



CLEVE HILL SOLAR PARK

EXPLANATORY MEMORANDUM

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CLEVE HILL
SOLAR PARK

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1. **GLOSSARY**

"1990 Act"	The Town and Country Planning Act 1990 (as amended)
"2008 Act"	The Planning Act 2008 which is the legislation in relation to applications for NSIPs, including pre-application consultation and publicity, the examination of applications and decision making by the Secretary of State.
"2009 Act"	The Marine and Coastal Access Act 2009.
"2011 Order"	The Marine Licensing (Exempted Activities) Order 2011.
"APFP Regulations"	The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. Sets out detailed procedures that must be followed for submitting and publicising applications for Nationally Significant Infrastructure Projects.
"Applicant"	Cleve Hill Solar Park Limited.
"Application"	The Application for a Development Consent Order made to the Secretary of State under Section 37 of the Planning Act 2008 in respect of the Authorised Development, required pursuant to Section 31 of the Planning Act 2008 because the Authorised Project comprises up to two Nationally Significant Infrastructure Projects under Section 14(1)(a) and Section 15 of the Planning Act 2008 by virtue of them being generating stations in England or Wales of 50 Megawatts electrical capacity or more.
"Associated Development"	Defined under S.115(2) of The Planning Act 2008 as development which is associated with the principal development and that has a direct relationship with it. Associated development should either support the construction or operation of the principal development, or help address its impacts. It should not be an aim in itself but should be subordinate to the principal development.
"Authorised Development"	The development to which the Application relates and refers to the development which requires a DCO and excludes the ancillary works described in Schedule 1, Part 2 of the Order.
"Authorised Project"	The development to which the Application relates and which requires a DCO, all of which are described in parts 1 and 2 of Schedule 1 to the Order, including the Authorised Development and Associated Development.
"Book of Reference"	The Book of Reference, which accompanied the Application (Document Reference 4.3), which is a reference document providing details of all land ownership interests within the Order Limits with reference to the Land Plans.
"Consultation Report"	The Consultation Report, which accompanied the Application (Document Reference 5.1), that explains the

consultation undertaken by the Applicant in accordance with the 2008 Act.

"DCO"	A Development Consent Order made by the relevant Secretary of State pursuant to the Planning Act 2008 to authorise a NSIP. A DCO does or can incorporate or remove the need for a range of consents which would otherwise be required for a development. A DCO can also include powers of compulsory acquisition.
"EIA"	Environmental Impact Assessment. The assessment of the likely significant environmental effects of the Authorised Project undertaken in accordance with the EIA Regulations.
"EIA Regulations"	The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 setting out how the EIA of NSIPs must be carried out and the procedures that must be followed.
"ES"	The Environmental Statement which accompanied the Application (Document References 6.1 – 6.5), documenting the findings of the EIA.
"Existing Substation"	The existing substation at Cleve Hill Faversham ME13 9EF owned and operated by National Grid Electricity Transmission plc.
"Explanatory Memorandum"	This document – it explains the intended purpose and effect of a DCO and the authorisations and powers that it seeks.
"Funding Statement"	The Funding Statement, which accompanied the Application (Document Reference 4.2), that explains how the Authorised Project will be funded.
"Land Plan"	The plans which accompanied the Application (Document Reference 2.1), showing all of the land that is required for the Authorised Project and / or over which rights are to be sought as part of the DCO.
"MHWS"	Mean High Water Springs or the highest level which spring tides reach on average over a period of time.
"MMO"	The Marine Management Organisation.
"MW"	Megawatt.
"NSIP"	A Nationally Significant Infrastructure Project that must be authorised by the making of a DCO under 2008 Act.
"ODP"	The Outline Design Principles, which accompanied the Application (Document Reference 7.1), which set out the design parameters for the Authorised Project.
"Order"	The Cleve Hill Solar Park Order, being the DCO that would be made by the Secretary of State authorising the Authorised Project, a draft of which has been submitted as part of the Application.

