

**SCHEDULE 27**  
**APPROACH TO PERMIT RISK**

**1. DEFINITIONS**

In each part of this Schedule 27 (Approach to Permit Risk) the following expressions (in addition to those specified in Schedule 1 (Definitions) shall, save where the context or the express provisions of this Contract otherwise requires or admits, have the following meanings:

**Challenge Period**

means period ending on the later of:

- (a) the last day of the period prescribed by statute including but not limited to Part 54 of the Civil Procedure Rules during which a third party may institute a challenge which could result in the quashing or modification of the relevant decision of the Permitting Authority; and
- (b) where such a challenge is initiated within the period in (a) above the final determination or withdrawal of that challenge plus five (5) Business Days;

**Judicial Review Challenge**

means proceedings brought under Part 54 of the Civil Procedure Rules in respect of the Environmental Permit;

**Leading Counsel**

means counsel experienced in environmental matters and practising at the environmental bar who:

- (a) shall be agreed upon by the Parties or, in default of agreement shall be a minimum of fifteen (15) years' call and identified by the Chairman of the Planning and Environmental Bar Association or his deputy; and
- (b) and accepts instructions to provide an

opinion pursuant to this Schedule 27  
(Approach to Permit Risk);

**Permit Deemed Refusal**

means any failure by the Permitting Authority or the Secretary of State to determine an application for an Environmental Permit within the statutory period which would entitle the Contractor to appeal against the deemed refusal of that application for an Environmental Permit or any other period which the Contractor and the Permitting Authority may agree shall constitute the period for determination of the application for an Environmental Permit for the purposes of any appeal by the Contractor;

**Permit Delay**

has the meaning given to it in paragraph 13.1.1;

**Permit Delay Change**

has the meaning given to it in paragraph 13.1.2;

**Permit Proceedings**

means any of the following:

- (a) a direction by the Secretary of State requiring a referral to him for determination or determination by the Secretary of State (or any inspector appointed by him) of any application for an Environmental Permit under a direction pursuant to the Environmental Permitting Regulations;
- (b) an appeal to the Secretary of State under the Environmental Permitting Regulations against refusal (including Permit Deemed Refusal) of any application for an Environmental Permit;
- (c) an application seeking to remove or

modify any conditions imposed in an Environmental Permit; and

- (d) an appeal to or direction by the Secretary of State requiring a referral to him for determination or determination by the Secretary of State under the Environmental Permitting Regulations relating to any application seeking to remove or modify any conditions imposed in an Environmental Permit;

## **Revised Project Plan**

## **Satisfactory Permit**

has the meaning given to it in paragraph 3.3.1 of Schedule 26 (Planning);

means an Environmental Permit for the Facility with the Challenge Period expired (and with any Permit Proceedings having finally been determined such that the Environmental Permit has been upheld and may be implemented) which does not impose on the Contractor by way of condition or other obligation any of the following requirements:

- (a) a requirement which restricts or prevents the Contractor from accepting Contract Waste or delivering or performing all or any of the Services as are to be provided at the Facility in accordance with the Service Delivery Plans or processing Third Party Waste or generating Third Party Income because it has one or more of the following effects:
  - (i) prevents the Facility from operating in accordance with the Output Specification and the Service Delivery Plans;
  - (ii) restricts the number or type of waste carrying vehicle

movements to and from the Site to less than the minimum inward movements of waste carrying vehicles per day as set out in the Service Delivery Plans;

- (iii) requires that any Contract Waste or Third Party Waste or any by-products of either of them will be delivered to or transport from the Facility otherwise than by road going vehicles alone;
- (iv) restricts tonnage levels of Contract Waste to be received and/or processed at the Facility other than as set out in the Service Delivery Plans;
- (v) restricts or prevents Third Party Waste from being processed at the Facility at the volumes assumed in the Base Case;
- (vi) restricts or prevents the recovery of recyclates or energy from the Facility which would prevent the Contractor from achieving:
  - (a) the diversion and/or recycling rates set out in this Contract, or
  - (b) the Third Party Income assumed in the Base Case;
- (vii) imposes a restriction on the ability of the Contractor to process Waste at the Facility at a capacity of 190,000 tonnes per annum;

