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Document No: wh19812110v1  
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Dear Sirs

**Re: Application by Eggborough Power Limited for an Order Granting Development Consent for the Eggborough CCGT Project**  
**Our Client: The Canal & River Trust**  
**The Applicant: Eggborough Power Limited**

We act on behalf of the Canal & River Trust ("the Trust") in relation to the above matter. We write in accordance with deadline 6 in order to provide our Client's comments to the Applicants' response to the further written questions. In particular, we provide our Client's comments in respect of the response to CA 2.3.

We confirm that we have been liaising with the Applicant's solicitors in an attempt to agree the final version of the protective provisions. Unfortunately, very little progress has been made due to the fact that the Applicant's solicitors have taken some time to respond with full instructions from the Applicant. A response was provided on 24 January 2018 however such response confirmed that the solicitors' instructions remained unchanged.

We therefore consider that the final version of the protective provisions is likely to be a matter which the Examiner will be required to determine. In these circumstances, we have therefore attached the proposed final version of the protective provisions which the Trust are content with (amendments from the Applicant's version of protective provisions are identified in tracked changes). We also explain below the Trust's position in relation to the outstanding matters. We would however refer the Examiner to the submissions made during the Issue Specific Hearing on 23 November 2017 as summarised in correspondence dated 29 November. This correspondence is intended to supplement the points previously raised.

**1. Applicant's proposal to cap its liability**

We note that the Applicant's response to the further written questions identifies that the Applicant does not consider there to be "any risk that the liability of CRT would be greater

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than £5 million". However, the Applicant subsequently states in the same response that it is important for the commercial viability of the project for financial risks such as uncapped indemnities to be avoided. We submit that these two arguments are inconsistent and would respectfully suggest that the Applicant cannot argue that there is no risk that the Trust's costs/losses will exceed £5 million and similarly argue that an uncapped indemnity poses an adverse financial risk.

As previously explained, as a registered charity the Trust's funds are limited and it does not therefore serve the public interest for any residual risk given rise to by the project to be borne by the voluntary sector. It is the Applicant who should be responsible for any such risks and associated liabilities regardless of their likelihood.

As the Applicant has accepted, there are a number of other Development Consent Orders which include protective provisions without a financial cap (one example being the Keuper Underground Gas Storage Facility Order 2017) and the Trust does not consider that the circumstances of this case justify a departure from this accepted approach.

## **2. Applicant's proposal to exclude its liability for consequential losses**

The Trust considers that it is reasonable for the Trust's consequential losses to be recoverable. The Trust would accept that only those losses which are reasonably foreseeable should be included within this. We have therefore prepared the revised draft protective provisions on this basis (see track changes to paragraph 16(2)(b) attached).

## **3. Other provisions**

As part of the approval of any plans pursuant to paragraph 5(1) of the protective provisions, the Trust would expect the Applicant to complete an application form and to pay an application fee in accordance with the Trust's Code of Practice. This is a standard procedure and the Trust does not understand why the Applicant will not agree to this wording.

The Applicant has included deemed approval provisions within paragraph 5(2) of the protective provisions. The Trust considers it reasonable that such deemed approval should only apply from the date that the relevant documentation has been "received by" the Trust and it is manifestly unfair for the Applicant to be able to trigger such deemed provisions by simply sending the documentation to the Trust regardless of whether or not it is actually received.

In relation to paragraph 14(e) the Trust's position is that if any works are reasonably required to be undertaken by the Trust as a consequence of the authorised development in order to ensure the safe navigation of the River Aire then all costs should be recoverable from the Applicant. The Trust therefore does not consider that such costs should be limited to specified or protective works. Whilst the Trust acknowledges that it is unlikely that other works pursuant to the authorised development will have an effect on the safe navigation of the River Aire, there remains an risk in respect of this.

The Trust does not consider that the Applicant's paragraphs 14(2)-(4) are necessary, or reasonable. Furthermore, those provisions do not reflect the actual position on the ground where it comes to procuring the protective work, and so the Trust has real concerns that the convoluted process for vetting and approval of costs in advance of this being incurred will be harmful to the public interest in that it will delay, unnecessarily complicate and put at risk the timely delivery of the necessary and relevant specified and protective works.