"Order Land"	The land on which the Authorised Project will be built as shown on the Land Plans.
"Order Limits"	The limits of the land to which the Application for the DCO relates, and shown on the Location, Order Limits and Grid Coordinates Plan which accompanied the Application (Document Reference 2.9), within which the Authorised Project must be carried out and which is required for its construction and operation.
"PINS"	The Planning Inspectorate. A Government agency responsible for receiving and administering the acceptance and examination of applications for NSIPs on behalf of the Secretary of State.
"Planning Statement"	The Planning Statement, which accompanied the Application (Document Reference 7.4), that explains the national and local policy support for the Authorised Project.
"Relevant Planning Authority"	Swale Borough Council, Canterbury City Council or Kent County Council.
"Statement of Need"	The Statement of Need, which accompanied the Application (Document Reference 7.3), that explains the national need for the Authorised Project.
"Statement of Reasons"	The Statement of Reasons which accompanied the Application (Document Reference 4.1), and sets out the justification for the acquisition or interference with the Order Land.
"Secretary of State"	The Secretary of State for Business, Energy and Industrial Strategy who will determine the Application.
"Undertaker"	Means the Applicant or such other person who takes benefit of the DCO following the procedure within Article 5 of the Order.
"Works Plans"	The plans, which accompanied the Application (Document Reference 2.2), showing the numbered works referred to at Schedule 1 to the Order.

The definitions included in Article 2 of the Order apply to the terminology used in this document. Where a specific term of not defined in this glossary the reader should refer to this Article.

2. INTRODUCTION

Overview

- 2.1 This Explanatory Memorandum has been prepared on behalf of the Applicant. It forms part of the Application for a DCO that has been submitted to the Secretary of State under section 37 of the 2008 Act.
- 2.2 The Applicant is seeking development consent for the Authorised Project, which in summary comprises a solar generating and energy storage facility and all infrastructure required to transmit the power generated to the Existing Substation. It will be located on the north Kent coast approximately 2 km north east of Faversham and 5 km west of Whitstable.
- 2.3 A DCO is required for the Authorised Project as it falls within the definition and thresholds for a NSIP under sections 14 and 15(3) of the 2008 Act, as it consists of up to two generating stations, being a ground mounted solar photovoltaic generating station and an energy storage facility, each with a capacity of over 50MW.
- 2.4 The DCO, if made by the Secretary of State, would be known as the Cleve Hill Solar Park Order.
- 2.5 This Explanatory Memorandum should be read in conjunction with the suite of documents that accompanied the Application, in particular the ES, Works Plans, Land Plans, Book of Reference, Statement of Reasons, Consultation Report and Statement of Need.

Cleve Hill Solar Park Limited

- 2.6 The Applicant is a limited company registered at Companies House under company number 08904850 and whose registered office is at Woodington House Woodington Road, East Wellow, Romsey, Hampshire, SO51 6DQ. It is a joint venture between two solar industry specialists – Hive Energy Limited and Wirsol Energy Limited.
- 2.7 Hive Energy is the second largest solar park developer in the UK and is based in Hampshire. Hive Energy has developed 26 sites in the last 5 years, and owns and operates UK sites and commercial roof systems.
- 2.8 Wirsol Energy Limited is a highly experienced solar park developer, constructor and operator across the UK, Germany and Australia. It has built and is operating 24 solar parks across the UK. Wirsol combine the installation of world-class components and the implementation of rigorous operation and maintenance processes.
- 2.9 More information on the Applicant, its ownership and corporate structure is set out in the Statement of Reasons and Funding Statement.
- 2.10 On 9 November 2018, Ofgem granted the Applicant a licence to generate electricity under section 6(1)(a) of the Electricity Act 1989. As such, the Applicant is a statutory undertaker for the purposes of the 2008 Act.