- (viii) imposes any restriction on the use of the Site as a waste transfer station;
- (ix) restricts the hours of delivery of Contract Waste or Third Party Waste to the Site, the hours of operation of the Facility or limits heavy goods vehicles from entering or exiting the Site other than in each case as set out in the Service Delivery Plans;
- (x) imposes limits in respect of noise exceeding the tolerances set out in the Service Delivery Plans;

(b) a requirement which itself, or when taken together with any other requirement imposed on the Contractor in respect of an Environmental Permit or a Planning Permission (as described in Schedule 26 (Planning)), has the effect of increasing the costs of carrying out the Works and/or the Services set out in the Base Case by an amount in excess of £500,000; and

(c) a requirement which will, or is reasonably likely to, cause a material delay to the Construction Programme;

and an "Unsatisfactory Permit" is one which is not a Satisfactory Permit.

## **2. APPLICATION OF THIS SCHEDULE**

This Schedule 27 (Approach to Permit Risk) shall apply only to the Contractor's obligations in respect of an Environmental Permit.

### **3. CONTRACTOR TO OBTAIN AN ENVIRONMENTAL PERMIT**

- 3.1. The Contractor undertakes to the Authority that (subject to the provisions of this Schedule 27 (Approach to Permit Risk)):
  - 3.1.1. it shall use All Reasonable Endeavours to obtain a Satisfactory Permit in the name of the Contractor to enable it to undertake the Works and to deliver the Services at the Facility concerned; and
  - 3.1.2. the Contractor shall in pursuing an Environmental Permit use All Reasonable Endeavours to follow and meet the Key Dates (Schedule 8) in respect of the Facility concerned.
- 3.2. The Contractor shall bear the costs of obtaining and of implementing and complying with the provisions and conditions of the Environmental Permit (other than any costs relating to Permit Proceedings in the name of the Contractor which exceed the Appeal Contingency and in respect of which the Authority has given prior written consent that such costs may be incurred in accordance with paragraph 6 (Permit Proceedings) below).
- 3.3. The Contractor shall provide to the Authority on a quarterly basis a written summary of:
  - 3.3.1. the steps taken by the Contractor in the preceding quarter in compliance with its obligations under this paragraph 3; and
  - 3.3.2. a written summary of those steps which it anticipates taking in the following quarter in order to comply with its obligations under this paragraph 3.
- 3.4. Without limiting the Contractor's obligations under this paragraph 3 the Authority may within five (5) Business Days after receipt of such summary notify the Contractor of any further measures which it believes the Contractor should take in order to comply with its obligations under this paragraph 3. If the Contractor disagrees, it may refer the matter to the Dispute Resolution Procedure.
- 3.5. Upon receipt of a notice issued under paragraph 3.4 (or where the matter has been referred to the Dispute Resolution Procedure, on determination or agreement of the dispute) the Contractor shall take the measures set out in the notice given under paragraph 3.4 (or, if relevant, the measures that have been determined or agreed under the Dispute Resolution Procedure) as soon as reasonably practicable and in any event within ten (10) Business Days of receipt of the notice.
- 3.6. Without prejudice to the Contractor's obligations under this paragraph 3 the Authority shall at the reasonable written request of the Contractor provide written confirmation (on not more than a monthly basis) as to whether the Authority believes that, in its

opinion the Contractor has up to the date of the Contractor's request fully complied with its obligations in paragraph 3.1 to 3.5 to use All Reasonable Endeavours to obtain a Satisfactory Permit and to rectify any failures to do so, such confirmation to provide reasonable detail as to the grounds for the Authority's opinion. The Contractor shall, on not less than a weekly basis, provide the Authority with supporting information (including any relevant correspondence with the Permitting Authority and/or any minutes of such meetings and minutes of any material communications with the Permitting Authority) regarding the steps which it has taken in order to obtain a Satisfactory Permit and the Authority's confirmation shall be solely based on such information.