## Conclusion

Whilst the Trust would be willing to continue to engage with the Applicant in relation to the wording of the protective provisions, the Trust does not consider that it can make any further concessions to the standard protective provisions which have been accepted at public examination on a number of occasions in respect of other Development Consent Orders.

Finally, we would respectfully ask that in considering the above issues the Examiner considers very carefully the public interest served in ensuring the project is authorised in a form that does not unduly inhibit, prevent or entirely bring to an end the charitable objectives of our client that is so fundamental to the continued safe navigation, use and enjoyment of the River Aire.

If the Examiner considers that it would be helpful for the Trust to clarify its position any further then please do not hesitate to contact us.

Yours faithfully

  
Ward Hadaway

# PART 1

## FOR THE PROTECTION OF CANAL AND RIVER TRUST

### Interpretation

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

(2) In this Part of this Schedule—

“Code of Practice” means the Code of Practice for Works Affecting the Canal and River Trust (April 2017) or any updates or amendments thereto;

“construction”, in relation to any specified work or protective work, includes—

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

“CRT” means the Canal & River Trust;

“CRT’s network” means CRT’s network of waterways;

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

- (a) any obstruction of, or interference with, or hindrance or danger to, navigation or to any use of the waterway (including towing paths);
- (b) the erosion of the bed or banks of the waterway, or the impairment of the stability of any works, lands or premises forming part of the waterway;
- (c) the deposit of materials or the siltation of the waterway so as to damage the waterway;
- (d) the pollution of the waterway;
- (e) any significant alteration in the water level of the waterway, or significant interference with the supply of water thereto, or drainage of water therefrom;
- (f) any harm to the ecology of the waterway (including any adverse impact on any site of special scientific interest comprised in CRT’s network);
- (g) any interference with the exercise by any person of rights over CRT’s network;

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

“plans” includes sections, designs, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction) and programmes;

“practical completion” means practical completion of all of the specified work notwithstanding that items which would ordinarily be considered snagging items remain outstanding, and the expression “practically complete” and “practically completed” shall be construed accordingly;

“protective work” means a work constructed under paragraph 5(3)(a);

“specified work” means so much of Work No 4 as is situated upon, across, under, over or within 15 metres of, or may in any way affect the waterway;

“the waterway” means the Aire & Calder Navigation, and includes any works, lands or premises belonging to CRT, or under its management or control, and held or used by CRT in connection with that navigation.

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

## **Powers requiring CRT's consent**

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

(2) The undertaker shall not exercise any power conferred by this Order to discharge water into the waterway under article 14 (discharge of water) or in any way interfere with the supply of water to or the drainage of water from the waterway unless such exercise is with the consent of CRT, save as to surface water discharge which will not require the consent of CRT.

(3) The undertaker shall not exercise the powers conferred by article 15 (authority to survey and investigate land) or section 11(3) of the 1965 Act, in relation to the waterway unless such exercise is with the consent of CRT.

(4) The undertaker shall not exercise the powers conferred by this Order to temporarily stop up streets or public rights of way under article 11 (temporary stopping up of streets, public rights of way and public rights of navigation), as applied by Schedule 6 (streets to be temporarily stopped up), Part 1 of Schedule 7 (public rights of way to be temporarily stopped up) and Part 2 of Schedule 7 (public rights of navigation to be temporarily suspended) so as to divert any right of access to or any right of navigation along the waterway but such right of access may be diverted with the consent of CRT.

(5) The undertaker shall not exercise the powers conferred by this Order to abstract water from the waterway if either that abstraction substantially deviates (which for the purpose of this paragraph 2 shall mean a deviation in angle greater than 20°) or the rate of abstraction increases beyond the licensed levels for the existing coal-fired power station as at 30 May 2017, unless such abstraction is with the consent of CRT.

(6) The consent of CRT pursuant to sub-paragraphs (1) to (4) shall not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions which in the case of article 14 (discharge of water) may include conditions—

- (a) specifying the maximum volume water which may be discharged in any period; and
- (b) authorising CRT on giving reasonable notice (except in an emergency, when CRT may require immediate suspension) to the undertaker to require the undertaker to suspend the discharge of water or reduce the flow of water where this is necessary by reason of any operational or environmental requirement of CRT, to the extent that any discharge of water by the undertaker is into the waterway.