The Authorised Project

- 2.11 A detailed description of the Authorised Project can be found in Chapter 5 of the ES. It contains up to two generating stations (which are each NSIPs in their own right), which are summarised below:
- 2.11.1 Work No.1: consists of a NSIP, being the ground mounted solar photovoltaic generating station with a gross electrical output capacity of over 50 megawatts comprising panels fitted to mounting structures fixed to the ground by piles, inverters, transformers, and a network of underground cables.
- 2.11.2 Work No. 2: consists of a NSIP, being either:

- (a) an energy storage facility with a gross storage capacity of over 50 megawatts along with a flood protection bund, transformers, switch gear, underground cables, a construction compound and landscaping; or
- (b) an extension of the ground mounted solar photovoltaic generating station in Work No. 1 (which when combined with Work No.1 would be a NSIP), comprising panels fitted to mounting structures fixed to the ground by piles, inverters, transformers, and a network of underground cables.

2.11.3 The description of Work Nos.1 and 2 refer to a gross electrical output of over 50MW. This is consistent with sections 14 and 15 of the 2008 Act which stipulates that a generating station which exceeds an electrical capacity of 50MW will be a NSIP and therefore development consent will be required. The Application is the first of its kind under the 2008 Act, comprising a NSIP scale solar park and an energy storage facility.

2.11.4 The description of Work Nos.1 and 2 do not refer to an upper limit on the capacity of the generating stations that development consent is being sought for. It is not considered that imposing an upper limit is desirable or necessary. The DCO includes reference to means by which the parameters of the Authorised Project will be constrained and it is on this basis which the EIA has been undertaken. There is no reason to limit the electrical output capacity of the Authorised Project provided those parameters are adequately captured in the DCO. Based on the extension pre-application consultation undertaken, which is explained in detail in the Consultation Report, the Applicant is confident that those parameters are adequately secured in the DCO.

2.11.5 There are clear advantages in not imposing an upper limit on capacity. For example, the Applicant may take advantage of technological improvements and innovation that may emerge before construction, which would enable it to still construct the Authorised Project within the assessed parameters, but increase capacity beyond the capacity which is currently anticipated. It is in the public interest and accords with National Policy to facilitate efficient and maximum generation from renewable sources, which is explained further in the Planning Statement and Statement of Need.

2.12 Based on consultation with National Grid and as explained in the Statement of Need, the Applicant currently expects that provision of energy storage as part of the Authorised Project will be necessary and viable at the time of construction. However, in the event that is not the case, the Applicant requires flexibility in the DCO to permit additional ground mounted solar photovoltaic panels on the land identified for the energy storage facility. Given the size of the area of land in question, the generating capacity of those additional panels would be unlikely to exceed 50MW, but nonetheless would constitute “an extension of a generating station”, i.e. the generating station in Work No. 1, in accordance with section 15(1) of the Planning Act 2008.

2.13 The Associated Development for the purposes of section 115 of the 2008 Act comprises Work Nos. 3 to 9 of the Authorised Project. They are as follows:

2.13.1 Work No.3 – a substation including a network of underground cable circuits to connect the substation to Work Nos 1 and 2, and the existing substation and a flood protection bund;

2.13.2 Work No.4 – covers the majority of the Order Land and comprises a network of cable circuits, construction compounds, landscaping, earthworks, drainage, and the undergrounding of existing overhead line;

2.13.3 Work No.5 – works to lay cables connecting Work No. 3 and the Existing Substation and works to create and maintain means of access with the existing access road in Work No. 7;

2.13.4 Work No.6 – works to create and maintain a means of access connecting Work Nos 1, 2 and 3 with the existing access road in Work No. 7;

- 2.13.5 Work No.7 – works to maintain the existing access road, which provides access to/from Seasalter Road and the Existing Substation;
- 2.13.6 Work No.8 – works to create and maintain habitat management area, comprising earth works, means of access, and drainage; and
- 2.13.7 Work No.9 – works to maintain the existing flood defence, which comprising a range of works required for the day to day maintenance of the flood defence. That maintenance is currently undertaken by the Environment Agency, which has agreed the scope of works with the Applicant. As explained in more detail in the Consultation Report and Chapter 5 of the ES, the Environment Agency has informed the Applicant that it would not continue that maintenance if the Authorised Project is constructed. Therefore, the Applicant seek the powers and rights in the Order to enable it to effectively "step into the shoes" of the Environment Agency and undertake the maintenance works required for the life time of the Authorised Project.