3.7. Where the Authority confirms in writing that in its opinion the Contractor has not complied with its obligations in paragraph 3.1 at any time ("ARE Failure"), the Authority shall give reasons for such opinion, including reasonable details of the ARE Failure and:

- (a) the Contractor shall provide to the Authority a written summary of steps that it has taken (or that it intends to take) in accordance with the requirements under clause 3.5 in order to rectify an ARE Failure ("ARE Rectification Notice"), together with any supporting information;
- (b) the Authority shall, as soon as reasonably practicable and, in any event, within fifteen (15) Business Days of receipt of an ARE Rectification Notice, provide written confirmation as to whether, in the Authority's opinion (acting reasonably) and based (i) upon the ARE Rectification Notice and the supporting information provided therewith and (ii) any other information which the Authority ought reasonably to have been aware of, the Contractor has or has not rectified the ARE Failure; and
- (c) if the Authority confirms in writing that in their opinion the ARE Failure has not been rectified, then the Contractor shall be entitled to provide a further ARE Rectification Notice and the provisions of this paragraph 3.7 shall apply.

3.8. Where:

- 3.8.1. the Authority confirms in writing that in its opinion the Contractor has complied with its obligations in paragraph 3.1 to use All Reasonable Endeavours up to the date of the Contractor's request;
- 3.8.2. the Authority confirms that the ARE Failure has been rectified pursuant to paragraph 3.7 or it has been determined that the ARE Failure has been rectified; or

3.8.3. the Contractor has made a request pursuant to paragraph 3.6 (and the Authority has failed to respond to such request in accordance with paragraph 3.6 within twenty (20) Business Days),

the Contractor shall (other than in respect of any prior failure to use All Reasonable Endeavours previously notified by the Authority to the Contractor to which this paragraph 3.8 did not apply) be considered to have used all Reasonable Endeavours up and until the date of the Contractor's request pursuant to paragraph 3.6 or 4.1A only (as the case may be) or the date of confirmation pursuant to paragraph 3.8.2 if applicable.

3.8A In the event that any information subsequently comes to the attention of the Authority and, based on such information, the Authority confirms in writing that in its opinion the Contractor has failed to use All Reasonable Endeavours prior to the date of the Contractor's request pursuant to this paragraph 3.8 then any such written confirmation provided by the Authority pursuant to paragraphs 3.8.1 or 3.8.2 or failure to provide written confirmation pursuant to paragraph 3.8.3 shall be disregarded and the provisions of paragraph 3.7 shall apply.

3.9. The period afforded to the Contractor to remedy a failure to use All Reasonable Endeavours pursuant to paragraphs 3.5 and 3.7 shall not entitle the Contractor to an extension to the Planned Readiness Date, Planned Services Commencement Date nor any longstop date and shall not be a Relief Event, Compensation Event or an Excusing Cause.

3.10. The Contractor shall be obliged to reimburse the Authority in respect of its costs in complying with the provisions of this paragraph 3 in accordance with paragraph 2.1 of Schedule 26 (Planning).

#### **4. ALL REASONABLE ENDEAVOURS**

4.1. For the purposes of paragraph 3 (Contractor to obtain an Environmental Permit) of this Schedule 27 (Approach to Permit Risk), "All Reasonable Endeavours" means that the Contractor shall:

4.1.1. in relation to any application for an Environmental Permit incur expenditure and do all the things reasonably necessary (including, without limitation, full engagement with the Environment Agency in discussions regarding the proposed application for an Environmental Permit at an appropriate time prior to the submission of such application, the commencement of any prosecution or defence of Permit Proceedings in accordance with and subject to the provisions

hereof) and in doing so shall exercise all proper care and skill to secure or procure the grant of the Satisfactory Permit;

- 4.1.2. prepare all documentation and supporting information in accordance with good practice for Environmental Permits;
- 4.1.3. answer queries of the Environment Agency or tribunal promptly;
- 4.1.4. (subject to the provisions of paragraph 7 (Appeal Contingency)) meet the costs of any Permit Proceedings such costs to include the cost of instructing Leading Counsel (including for the purposes of deciding whether or not to initiate or pursue Permit Proceedings) and the costs of securing the services of any expert witnesses considered necessary for the purpose of such Permit Proceedings;
- 4.1.5. provide forthwith copies to the Authority of all instructions (including enclosures) given to Leading Counsel and opinions received from Leading Counsel relating to such Permit Proceedings in respect of the Environmental Permit sought. The Authority's Representative shall be entitled to attend any conference with Leading Counsel and the Contractor shall endeavour when arranging such conference to agree a convenient time for attendance by the Authority's Representative; and
- 4.1.6. in relation to any Judicial Review Challenge, provide to the Authority all such assistance as it reasonably requires to the extent that the provision of such reasonable assistance does not cause the Contractor to incur any material expense (on each individual occasion or in the aggregate).

