INFORMATION**



NZNSS's Response to the Secretary of State's letter requesting information

1 Background

- 1.1 In the Request for Information dated 13 June 2025 (**the RFI**), the Secretary of State directs Questions 16 and 17 to NZNSS.
- 1.2 We set out below the responses to those questions on behalf of NZNSS. We also address a preliminary matter arising in respect to Question 16.

2 Preliminary matter arising in respect to Question 16

- 2.1 We note that Question 16 refers to NZNSS document REP8-062. This is a red-line compare submitted by NZNSS at Deadline 8 to show the differences between NZNSS's protective provisions and the Applicant's protective provisions from Deadline 7A for the benefit of NZNSS as undertaker for the part of the NZT Project consented by the Net Zero Teesside Order 2024 (**the NZT DCO**) forming part of the wider Northern Endurance Partnership (**NEP**) project.
- 2.2 We wish to flag that this compare no longer accurately shows the differences between the parties' respective protective provisions. This is because the Applicant's protective provisions from Deadline 7A were superseded by the updated set of protective provisions for the benefit of NZNSS submitted by the Applicant at Deadline 8 [REP8-017] (**the Applicant's PPs**).
- 2.3 In order to assist the Secretary of State and avoid potential confusion as to the extent of the differences between the parties' respective protective provisions, we attach an updated compare at Appendix 1 to this document. This shows all of the outstanding differences between NZNSS's protective provisions and the Applicant's PPs, which it should be noted have narrowed from the Applicant's previous version.
- 2.4 As it can be seen from this compare, as well as omitting the acceptable insurance provisions the subject of Question 16 in the RFI, the Applicant's PPs continue to omit the provisions regulating the use of certain DCO powers in the Shared Area (including the use of compulsory acquisition powers) at paragraph 6 of NZNSS's protective provisions (**the Para 6 Provisions**).
- 2.5 We note that the RFI does not raise any questions regarding the continuing omission of the Para 6 Provisions from the Applicant's PPs. For the avoidance of doubt, NZNSS's position remains as set out in its Deadline 8 representation [REP8-060] (**D8 Rep**), i.e. that the Para 6 Provisions are necessary and their omission from the Applicant's PPs undermines the purpose of the protective provisions for the reasons set out in paragraph 3.2(b) of the D8 Rep.
- 2.6 NZNSS also notes that the Applicant's Response to Deadline 8 Submissions [REP9-023] (**the Applicant's Response**) suggested that the Para 6 Provisions are unnecessary because of the approval process in paragraph 3 of the protective provisions for the benefit of NZNSS. This overlooks the fact that paragraph 3 and paragraph 6 are dealing with completely different matters and, in order to avoid potential prejudice to the NZT and NEP projects, both of these protections are needed for the reasons set out in the D8 Rep. Whilst the Applicant's Response then goes on to suggest that the Para 6 Provisions would jeopardise the

delivery of the H2T Project, this assertion neither acknowledges nor engages with the fact that the H2T Project is dependent upon the delivery of the NZT and NEP projects – please see the D8 Rep for further information in this regard. Without the Para 6 Provisions, there is the potential for the Applicant to jeopardise the delivery and/or operation of the NZT and NEP projects, not least because the compulsory acquisition powers in the NZT DCO are already active and will expire before the compulsory acquisition powers in the DCO for the H2T Project (if the same is granted).

- 2.7 In these circumstances the Para 6 Provisions provide a critical – and standard - safeguard for the two projects already consented by the NZT DCO. The fact that ground clearance works have now commenced pursuant to these projects further underlines the need for the Para 6 Provisions to avoid the H2T Project inadvertently prejudicing projects that are already in progress and which will be under construction in the Shared Area before the H2T Project is commenced and operational before the H2T Project is completed.