2.14 The Associated Development includes such other works as may be necessary or expedient for the purposes of or in connection with the relevant part of the authorised development and which fall within the scope of the work assessed by the environmental statement, including—

- 2.14.1 works for the provision of fencing and security measures such as CCTV and lighting;
- 2.14.2 laying down of internal access tracks;
- 2.14.3 ramps, means of access and footpaths;
- 2.14.4 bunds, embankments, and swales
- 2.14.5 boundary treatments, including means of enclosure;
- 2.14.6 permissive paths;
- 2.14.7 habitat creation and management;
- 2.14.8 jointing bays, cable ducts, cable protection, joint protection, manholes, kiosks, marker posts, underground cable marker, tiles and tape, and lighting and other works associated with cable laying;
- 2.14.9 works for the provision of apparatus including cabling, water supply works, foul drainage provision, surface water management systems and culverting;
- 2.14.10 works to alter the position of apparatus, including mains, sewers, drains and cables;
- 2.14.11 works to alter the course of, or otherwise interfere with, non-navigable rivers, streams or watercourses;
- 2.14.12 landscaping and other works to mitigate any adverse effects of the construction, maintenance or operation of the authorised project;
- 2.14.13 works for the benefit or protection of land affected by the Authorised Project; and
- 2.14.14 working sites in connection with the construction of the Authorised Project, construction lay down areas and compounds, storage compounds and their restoration.

Phasing

2.15 The Applicant requires flexibility to construct the Authorised Project in phases. The proposed approach to phasing is described in Chapter 5 of the ES.

- 2.16 The requirements (Schedule 1, Part 3) allow for phasing of the Authorised Project, by way of allowing phased discharge of the requirements and conditions.

Parameters in the Order

- 2.17 The design parameters for the Authorised Project that have been assessed in the ES are set out in the ODP. An important point to note is that the ODP does not capture every parameter of the candidate design reported on in the ES. Rather, the ODP captures only those important parameters necessary to ensure the Authorised Project is not constructed in such a way that would exceed the worst case scenario assessed in the ES.
- 2.18 The ODP is proposed as a certified document and the detailed design of the Authorised Project in accordance with the ODP is secured by a requirement of the Order. This approach is intended to provide flexibility in the design of the Authorised Project, such that new technology can be engaged, whilst ensuring compliance with the ES. The principle of employing a design envelope has been recognised as appropriate for a wide range of NSIPs and is described in PINS Advice Note 9: Rochdale Envelope (July 2018).

3. THE PURPOSE AND STRUCTURE OF THIS DOCUMENT

- 3.1 This Explanatory Memorandum is prepared to explain the purpose and effect of each article of, and the Schedules to, the draft Order, as required by Regulation 5(2)(c) of the APFP Regulations.
- 3.2 It also seeks to identify and explain departures from the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ('the model provisions'). Whilst the power for the Secretary of State to designate, and the requirement to have regard to, model provisions have been removed by the Localism Act 2011, it can be helpful to explain variations made in the Order compared to the model provisions.
- 3.3 The Order includes a number of provisions to enable the construction, maintenance and operation of the Authorised Project. These are briefly described below and then considered in more detail in the following sections:-
- 3.3.1 Part 1: Article 1 sets out what the Order may be cited as and when it comes into force. Article 2 sets out the meaning of various terms used in the Order;
- 3.3.2 Part 2: Articles 3 to 4 provide development consent for the Authorised Project, and allow it to be constructed and maintained. Article 5 sets out who has the benefit of the powers of the Order and how those powers can be transferred. Articles 6 and 7 relate to application and modification of legislative provisions and defence to proceedings in statutory nuisance respectively;
- 3.3.3 Part 3: Articles 8 to 12 provide a suite of powers in relation to street works. The powers include the ability for the undertaker to be able to carry out works to and within streets, to temporarily stop up streets and to be able to divert and temporarily stop up public rights of way;
- 3.3.4 Part 4: Articles 13 to 15 set out three supplemental powers relating to discharge of water, protective work to buildings and authority to survey and investigate land onshore;
- 3.3.5 Part 5: Articles 16 to 27 provide for the undertaker to be able to compulsorily acquire the Order Land and rights over/within it, and to be able to temporarily use parts of the Order Land for the construction or maintenance of the Authorised Project. The provisions provide for compensation to be payable to affected persons in respect of these powers, where that is not already secured elsewhere. These articles also provide for powers in relation to equipment of statutory undertakers;
- 3.3.6 Part 6: Articles 28 and 29 provide powers for the operation of the generating station and the provision of the deemed marine licence in Schedule 8 of the Order.