The Authority may require the Contractor to join as an interested party in any Judicial Review Challenge provided it meets the Contractor's reasonable costs of doing so.

4.1A Further, and subject to paragraph 3.8A, the Authority confirms that in its opinion it is satisfied that the Contractor has complied with its obligations under paragraph 3.1 in the period prior to the Restatement Date.

## **5. OBLIGATIONS OF THE CONTRACTOR**

- 5.1. The Contractor shall:

- 5.1.1. not cause or permit any Affiliate, associated or Holding Company of the Contractor or any entity or any third party over which it has control to object or procure any objection to any application for an Environmental Permit; and

5.1.2. not vary any application for an Environmental Permit without the prior written consent of the Authority's Representative (which consent shall not be unreasonably withheld or delayed) and where the Contractor with such consent varies any application for an Environmental Permit the Contractor shall inform the Authority's Representative of the variance to the application for an Environmental Permit and (where appropriate and/or applicable) provide to the Authority's Representative any documents or letters relating to the variance.

## 6. PERMIT PROCEEDINGS

6.1. If in respect of the Facility, the relevant Permitting Authority:

- 6.1.1. refuses to grant an Environmental Permit or there is a Permit Deemed Refusal; or
- 6.1.2. grants an Environmental Permit which is not a Satisfactory Permit in circumstances where the Authority and the Contractor agree (or are unable to agree and it is determined pursuant to Schedule 22 (Dispute Resolution)) that Permit Proceedings may secure a Satisfactory Permit; or
- 6.1.3. refuses to grant an application to remove, modify or vary any unreasonable condition imposed in an Environmental Permit; or
- 6.1.4. grants an Environmental Permit in respect of which any condition is imposed which is unreasonable in the Contractor's reasonable opinion,

the Contractor shall take the opinion of Leading Counsel as to the merits of pursuing any Permit Proceedings.

6.2. If Leading Counsel advises the Contractor that there is a reasonable prospect of success in pursuing any Permit Proceedings in order to obtain a Satisfactory Permit (or in order to remove or vary any unreasonable condition referred to in paragraph 6.1.3) the Contractor shall seek the approval of the Authority to institute such Permit Proceedings which the Authority shall not unreasonably withhold or delay and if such approval is granted the Contractor shall pursue or defend the same until determination of such Permit Proceedings (subject to the Planning Permission Longstop Date) unless subsequently in accordance with paragraph 6.5, the Authority directs that such Permit Proceedings shall cease to be pursued.

6.3. At any reasonable time after the commencement of any Permit Proceedings in relation to the Environmental Permit the Authority may require the Contractor to take (or the Contractor may take (subject to notifying the Authority of such intention)) the opinion of

Leading Counsel as to the merits of continuing to pursue such Permit Proceedings and to make such opinion available to the Authority.

6.4. In the event that Leading Counsel advises under paragraph 6.2 or subsequently under paragraph 6.3 that there is no reasonable prospect of success the Authority shall by serving written notice on the Contractor on or before a date twenty (20) Business Days from the receipt by the Authority of the advice of Leading Counsel either:

- 6.4.1. direct that the Contractor shall not pursue or shall cease to pursue the relevant Permit Proceedings; or
- 6.4.2. direct that the Contractor institutes or continues the relevant Permit Proceedings and such direction shall be treated as an approval to those Permit Proceedings given pursuant to paragraph 6.2.

6.5. If the Authority (acting reasonably in all cases):

- 6.5.1. does not give such approval to any Permit Proceedings (or is deemed not to have done so); or
- 6.5.2. directs that the Contractor should cease to pursue such Permit Proceedings; the Contractor may still institute or continue to pursue (or procure the pursuit of) those Permit Proceedings, subject to service of prior written notice of its intention to do so upon the Authority within twenty (20) Business Days of receipt of the Authority's notice under paragraph 6.4 and the Contractor will bear all the costs of instituting or continuing to pursue those Permit Proceedings which it incurs from the point at which the Authority serves notice pursuant to paragraph 6.4 and paragraph 7 (Appeal Contingency) and paragraph 9 (Costs Awarded in Permit Proceedings) will not apply to those costs.