(7) The consent of CRT pursuant to sub-paragraph (5) shall not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions including specifying the maximum velocity of the flow of water which may be abstracted at right angles to the waterway at any time.

## **Fencing**

3. Where so required by the engineer the undertaker shall to the reasonable satisfaction of the engineer fence off a specified work or a protective work or take such other steps as the engineer may require to be taken for the purpose of separating a specified work or a protective work from the waterway, whether on a temporary or permanent basis or both.

## **Survey of waterway**

4.—(1) Before the commencement of the initial construction of any part of the specified works and again following practical completion of the specified works the undertaker shall bear the reasonable and proper cost of the carrying out by a qualified engineer (the “surveyor”), to be approved by CRT and the undertaker, of a survey including a dip-survey to measure the depth of the waterway (“the survey”) of so much of the waterway and of any land and existing works of the undertaker which may provide support for the waterway as will or may be affected by the specified works.

(2) For the purposes of the survey the undertaker shall—

- (a) on being given reasonable notice (save in case of emergency, when immediate access shall be afforded) afford reasonable facilities to the surveyor for access to the site of the specified works

and to any land and existing works of the undertaker which may provide support for the waterway as will or may be affected by the specified works; and

- (b) supply the surveyor as soon as reasonably practicable with all such information as he may reasonably require and which the undertaker holds with regard to such existing works of the undertaker and to the specified works or the method of their construction.

(3) The reasonable costs of the survey shall include the costs of any dewatering or reduction of the water level of any part of the waterway (where reasonably required) which may be effected to facilitate the carrying out of the survey and the provisions of this Part of this Schedule shall apply with all necessary modifications to any such dewatering or reduction in the water level as though the same were specified works.

- (4) Copies of the survey shall be provided to both CRT and the undertaker at no cost to CRT.

#### **Approval of plans, protective works etc.**

5.—(1) The undertaker shall before commencing construction of any specified work including any temporary works supply to CRT proper and sufficient plans of that work, the form(s) and application fee which is ordinarily required by CRT's engineers in accordance with the Code of Practice and such further particulars available to it as CRT may within 14 days of the submission of the plans reasonably require for the approval of the engineer and shall not commence such construction of a specified work until plans of that work have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) shall not be unreasonably withheld or delayed, and if within 35 days after such plans (including any other particulars reasonably required under sub-paragraph (1) have been ~~supplied to~~received by CRT the engineer has not intimated his disapproval of those plans and the grounds of his disapproval he shall be deemed to have approved the plans as submitted.

(3) When signifying approval of the plans the engineer may specify on land held or controlled by CRT or the undertaker and subject to such works being authorised by the order or being development permitted by an Act of Parliament or general development order made under the 1990 Act—

- (a) any protective work (whether temporary or permanent) which in the reasonable opinion of the engineer should be carried out before the commencement of a specified work to prevent detriment; and
- (b) such other requirements as may be reasonably necessary to prevent detriment; and such protective works shall be constructed by the undertaker or by CRT at the undertaker's request with all reasonable dispatch and the undertaker shall not commence the construction of a specified work until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction such consent not to be unreasonably withheld or delayed.

(4) The undertaker shall pay to CRT a capitalised sum representing the reasonably increased or additional cost of maintaining and, when necessary, renewing any works, including any permanent protective works provided under sub-paragraph (3) above, and of carrying out any additional dredging of the waterway reasonably necessitated by the exercise of any of the powers under this Order but if the cost of maintaining the waterway, or of works of renewal of the waterway, is reduced in consequence of any such works, a capitalised sum representing such reasonable saving shall be set off against any sum payable by the undertaker to CRT under this paragraph.

(5) In the event that the undertaker fails to complete the construction of, or part of, the specified works CRT may, if it is reasonably required in order to avoid detriment, serve on the undertaker a notice in writing requesting that construction be completed. Any notice served under this subparagraph shall state the works that are to be completed by the undertaker and lay out a reasonable timetable for the works' completion. If the undertaker fails to comply with this notice within 35 days, CRT may construct any of the specified works, or part of such works, (together with any adjoining works) in order to complete the construction of, or part of, the specified works or make such works and the undertaker shall reimburse CRT all costs, fees, charges and expenses it has reasonably incurred in carrying out such works.