3.3.7 Part 7: Articles 30 to 39 include various general provisions in relation to the Order:-

- (a) Articles 30 to 37 include provisions such as application of statutes relating to leases, that the Order Land will be 'operational land', felling and lopping of trees, certification of documents relevant to the Order, arbitration in case of disagreements under the Order, an ability to use the appeal mechanism in s.78 of the 1990 Act where a party either refuses or withholds consent required under a requirement attached to the DCO, and a provision in respect of Crown land.
- (b) Article 38 provides protection for statutory undertakers through the protective provisions (set out in Schedule 7);
- (c) Article 39 provides a requirement for the undertaker to put into place a guarantee or alternative form of security in advance of exercising powers under Part 5 of the Order.

3.4 Schedules: there are 9 Schedules to the Order, providing for the description of the Authorised Project (Schedule 1), the requirements (a form of control akin to planning conditions) applying to it (Part 2 of Schedule 1), matters in relation to streets and public rights of way (Schedules 2 to 4), land in which new rights may be acquired (Schedule 5), modification of compensation and compulsory purchase enactments for creation of new rights (Schedule 6), provisions protecting statutory undertakers and their apparatus (Schedule 7), the deemed marine licence (Schedule 8) and the Arbitration Rules (Schedule 9).

4. **PURPOSE OF THE ORDER**

- 4.1 As the Authorised Project is a generating station with a capacity of over 50 MW, in England, it is a NSIP under sections 14(1)(a) and 15 of the 2008 Act. The Applicant therefore requires development consent under the 2008 Act in order to construct and operate the Authorised Project. Development consent may only be granted by order, following an application to the Secretary of State (section 37 of the 2008 Act).
- 4.2 The Applicant is therefore making the Application to the Secretary of State for a development consent order for the construction, maintenance and operation of a solar generating station and energy storage facility.
- 4.3 The Order refers to the person authorised to exercise the powers in the Order as 'the undertaker', and defines the undertaker as Cleve Hill Solar Park Limited.
- 4.4 In addition to providing for the construction and operation of the Authorised Project, the Order will, in accordance with section 122 and section 120(3) / Schedule 5 of the 2008 Act, authorise the acquisition of land and rights over land, and the extinguishment of, or interference with, interests in or rights over land.
- 4.5 The Book of Reference sets out a description of the land and interests included in the Order, and this is shown on the Land Plans. The Order provides for the areas which can be compulsorily acquired and what rights can be acquired, and what other rights and interests will be affected. The Order and the Book of Reference should be read together with the Statement of Reasons.
- 4.6 The matters for which development consent is sought are summarised in paragraph 4.8 below and described more formally in Schedule 1 to the Order.
- 4.7 Section 115(1) of the 2008 Act provides that development consent may be granted for "(a) development for which development consent is required, or (b) associated development". The Secretary of State must therefore be satisfied that all the elements included within the Authorised Project are either part of the NSIP or are associated development, in order to include them in the Order pursuant to section 115 of the 2008 Act.