3 Response to Questions 16 and 17

	Question	Response
16.	NZNSS and NZTP should provide their views on the removal of paragraphs 9(7) and 9(8) from their PPs provided respectively at REP8- 062 and REP8-065	<p>Paragraph 9 of the protective provisions required by NZNSS relate to the provision of an indemnity. Paragraphs 9(7) and 9(8) provide for the following:</p> <p><i>9(7) Not to commence construction (and not to permit the commencement of such construction) of the authorised works on any land owned by NEP or in respect of which NEP has an easement or wayleave for its apparatus or any other interest or to carry out any works within 15 metres of NEP's Apparatus unless and until NEP is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to NEP that it shall maintain such acceptable insurance for the construction period of the authorised works from the proposed date of commencement of construction of the authorised works) and NEP has confirmed the same in writing to the undertaker.</i></p>

		<p>9(8) <i>In the event that the undertaker fails to comply with paragraph 9(7) of this Schedule, nothing in this shall prevent NEP from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.</i></p> <p><i>“acceptable insurance” is defined as:</i></p> <p><i>“general third party liability insurance effected and maintained by the undertaker with a combined property damage and bodily injury limit of indemnity of not less than a sum to be notified to the undertaker by NEP and agreed in writing between the parties. Evidence of that insurance must be provided to NEP on request. Such insurance shall be maintained (a) during the construction period of the authorised works; and (b) after the construction period of the authorised works in respect of any use and maintenance of the authorised development by or on behalf of the undertaker which constitute specified works and arranged with an insurer whose security/credit rating meets the requirements as agreed by the undertaker and NEP, such insurance shall include (without limitation):</i></p> <p><i>(a) a waiver of subrogation and an indemnity to principal clause in favour of NEP</i></p> <p><i>(b) pollution liability for third party property damage and third party bodily damage arising from any pollution/contamination event with a (sub)limit of indemnity of not less than a sum to be notified to the undertaker by NEP and agreed in writing between the parties”</i></p> <p>The principle of inclusion of 'acceptable insurance' is well established within protective provisions and there are multiple precedents in existing DCOs - for example in the recently granted Viking CCS Development Consent Order.</p>
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		<p>The principle is also well established in other forms of infrastructure agreements, for example, highways agreements anticipate statutory highways authorities having recourse to insurance.</p> <p>Insurance is required to avoid NZNSS being left wholly reliant on the Applicant's indemnity and so potentially exposed to irrecoverable liabilities and losses which it would not have been subject to but for the proposed authorised development. The need for insurance to be in place before the H2T Project commences is particularly important given the physical overlap in the Shared Area of the H2T Project with the NZT and NEP Projects and the fact that the latter projects will be under construction by the time the H2T Project commences.</p> <p>Similarly, NZNSS should have recourse to injunctive relief in the event that the Applicant commences construction without acceptable insurance being in place. Should works continue without sufficient insurance in place, NZNSS's interests and apparatus would be exposed to unmitigated risk and loss.</p>
17.	If any further legal side agreements have been made for the protection of assets in relation to the Proposed Development, information on these should be provided by the Applicant, AA, NZNSS, NZTP, NTG, and NWL as well.	<p>Whilst NZNSS remains in discussions with the Applicant to address the outstanding points referred to above (i.e. insurance and the regulation of the Applicant's DCO powers in the Shared Area) – and anticipates that any legal agreement between the parties would include provisions covering these points - an agreed position has yet to be reached between the parties.</p> <p>Accordingly, in the event that the Secretary of State is minded to grant the DCO for the Proposed Development, NZNSS must maintain the position set out in the D8 Rep, i.e. that NZNSS's PPs should be included in the DCO in the place of the Applicant's PPs.</p>

Addleshaw Goddard LLP on behalf of NZNSS

26 June 2025

Appendix 1: Updated compare to show outstanding differences between the Applicant's PPs and NZNSS's protective provisions

SCHEDULE 44

FOR THE PROTECTION OF NET ZERO NORTH SEA STORAGE LIMITED

Interpretation

1. For the protection of NEP, the following provisions have effect, unless otherwise agreed in writing between the Parties.