6.6. The Contractor shall be entitled, in its absolute discretion, to cease to pursue any Permit Proceedings which it institutes or continues pursuant to paragraph 6.5 (approval being withheld or a direction having been given to the contrary) and in respect of which it has undertaken to bear the costs pursuant to paragraph 6.5.

## 7. APPEAL CONTINGENCY

7.1. The Contractor will bear all costs relating to and arising from any Permit Proceedings (including for the avoidance of doubt the costs of obtaining any Leading Counsel's opinion under paragraph 6 (Permit Proceedings)) up to the limit of the Appeal Contingency (taking into account any such costs of Permit Proceedings and Proceedings previously incurred under Schedule 26 (Planning) or Schedule 27 (Approach to Permit Risk)) following which the Authority shall indemnify the Contractor

for nine-tenths of all amounts reasonably, properly and prudently spent or contracted to be spent by the Contractor in excess of the Appeal Contingency in the proper and diligent conduct of the Permit Proceedings provided that:

7.1.1. the Contractor shall within twenty (20) Business Days of receiving:

- (a) the written notification that the application for the Environmental Permit is being referred to the Secretary of State; or
- (b) any decision of the Permitting Authority or the Secretary of State to refuse the Environmental Permit; or
- (c) a Permit Deemed Refusal; or
- (d) the grant of an Environmental Permit which is to be the subject of the Permit Proceedings,

provide to the Authority for its approval (such approval not to be unreasonably withheld or delayed) a detailed estimate of the likely cost of such Permit Proceedings including a detailed breakdown of the estimated costs of legal fees and all other professional fees and other disbursements together with details of all the legal and other professional advisers that the Contractor proposes to employ and shall at no time incur any costs above the said estimate or employ any additional or alternative legal or professional advisers without the further approval of the Authority (such approval not to be unreasonably withheld or delayed); and

7.1.2. the Contractor shall use its reasonable endeavours to ensure that the costs of the Permit Proceedings are kept to the minimum extent prudent and reasonable at all times.

## 8. EXCESS COSTS ABOVE APPEAL CONTINGENCY

8.1. Where the Authority is required to indemnify the Contractor pursuant to paragraph 7 (Appeal Contingency) for costs incurred over and above the amount of the Appeal Contingency ("**Permit Excess Costs**") the Authority shall reimburse the Contractor such Permit Excess Costs together with any reasonable and proper financing costs subject to the Contractor providing satisfactory evidence to the Authority of such Permit Excess Costs reasonably and properly incurred through any one of the following means the choice of such means to be in the Authority's absolute discretion:

8.1.1. by way of an adjustment to the Unitary Charge for all or some part of the remainder of the Services Period; or

- 8.1.2. by way of a lump sum payment made in one or more instalment together with an adjustment to the Unitary Charge; or
- 8.1.3. by way of a lump sum payment made in one or more instalment in respect of the whole amount;

such Permit Excess Costs being calculated in accordance with the provisions of Schedule 21 (Change Protocol).

- 8.2. The Contractor shall provide the Authority with such cost information as the Authority may request in writing (acting reasonably) including any breakdown of costs as is reasonably practicable to allow the Authority to undertake any of the methods of payment set out in paragraphs 8.1.1 to 8.1.3 above and the Contractor shall provide such information promptly and in any event within five (5) Business Days of a written request from the Authority.

## **9. COSTS AWARDED IN PERMIT PROCEEDINGS**

- 9.1. If the Authority has indemnified the Contractor for its costs in respect of any Permit Proceedings pursuant to paragraph 8 (Excess Costs Above Appeal Contingency) any costs awarded to the Contractor in those Permit Proceedings shall be paid to the Authority in full up to the amount it has paid equal to the Appeal Contingency and where those costs exceed an amount equal to the Appeal Contingency the balance shall be shared between the Contractor and the Authority pro rata the expenses they have incurred in respect of the Permit Proceedings in excess of the Appeal Contingency. All payments to the Authority shall be by way of a lump sum payment within twenty (20) Business Days of the Contractor receiving such costs to which they relate.