## **Design of works**

6.—(1) Without prejudice to its obligations under the foregoing provisions of this Part of this Schedule the undertaker shall consult, collaborate and respond constructively to any reasonable approach, suggestion, proposal or initiative made by CRT on—

- (a) the design and appearance of the specified works, including the materials to be used for their construction; and
- (b) the environmental effects of those works; and shall have regard to such views as may be expressed by CRT to the extent that these accord with the requirements of the local planning authority in response to such consultation pursuant in particular to the requirements imposed on CRT by section 22 (general environmental and recreational duties) of the British Waterways Act 1995 and to the interest of CRT in preserving and enhancing the environment of its waterways.

## **Notice of works**

7. The undertaker shall give to the engineer 30 days' notice of its intention to commence the construction of any of the specified or protective works, or, in the case of repair carried out in an emergency, such notice as may be reasonably practicable so that, in particular, CRT may where appropriate arrange for the publication of notices bringing those works to the attention of users of CRT's network.

## **Lighting**

8. The undertaker shall provide and maintain at its own expense in the vicinity of the specified or protective works such temporary lighting and such signal lights for the control of navigation as the engineer may reasonably require during the construction or failure of the specified or protective works.

## **Construction of specified works**

9.—(1) Any specified or protective works shall, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled as aforesaid and with any requirements made under paragraph 5 and paragraph 6;
- (b) under the supervision (if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little detriment as is reasonably practicable;
- (d) in such manner as to cause as little inconvenience as is reasonably practicable to CRT, its officers and agents and all other persons lawfully using the waterways, except to the extent that temporary obstruction has otherwise been agreed by CRT; and
- (e) in such a manner so as to ensure that no materials are discharged or deposited into the waterway otherwise than in accordance with article 14 (discharge of water).

(2) Nothing in this Order shall authorise the undertaker to make or maintain any permanent works in or over the waterway so as to impede or prevent (whether by reducing the width of the waterway or otherwise) the passage of any vessel which is of a kind (as to its dimensions) for which CRT is required by section 105(1)(b) and (2) of the Transport Act 1968 to maintain the waterway.

(3) Following the completion of the construction of the specified works the undertaker shall restore the waterway to a condition no less satisfactory than its condition immediately prior to the commencement of those works unless otherwise agreed between the undertaker and CRT.

(4) In assessing whether the condition of the waterway is no less satisfactory than immediately prior to the works pursuant to sub-paragraph (3), CRT and the undertaker shall take account of any survey issued pursuant to paragraph 4 and any other information agreed between them pursuant to this Part 3 of this Schedule.

### **Prevention of pollution**

10. The undertaker shall not in the course of constructing a specified work or a protective work or otherwise in connection therewith do or permit anything which may result in the pollution of the waterway or the deposit of materials therein and shall take such steps as the engineer may reasonably require to avoid or make good any breach of its obligations under this paragraph.

### **Access to work – provision of information**

11.—(1) The undertaker on being given reasonable notice shall—

- (a) at all reasonable times allow reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or the method of constructing it.

(2) CRT on being given reasonable notice shall—

- (a) at all times afford reasonable facilities to the undertaker and its agents for access to any works carried out by CRT under this Part of this Schedule during their construction; and
- (b) supply the undertaker with such information as it may reasonably require with regard to such works or the method of constructing them and the undertaker shall reimburse CRT's reasonable costs in relation to the supply of such information.

### **Alterations to the waterway**

12.—(1) If during the construction of a specified work or a protective work or during a period of twenty four (24) months after the completion of those works any alterations or additions, either permanent or temporary, to the waterway are reasonably necessary in consequence of the construction of the specified work or the protective work in order to avoid detriment, and CRT gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (which shall be specified in the notice), the undertaker shall pay to CRT the reasonable costs of those alterations or additions including, in respect of any such alterations or additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by CRT in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If the cost of maintaining, working or renewing the waterway is reduced in consequence of any such alterations or additions a capitalised sum representing such saving shall be set off against any sum payable by the undertaker to CRT under this paragraph.