2. The following definitions apply in this Schedule—

~~“acceptable insurance” means general third party liability insurance effected and maintained by the undertaker with a combined property damage and bodily injury limit of indemnity of not less than a sum to be notified to the undertaker by NEP and agreed in writing between the parties. Evidence of that insurance must be provided to NEP on request. Such insurance shall be maintained (a) during the construction period of the authorised works; and (b) after the construction period of the authorised works in respect of any use and maintenance of the authorised development by or on behalf of the undertaker which constitute specified works and arranged with an insurer whose security/credit rating meets the requirements as agreed by the undertaker and NEP, such insurance shall include (without limitation):~~

~~(a) a waiver of subrogation and an indemnity to principal clause in favour of NEP~~

~~(b) pollution liability for third party property damage and third party bodily damage arising from any pollution/contamination event with a (sub)limit of indemnity of not less than a sum to be notified to the undertaker by NEP and agreed in writing between the parties;~~

“H2T Apparatus” means the pipeline, cables, structures which are or are to be owned, occupied or maintained by the undertaker within the Shared Area for the purposes of the authorised development;

“NEP Apparatus” means the pipeline, cables, structures to be owned, occupied or maintained by NEP within the Shared Area;

“NZT Order” means The Net Zero Teesside Order 2024;

“NEP Project” means the construction, operation or maintenance of Project B as is defined by the NZT Order;

“NEP Project Site” means –

(a) land on which any NEP Apparatus is situated; and

(b) land on which NEP Apparatus is anticipated to be situated which is necessary for the construction, use or maintenance of the NEP Project (insofar as the same has been notified by NEP in writing to the undertaker);

“NEP Specified Works” means so much of the NEP Project as is within the Shared Area;

“NEP” means Net Zero North Sea Storage Limited (company number 12473084) whose registered office is at Chertsey Road, Sunbury On Thames, Middlesex, United Kingdom, TW16 7BP;

“Parties” means NEP and the undertaker;

“Plans” includes so far as is reasonably relevant: sections, drawings, specifications design data, software, 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 by the undertaker of any land for purposes of the Shared Area Works;

“Secretary of State” means the Secretary of State for Energy Security and Net Zero or any successor in function;

“Shared Area” means land included within both the NEP Project Site and the authorised development;

“Shared Area Works” means any part of the authorised development taking place within the Shared Area;

Consent to Shared Area Works

3.—(1) Subject to sub-paragraph (8), the undertaker must not except with the prior written agreement of NEP under this paragraph carry out any Shared Area Works or any part of it.

(2) Prior to the commencement of any Shared Area Works, or any part of it, the undertaker must submit

to NEP Plans of the relevant Shared Area Works (or part of it) and such further particulars available to it as NEP may request within 21 days of receipt of the Plans reasonably requested.

(3) The Plans that will be provided with the request which must identify—

- (a) the land that will or may be affected;
- (b) which Works Nos. as set out in Schedule 1 (authorised development) any powers under the Order sought to be used or works to be carried out relate to;
- (c) the identity of the contractors carrying out the work;
- (d) the proposed programme for the power under the Order to be used or works to be carried out; and
- (e) the named point of contact for the undertaker for discussions in relation to the information supplied and the consenting process.

(4) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 48 days before commencing the execution of any of the Shared Area Works, new Plans in respect of that Shared Area Works in substitution of the Plans previously submitted, and the provisions of this paragraph shall apply to the new Plans.

(5) Any Shared Area Works must not be constructed except in accordance with such Plans as are approved in writing by NEP.

(6) Any approval of NEP required under this Schedule –

- (a) must not be unreasonably withheld or delayed;
- (b) in the case of a refusal must be accompanied by a statement of grounds or refusal; and
- (c) may be given subject to such reasonable requirements as NEP may have in connection with the safe, economic and efficient construction, commissioning, operation, maintenance and future decommissioning of the NEP Project or otherwise for the protection of the NEP Apparatus,

provided always that in relation to a refusal under sub-paragraph (b) or any requirements requested pursuant to sub-paragraph (c) the undertaker shall be permitted to refer such matters to expert determination in accordance with paragraph 10.