## **10. SATISFACTORY PERMIT**

- 10.1. Where by the Planning Permission Long Stop Date the Contractor obtains either:
  - 10.1.1. a Satisfactory Permit; or
  - 10.1.2. an Unsatisfactory Permit where the Authority has served an Authority Change Notice to enable the Contractor either:
    - (a) to comply with the Unsatisfactory Permit and its other obligations under this Contract without being in breach of this Contract; and/or
    - (b) to render compliance with the relevant part of the Unsatisfactory Permit unnecessary; and/or
    - (c) to render the Unsatisfactory Permit a Satisfactory Permit,

the Contractor shall, subject to the provisions of Clause 10.2 (Grant of Lease/Underlease), where the expiry of the Challenge Period is the only condition preventing an Environmental Permit becoming a Satisfactory Permit, proceed to implement the Satisfactory Permit, provided that the Authority may by written notice require the Contractor so to proceed without letting the relevant Challenge Period elapse in which case the provisions of paragraph 12 (Challenge Period) shall apply.

10.2. As soon as reasonably practicable and in any event within fifteen (15) Business Days after issue of an Environmental Permit, the Contractor shall provide to the Authority a copy of the Environmental Permit and will notify the Authority in writing whether or not the Contractor considers the Environmental Permit to be a Satisfactory Permit or an Unsatisfactory Permit.

10.3. If the Contractor considers that the Environmental Permit will be (notwithstanding the expiry of the Challenge Period) an Unsatisfactory Permit it shall provide to the Authority within five (5) Business Days of the issue of the notice given pursuant to paragraph 10.2 (or such longer period as the parties may in the circumstances and acting reasonably agree):

10.3.1. full details of the grounds for such opinion; and/or

10.3.2. an indication of what action could be taken (if any) by the Contractor or the Authority to:

- (a) enable the Contractor to comply with the Environmental Permit without being in breach of this Contract; and/or
- (b) render it a Satisfactory Permit; or
- (c) render compliance with such Unsatisfactory Permit unnecessary;

including without limitation:

- (d) Permit Proceedings; or
- (e) the issue of an Authority Notice of Change to vary the Works and/or the Services.

10.4. If the Contractor fails to provide the notice pursuant to paragraph 10.2 within fifteen (15) Business Days after the issue of the Environmental Permit then on expiry of the Challenge Period the Environmental Permit shall be deemed to be a Satisfactory Permit.

- 10.5. If the Contractor notifies the Authority that the Environmental Permit is a Satisfactory Permit, or such an Environmental Permit is deemed to be a Satisfactory Permit in accordance paragraph 10.3 then the provisions of paragraph 10.1 shall apply.
- 10.6. If the Contractor notifies the Authority that the Environmental Permit will, on expiry of the Challenge Period, be an Unsatisfactory Permit the Authority shall, within ten (10) Business Days of receipt of the notice given pursuant to paragraph 10.3 notify the Contractor in writing whether or not the Authority accepts that the Environmental Permit is or will be an Unsatisfactory Permit and whether it accepts the action indicated by the Contractor in the notice served pursuant to paragraph 10.3 and in particular whether Permit Proceedings will be likely to secure a Satisfactory Permit having regard to the grounds given by the Contractor in the notice served pursuant to paragraph 10.3.
- 10.7. If the Authority does not accept within the time set out in paragraph 10.6 or is deemed to not accept because it has not notified to the Contractor within the time set out in paragraph 10.6 that the Environmental Permit will be on expiry of the Challenge Period an Unsatisfactory Permit the matter may be referred at the instance of either Party for determination by an expert under Schedule 22 (Dispute Resolution) as to whether the Environmental Permit is a Satisfactory Permit or Unsatisfactory Permit.
- 10.8. If the Authority accepts in accordance with paragraph 10.6 or it is determined pursuant to paragraph 10.7 and Schedule 22 (Dispute Resolution) that the Environmental Permit is an Unsatisfactory Permit and the Parties agree that Permit Proceedings will not be likely to secure a Satisfactory Permit the Authority may:
  - 10.8.1. within thirty (30) Business Days after it is accepted by the Authority pursuant to paragraph 10.6 or it is determined in accordance with paragraph 10.7 and Schedule 22 (Dispute Resolution) that the Environmental Permit is an Unsatisfactory Permit issue an Authority Change Notice in respect of the Works and/or the Services or other actions required to enable the Contractor to comply with the conditions of the Environmental Permit which render it an Unsatisfactory Permit without being in breach of this Contract or to render it a Satisfactory Permit or render compliance with such Unsatisfactory Permit unnecessary (in each case upon confirmation and final agreement of the consequential Authority Change Notice in accordance with Schedule 21 (Change Protocol) for the purposes of this paragraph 10 (Satisfactory Permit) the Environmental Permit shall be deemed to be a Satisfactory Permit provided the Challenge Period has expired); or