### **Maintenance of works**

13. If at any time after the completion of a specified work or a protective work, not being a work vested in CRT, CRT gives notice to the undertaker informing it that it reasonably considers that the state of maintenance of the work appears to be such that the work is causing or likely to cause detriment, the undertaker shall, on receipt of such notice, take such steps as may be reasonably necessary to put the work in such state of maintenance as not to cause such detriment.

### **Repayment of CRT's fees, etc.**

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

- (a) in constructing any protective works under the provisions of paragraph 5(3)(a);
- (b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction or repair of a specified work and any protective works;
- (c) in respect of the employment during the construction of the specified works or any protective works of any inspectors, watchmen and other persons whom it shall be reasonably necessary to appoint for inspecting, watching and lighting any waterway and for preventing, so far as may be



reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of the specified works or any protective works; and

- (d) in bringing the specified works or any protective works to the notice of users of CRT's network.
- (e) in constructing and/or carrying out any measures related to the authorised development any specified works or protective works which are reasonably required by CRT to ensure the safe navigation of the waterway save that nothing shall require CRT to construct and/or carry out any measures.

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

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

~~(3) CRT must take in to account any representations made by the undertaker in accordance with this paragraph 14 and must, within twenty one days of receipt of the information pursuant to sub-paragraph (1), confirm the amount of the fee, charge, cost or expense to be paid by the undertaker (if any) and the date by which this is to be paid.~~

~~(4) CRT must, when estimating and incurring any charge, cost or expense pursuant this paragraph 14, do so with a view to being reasonably economic and acting as if CRT were itself to fund the relevant fee, charge, cost or expense.~~

#### **Costs of alterations, etc.**

**15.** Any additional expenses which CRT may reasonably incur in altering, reconstructing or maintaining the waterway under any powers existing at the date when this Order was made by reason of the existence of a specified work shall, provided that 56 days' notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, be repaid by the undertaker to CRT.

#### **Making good of detriment; compensation and indemnity, etc.**

**16.**—(1) If any detriment shall be caused by the construction or failure of the specified works or the protective works if carried out by the undertaker, the undertaker (if so required by CRT) shall make good such detriment and shall pay to CRT all reasonable expenses to which CRT may be put, and compensation for any loss which CRT may sustain, in making good or otherwise by reason of the detriment.

(2) The undertaker shall be responsible for and make good to CRT all costs, charges, damages, expenses and losses not otherwise provided for in this Part of this Schedule which may be occasioned to and reasonably incurred by CRT—

- (a) by reason of the construction of a specified work or a protective work or the failure of such a work; or
- (b) by reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon the construction of a specified work or protective work; and subject to sub-paragraph (4) the undertaker shall effectively indemnify and hold harmless CRT from and against all claims and demands arising out of or in connection with any of the matters referred to in paragraphs (a) and (b) (provided that CRT shall not be only be entitled to recover any consequential losses which are reasonably foreseeable from the undertaker).

(3) The fact that any act or thing may have been done by CRT on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision or in accordance with any directions or awards of an arbitrator shall not (if it was done without negligence on the part of CRT or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.

(4) Nothing in sub-paragraph (2) shall impose any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the neglect or wilful default of CRT, its officers, servants, contractors or agents.

(5) CRT shall give the undertaker reasonable notice of any such claim or demand as aforesaid and no settlement or compromise of such a claim or demand shall be made without the prior consent of the undertaker.

~~(6) The aggregate cap of the undertaker's gross liability shall be limited to £5,000,000 (five million pounds) for any one occurrence or all occurrences of a series arising out of the one original cause.~~

### **Arbitration**

17. Any difference arising between the undertaker and CRT under this Part of this Schedule (other than a difference as to the meaning or construction of this Part of this Schedule) shall be referred to and settled by arbitration in accordance with article 41 (arbitration) of this Order.

### **Capitalised sums**

18. Any capitalised sum which is required to be paid under this Part of this Schedule shall be calculated by multiplying the cost of the maintenance or renewal works to the waterway necessitated as a result of the operation of the authorised development by the number of times that the maintenance or renewal works will be required during the operation of the authorised development.