(7) Where conditions are included in any consent granted by NEP pursuant to this Schedule, the undertaker must comply with the conditions if it chooses to implement or rely on the consent, unless the conditions are waived or varied in writing by NEP or by an expert to which such conditions are referred under sub-paragraph (6).

(8) NEP must employ reasonable endeavours to respond to the submission of any Plans as soon as is reasonably practicable but in any event within a period of 56 days from the date of submission of the Plans. If NEP require further particulars, such particulars must be requested by NEP no later than 21 days from the submission of Plans and thereafter NEP must employ reasonable endeavours to respond to the submission as soon as is reasonably practicable and no later than within 56 days from receipt of the further particulars and if by the expiry of the 56 day period NEP has failed to notify the undertaker of its decision NEP is deemed to have given its consent, approval or agreement without any terms or conditions.

(9) Any notice under sub-paragraph (1) and any request for approval or consent under the provisions of this Schedule must be sent to NEP by recorded delivery and addressed to the Managing Director.

Interaction with the NEP Project

4.—(1) Without limiting any other provision of this Schedule, the undertaker must use reasonable endeavours to avoid any conflict arising between the carrying out of the authorised development and the NEP Project. For the purposes of this paragraph, "reasonable endeavours" means –

- (a) undertaking consultation on the detailed design and programming of the Shared Area Works and all works associated with or ancillary to the Shared Area Works to ensure that the design and programme for the Shared Area Works does not unreasonably impede or interfere with the NEP Project;
- (b) having regard to the proposed programme of works for the NEP Project as may be made available to the undertaker by NEP and facilitating a co-ordinated approach to the programme, land assembly, and the carrying out of the Shared Area Works and the NEP Project;
- (c) providing a point of contact for continuing liaison and co-ordination throughout the construction and operation of the authorised development; and

(d) keeping NEP informed on the programme of works for the authorised development.

(2) Prior to the seeking of any consent under this Schedule, the undertaker must invite NEP to participate in a design and constructability review for that part of the Shared Area Works which shall, at a minimum (unless otherwise agreed), include the following matters—

(e) a Front End Engineering Design (FEED) level indicative construction work-pack;

(f) a hazard and operability study; and

(g) a construction hazard study.

Regulation of Shared Area Works

5.—(1) Where under paragraph 3(6) NEP requires any protective works to be carried out either by themselves or by the undertaker (whether of a temporary or permanent nature) such protective works must be carried out to the reasonable satisfaction of NEP.

(2) The undertaker must give to NEP not less than 28 days' written notice of its intention to commence the construction of any of the Shared Area Works and, not more than 14 days after completion of their construction, must give NEP written notice of the completion and NEP will be entitled by its offer to watch and inspect the construction of such works.

(3) The undertaker is not required to comply with paragraph 3(5) above in a case of emergency, (being actions required directly to prevent possible death or injury) but in that case it must give to NEP notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and thereafter must comply with paragraphs 3 and 5 in so far as is reasonably practicable in the circumstances.

(4) The undertaker must at all reasonable times during construction of the Shared Area Works allow NEP and its officers, employees, servants, contractors, and agents access to the Shared Area Works and all reasonable facilities for inspection of the Shared Area Works.

(5) After the purpose of any temporary works has been accomplished, the undertaker must with all reasonable dispatch, or after a reasonable period of notice in writing from NEP requiring the undertaker to do so, remove the temporary works in, on, under, over, or within the Shared Area.

(6) If the undertaker fails to remove the temporary works within a reasonable period of receipt of a notice pursuant to sub-paragraph (9), NEP may remove the temporary works and may recover the reasonable costs of doing so from the undertaker.

(7) If in consequence of the exercise of the powers conferred by the Order or the carrying out of the Shared Area Works the access to any of the NEP Specified Works is materially obstructed, the undertaker must provide such alternative means of access to the NEP Specified Works as will enable NEP to construct, maintain or operate the NEP Project no less effectively than was possible before the obstruction.

(8) To ensure its compliance with this paragraph 5, the undertaker must before carrying out any of the Shared Area Works request up-to-date written confirmation from NEP of the location of any part of the NEP Specified Works.