10.8.2. require the Contractor to prepare a Revised Project Plan in which case the provisions of paragraph 3.3 (Revised Project Plan) of Schedule 26 (Planning) shall apply and the provisions of paragraph 11 shall cease to apply.

10.9. If the Authority:

10.9.1. does not issue the Authority Change Notice within the time set out in paragraph 10.8; or

10.9.2. withdraws or is deemed to have withdrawn the Authority Change Notice issued pursuant to paragraph 10.8.1 in accordance with Schedule 21 (Change Protocol),

then the Contractor shall prepare a Revised Project Plan in which case the provisions of paragraph 3.3 (Revised Project Plan) of Schedule 26 (Planning) shall apply and the provisions of paragraph 11 shall cease to apply.

10.10. If the Authority accepts pursuant to paragraph 10.6 or it is determined pursuant to Schedule 22 (Dispute Resolution) that the Environmental Permit is an Unsatisfactory Permit and the Parties agree or if the Parties are unable to agree and either Party wishes it to be determined whether Permit Proceedings might secure a Satisfactory Permit then the Parties shall seek the opinion of Leading Counsel pursuant to paragraph 6 and the provisions of paragraphs 6 and 7 shall apply and if Permit Proceedings are not instituted or, if instituted, are withdrawn or determined, leaving in place an Unsatisfactory Permit the Authority may either issue an Authority Change Notice or require the Contractor to prepare a Revised Project Plan in accordance with the provisions of paragraph 3.3 (Revised Project Plan) of Schedule 26 (Planning).

## **11. FAILURE TO OBTAIN AN ENVIRONMENTAL PERMIT**

11.1. At the earlier of:

11.1.1. the date when the Parties acting reasonably conclude and agree that it will not be possible to obtain a Satisfactory Permit by the Planning Permission Longstop Date;

11.1.2. the Planning Permission Longstop Date where at such date the Contractor has failed to obtain the Satisfactory Permit; and

11.1.3. unless the Parties agree otherwise, the date at which Leading Counsel advises under paragraph 6.4 that there is no reasonable prospect of success in pursuing or continuing to pursue any Permit Proceedings and obtaining a Satisfactory Permit, save where the Authority directs or the Contractor chooses to initiate or continue to pursue those Permit Proceedings under paragraph 6

(Permit Proceedings) in which case paragraphs 11.1.1, 11.1.2 or 11.1.4 shall apply; or

11.1.4. unless the Parties agree otherwise, the date at which Permit Proceedings have been finally determined (including any withdrawal of the same) and a Satisfactory Permit has not been obtained;

the Authority shall by notice in writing advise the Contractor that in the Authority's absolute discretion:

11.1.5. the Authority wishes to terminate this Contract; or

11.1.6. the Authority wishes the Contractor to propose a Revised Project Plan in accordance with paragraph 3.3 (Revised Project Plan) of Schedule 26 (Planning).

11.2. In the event of a notice of termination served pursuant to paragraph 11.1 of this Schedule 27 (Approach to Permit Risk), the Contract Period shall terminate thirty (30) Business Days from the date of such notice of termination and (provided that the Contractor has complied with its obligations under paragraph 4 (Meaning of All Reasonable Endeavours) to use All Reasonable Endeavours to obtain a Satisfactory Permit) the Authority shall pay to the Contractor the Force Majeure Termination Sum in accordance with Part 5 of Schedule 17 (Compensation on Termination).

11.3. If it is agreed or determined that there has been a failure by the Contractor to use All Reasonable Endeavours, the provisions of Schedule 17 (Compensation of Termination) shall not apply and the Authority shall not be liable to the Contractor for any compensation on termination.

## **12. CHALLENGE PERIOD AND JUDICIAL REVIEW CHALLENGE**

12.1. Where the Authority directs the Contractor to proceed to implement a Satisfactory Permit without allowing the Challenge Period to elapse in respect of any relevant decision pursuant to paragraph 10.1 (Satisfactory Permit) and a challenge is instituted within the Challenge Period the Authority shall indemnify and keep indemnified the Contractor for all costs, losses, expenses and liabilities reasonably and properly incurred up to the point at which such challenge is finally determined and the Contractor shall mitigate such costs, losses, expenses and liabilities provided that any indemnification of any costs, losses, expenses or liabilities shall be calculated on the basis that the Contractor should be in no better or no worse position than it would have been in had such costs, losses, expenses or liabilities not arisen.

12.2. In the event that a Judicial Review Challenge is instituted in respect of an Environmental Permit during the Challenge Period then any Environmental Permit which would otherwise be deemed a Satisfactory Permit shall be deemed to be and to have always been an Unsatisfactory Permit until such time as the Judicial Review Challenge is dismissed, withdrawn, quashed or defeated.

### 13. DELAYS

13.1.1 Failure by the Contractor to commence the Works anticipated in the Construction Programme to take place from the Planned Works Commencement Date due to:

13.1.1.1 the Contractor having not obtained a Satisfactory Permit for the Facility having used All Reasonable Endeavours to do so; or

13.1.1.2 the Contractor having obtained a Satisfactory Permit for the Facility but later than the applicable date set out Schedule 8 (Key Dates),

shall be a "**Permit Delay**" and paragraph 13.1.2 shall apply.

13.1.1A Where following a Permit Delay, the Contractor obtains a Satisfactory Permit, the provisions of Annex 1 (Planning and/or Permit Delay Costs) of Schedule 26 shall apply to determine the manner in which the Parties shall share the additional costs and lost revenue arising from the Permit Delay (provided always that no relief or compensation shall apply in respect of the periods afforded pursuant to paragraph 3.9, including any delays arising out of failures to use All Reasonable Endeavours which were subsequently remedied).

13.1.2 The occurrence of a Permit Delay shall be a Relief Event and the provisions of Clause 40 (Relief Event) shall apply accordingly.

13.1.3 Compliance with this paragraph 13 shall be deemed to satisfy the provision of information requirements of Clauses 40.2 and 40.6 (Delays due to a Relief Event) where the Contractor is claiming relief pursuant to limb (j) of the definition of a Relief Event and the Contractor shall not additionally be required to comply with Clauses 40.2 and 40.6 (Delays due to a Relief Event) in respect of any such claim.

13.1.4 Notwithstanding paragraph 13.1.1 the Contractor shall continue to comply with its obligations to use All Reasonable Endeavours to obtain the relevant Satisfactory Permit (unless those obligations shall cease to apply in accordance with paragraph 11.1 above (Failure to Obtain an Environmental

Permit)) and if the Contractor shall have obtained a Satisfactory Permit the Contractor shall promptly so notify the Authority and within ten Business Days propose to the Authority a revised Planned Works Commencement Date and revised Planned Services Commencement Date for the Facility (the "**Revised Project Dates**").

- 13.1.5 The Authority and the Contractor shall seek to agree the Revised Project Dates as soon as possible and in doing so shall:
  - 13.1.5.1 agree the Revised Project Dates which are fair and reasonable in the circumstances having regard to the extent of the delay;
  - 13.1.5.2 disregard any delay caused by a breach, neglect or default of the Contractor; and
  - 13.1.5.3 take account of the extent to which the Contractor should be able, by acting in accordance with Good Industry Practice (and without being required to expend any sums), to mitigate the consequences of delay.
- 13.1.6 In default of delivery of the Revised Project Dates in accordance with paragraph 13.1.4 or default of agreement of the Revised Project Dates within ten Business Days of delivery of such proposed Revised Project Dates, the Revised Project Dates shall be determined at the instance of either Party in accordance with Schedule 22 (Dispute Resolution).
- 13.1.7 Once agreed or determined the Construction Programme and Schedule 8 (Key Dates) shall be amended to reflect the Revised Project Dates.