(9) If any part of the Shared Area Works is constructed otherwise than in accordance with paragraph 3(5) above NEP may by notice in writing identify the extent to which the Shared Area Works do not comply with the approved details and request the undertaker at the undertaker's own expense carry out remedial works so as to comply with the requirements of paragraph 3(5) of this Schedule or such alternative works as may be agreed with NEP or as otherwise may be agreed between the parties.

(10) Subject to sub-paragraph (11), if within a reasonable period, being not less than 28 days beginning with the date when a notice under sub-paragraph (9) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably

expeditious progress towards their implementation, NEP may execute the works specified in the notice and any reasonable expenditure incurred by NEP in so doing will be recoverable from the undertaker.

(11) In the event of any dispute as to whether sub-paragraph (10) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, NEP will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (10) until the dispute has been finally determined in accordance with paragraph 10.

Regulation of powers over the shared area

~~6.—(1) The undertaker must not exercise the powers granted under the Order so as to hinder or prevent the construction, operation or maintenance of the NEP Specified Works without the prior written consent of NEP.~~

~~(2) The undertaker must not exercise the powers under any of the articles of the Order below, over land for the purposes of the Shared Area Works or in respect of the Shared Area Works otherwise than with the prior written consent of NEP.~~

~~(3) The articles referred to in sub-paragraph (2) above are—~~

- ~~(a) article 4 (development consent etc. granted by the Order);~~
 - ~~(b) article 5 (maintenance of authorised development);~~
 - ~~(c) article 11 (street works);~~
 - ~~(d) article 12 (construction and maintenance of new or altered means of access);~~
 - ~~(e) article 13 (temporary closure of streets and public rights of way);~~
 - ~~(f) article 14 (access to works);~~
 - ~~(g) article 17 (discharge of water);~~
 - ~~(h) article 19 (protective works to buildings);~~
 - ~~(i) article 20 (authority to survey and investigate land);~~
 - ~~(j) article 22 (compulsory acquisition of land);~~
 - ~~(k) article 23 (power to override easements and other rights);~~
 - ~~(l) article 25 (compulsory acquisition of rights etc.);~~
 - ~~(i) article 32 (temporary use of land for carrying out the authorised development); and~~
 - ~~(ii) article 33 (temporary use of land for maintaining the authorised development).~~
- ~~(4) In the event that NEP withholds its consent pursuant to sub-paragraph (2) it must notify the undertaker in writing of the reasons for withholding such consent and (if applicable) the time period during which such consent will be withheld.~~
- ~~(5) Regardless of any provision in the Order or anything shown on the land plans or contained in the book of reference to the Order, the undertaker must not appropriate or acquire or take permanent or temporary possession of any land interest held by NEP in any plots shown on the land plans or in the NEP Project Site, or appropriate, acquire, extinguish, interfere with or override any easement, other interest or right in such land.~~

Constructability Principles

~~6.7.~~—(1) The undertaker must (unless otherwise agreed, in an emergency relating to potential death or serious injury, or where it would render the H2T Apparatus, the Shared Area Works, the NEP Specified Works or NEP Apparatus unsafe, or put the undertaker in breach of its statutory duties or in breach of an obligation or requirement of the Order)—

- (a) carry out the Shared Area Works in such a way that will not prevent or interfere with the continued construction of the NEP Specified Works, or the maintenance or operation of the NEP Apparatus unless the action leading to such prevention or interference has the prior written consent of NEP;
- (b) ensure that works carried out to, or placing of H2T Apparatus beneath, roads along which construction or maintenance access is required by NEP in respect of any NEP Apparatus will be of adequate specification to bear the loads;
- (c) prior to the carrying out of any of the Shared Area Works in any part of any Shared Area—
 - (i) where requested in writing by NEP within 21 days of receipt of the Plans submitted pursuant to paragraph 3(2), submit a construction programme and a construction traffic and access management plan in respect of that area to NEP for approval (noting that a single construction traffic and access management plan may be completed for one or more parts of the Shared Area Works and may be subject to review if agreed between the Parties); and
 - (ii) where applicable and where requested in writing by NEP within 21 days of receipt of the Plans submitted pursuant to paragraph 3(2), confirm to NEP in writing the identity of the client for the purposes of the relevant Construction Design and Management Regulations applicable from time to time;
- (d) at all times construct the Shared Area Works in compliance with the relevant approved construction traffic and access management plan;
- (e) notify NEP of any incidences which occur as a result of, or in connection with, the Shared Area Works which are required to be reported under the relevant Reporting of Injuries Diseases and Dangerous Occurrences Regulations applicable from time to time within 24 hours of the duty to report arising;
- (f) where requested in writing by NEP within 21 days of receipt of post-completion notice pursuant to paragraph 5(2), provide comprehensive, as built, drawings of the Shared Area Works (including,

for the avoidance of doubt, buried pipelines) within three months of the completion of each of the Shared Area Works;

(2) In considering a request for any consent under the provisions of this Schedule, NEP must not request an additional construction traffic and access management plan if such a plan has already been approved pursuant to subparagraph (1)(c) (as relevant in respect of a traffic and access management plan).

Expenses

~~7.8.~~—(1) Save where otherwise agreed in writing between NEP and the undertaker and subject to the following provisions of this paragraph, the undertaker must pay to NEP within 30 days of receipt of an itemised invoice or claim from NEP all charges, costs and expenses reasonably anticipated within the following three months or reasonably and properly incurred by NEP in, or in connection with, the inspection, removal, relaying or replacing, alteration or protection of any apparatus or the construction of any new or alternative apparatus which may be required in consequence of the execution of any authorised works including without limitation—

- (a) 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;
- (b) the cutting off of any apparatus from any other apparatus or the making safe of redundant apparatus;
- (c) the approval of Plans;
- (d) the carrying out of protective works, plus a capitalised sum to cover the cost of maintaining and renewing permanent protective works;
- (e) the survey of any land, apparatus or works, the inspection and monitoring of works or the installation or removal of any temporary works reasonably necessary in consequence of the execution of any such works referred to in this Schedule.

(2) There will be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Schedule and which is not re-used as part of the alternative apparatus, that value being calculated after removal.

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

- (a) 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
- (b) 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 dispute resolution in accordance with paragraph 10 to be necessary, then, if such placing involves cost in the construction of works under 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 NEP by virtue of sub-paragraph (1) will be reduced by the amount of that excess save to the extent that it is not possible in the circumstances to obtain the existing type of apparatus at the same capacity and dimensions or place at the existing depth in which case full costs will be borne by the undertaker.

(4) For the purposes of sub-paragraph (3)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus will not be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) 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 a manhole will be treated as if it also had been agreed or had been so determined.

(5) Any amount which apart from this sub-paragraph would be payable to NEP in respect of works by virtue of sub-paragraph (1) will, 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 NEP 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.

(6) Where reasonably anticipated charges, costs or expenses have been paid by the undertaker pursuant to sub-paragraph (1), if the actual charges, costs or expenses incurred by NEP are less than the amount already

paid by the undertaker NEP will repay the difference to the undertaker as soon as reasonably practicable.

Indemnity

~~8.9.~~—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any works authorised by this Part of this Schedule or in consequence of the construction, use, maintenance or failure of any of the authorised works by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the undertaker under this Schedule or any subsidence resulting from any of these 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 the authorised works) or property of NEP, or there is any interruption in any service provided, or in the supply of any goods, by NEP, or NEP becomes liable to pay any amount to any third party, the undertaker will—

- (a) bear and pay on demand accompanied by an invoice or claim from NEP the cost reasonably and properly incurred by NEP in making good such damage or restoring the supply; and
- (b) indemnify NEP for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from NEP, by reason or in consequence of any such damage or interruption or NEP becoming liable to any third party other than arising from any default of NEP.

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

(3) Nothing in sub-paragraph (1) shall impose any liability on the undertaker in respect of—

- (a) any damage or interruption to the extent that it is attributable to the neglect or default of NEP, its officers, servants, contractors or agents;
- (b) any authorised works and/or any other works authorised by this Schedule carried out by NEP as an assignee, transferee or lessee of the undertaker with the benefit of the Order pursuant to section 156 of the Planning Act 2008 or article 8 (benefit of the Order) subject to the proviso that once such works become apparatus (“new apparatus”) any authorised works yet to be executed and not falling within this sub-section 3(b) will be subject to the full terms of this Schedule including this paragraph; and/or
- (c) any indirect or consequential loss of any third party (including but not limited to loss of use, revenue, profit, contract, production, increased cost of working or business interruption) arising from any such damage or interruption, which is not reasonably foreseeable;

(4) NEP must give the undertaker reasonable notice of any such third party claim or demand and no settlement, admission of liability or compromise must, unless payment is required in connection with a statutory compensation scheme, be made without first consulting the undertaker and considering their representations.

(5) NEP 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) NEP must use its reasonable endeavours to mitigate and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph applies where it is within NEP’s reasonable ability and control to do so and which expressly excludes any obligation to mitigate liability arising from third parties which is outside of NEP’s control and if reasonably requested to do so by the undertaker NEP must provide an explanation of how the claim has been minimised, where relevant or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1).

~~(7) Not to commence construction (and not to permit the commencement of such construction) of the authorised works on any land owned by NEP or in respect of which NEP has an easement or wayleave for its apparatus or any other interest or to carry out any works within 15 metres of NEP’s Apparatus unless and until NEP is satisfied acting reasonably (but subject to all necessary regulatory constraints) that the undertaker has procured acceptable insurance (and provided evidence to NEP that it shall maintain such acceptable insurance for the construction period of the authorised works from the proposed date of~~

~~commencement of construction of the authorised works) and NEP has confirmed the same in writing to the undertaker.~~

~~(8) In the event that the undertaker fails to comply with paragraph 9(7) of this Schedule, nothing in this shall prevent NEP from seeking injunctive relief (or any other equitable remedy) in any court of competent jurisdiction.~~

Miscellaneous provisions

~~2.10.~~—(1) NEP and the undertaker must each act in good faith and use reasonable endeavours to co-operate with, and provide assistance to, each other as may be required to give effect to the provisions of this Schedule.

Dispute resolution

- ~~10.11.~~—(1) Article 46 (arbitration) of this Order does not apply to provisions of this Schedule.
- (2) Any difference in relation to the provisions in this Schedule must be referred to—
- (a) a meeting of the Managing Director to seek agreement on the matter in dispute within 21 days from the date of a dispute first being notified in writing by one Party to the other; and
 - (b) in the absence of the difference being settled within that period, to be 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 NEP and the undertaker or, in the absence of agreement identified by the President of the Law Society, who must be sought to be appointed within 28 days of the notification of the dispute.
- (3) 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 as between the Parties.
- (4) Where appointed pursuant to sub-paragraph (2)(b), the expert must—
- (a) invite the Parties to make submissions to the expert in writing and copied to the other party to be received by the expert within 21 days of the expert's appointment;
 - (b) allow each Party an opportunity to comment on the submissions made by the other provided they are received within 21 days of the receipt of the submissions referred to in sub-paragraph (a) above;
 - (c) issue a decision within 42 days of receipt of the submissions submitted pursuant to sub-paragraph (a) above; and
 - (d) give reasons for the decision.
- (5) The expert must consider where relevant—
- (a) the development outcomes sought by NEP and the undertaker;
 - (b) the ability of NEP and the undertaker to achieve the outcomes referred to in sub-paragraph (a) above in a timely and cost-effective manner;
 - (c) any increased costs on any Party as a result of the matter in dispute;
 - (d) whether under the NZT Order or the Order, NEP's or the undertaker's outcomes could be achieved in any alternative manner without the NEP Specified Works being materially compromised in terms of increased cost or increased length of programme; and
 - (e) any other important and relevant considerations.
- (6) Any determination by the expert is final and binding which the Parties must comply with and is enforceable by the Parties by injunction 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 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) by the Law Society.