- 4.8 The solar generating station and energy storage facility and related development within Work Nos. 1 and 2 constitute "development for which development consent is required" (as both are NSIPs, as set out above). The Order also includes other development which is Associated Development, which is included at Work Nos. 3 to 9. The Applicant has considered these works against the policy and criteria in DCLG 'Guidance on associated development applications for major infrastructure projects' (April 2013) - it is clear that all of these works come within the guidance and are clearly capable of being granted development consent by the Secretary of State pursuant to section 115.
- 4.9 The approach taken by the Applicant between those parts of the Authorised Project which form the NSIPs and those parts that form Associated Development follows the approach taken by other DCO applications to date.
- 4.10 In particular, Work Nos. 3 to 9 are all:
- 4.10.1 directly associated with the NSIPs, as they are all required to support the construction, maintenance or operation of the generating station and/or energy storage facility, or to mitigate its impacts (paragraph 5(i) of the Guidance);
 - 4.10.2 subordinate to the NSIPs - none of them are an aim in themselves (paragraph 5(ii));
 - 4.10.3 proportionate to the nature and scale of the NSIPs (paragraph 5(iv)); and
 - 4.10.4 of a nature which is typically brought forward alongside a solar generating station or energy storage facility (paragraph 6);
 - 4.10.5 listed in or analogous to the types of associated development listed in Annexes A and B to the Guidance. Those annexes mention:
 - (a) "Connection to Electricity Networks" and "underground lines" would include the substation and grid connection works (Work No.s 3 and 4);
 - (b) "Onshore substations" would include the substation (Work No. 3);
 - (c) "Formation of new or improved vehicular or pedestrian access (to stations, work sites etc), whether temporary or permanent" would include access (Work No.5 and 6);
 - (d) "Diversion or realignment of watercourses" would include works for drainage (Work no. 4 and 5); and
 - (e) Hard and soft landscaping would include landscaping and other works to mitigate adverse impacts (Work No. 4).

5. PROVISIONS OF THE ORDER

- 5.1 The Order consists of operative provisions, each referred to as articles, and Schedules. The articles are considered below in numerical order (split between the 'Parts' of the Order), and Schedules are considered along with the article which introduces them or to which they relate.

Part 1 (Preliminary) and Part 2 (Principal Powers)

- 5.2 Articles 1 (*Citation and commencement*) and 2 (*Interpretation*) are preliminary provisions. Article 1 provides for the way in which the Order should be cited and when it takes effect.
- 5.3 Article 2 provides for the interpretation of the rest of the Order, including the Schedules. Where appropriate some Schedules also contain provisions setting out what terms mean in the relevant Schedule. Article 2 makes alterations to the model provisions to accommodate the departures from the model provisions elsewhere in the Order, and to add required definitions, including:-

- 5.3.1 Definitions of documents submitted as part of the Application and which are referred to in the Order have been added;
- 5.3.2 A definition of "commence" has been added to the Order, which excludes certain pre-commencement activities such as surveys, monitoring and site investigations. The effect of the definition is that certain 'carved out' works can be carried out prior to the requirements contained in Schedule 1 to the Order being discharged. The ability to do this is of critical importance to the Applicant in the context of the envisaged construction programme. It is considered that the works that are 'carved out' would not have any impact on the effectiveness of the requirements from an environmental protection perspective. The Applicant notes the definition of 'commence' was deleted by the Secretary of State when the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 was made. Highways England (the promoter of that scheme) drew the Secretary of State's attention to the consequences of this and a Correction Order was made, amending some of the requirements, and it was recognised by the Secretary of State in the Correction Notice that the deletion of the definition of 'commence' had 'the unintended consequence of removing an acceptable degree of flexibility in the implementation of the project and that this is a correctable error for the purposes of Schedule 4 to the Planning Act 2008';
- 5.3.3 A definition of "maintain" has been added to make clear what is authorised under article 4 (see below), and in particular that it does not permit the undertaker to carry out any maintenance operations which would cause different environmental effects to those identified in the ES);
- 5.3.4 The "undertaker" is defined as Cleve Hill Solar Park Limited, who has the benefit of the provisions of the Order, subject to the provisions of article 5 (see below).
- 5.4 Article 3 (*Development consent etc granted by the Order*) grants development consent for the Authorised Development. Schedule 1 describes the Authorised Project in detail, split into 'work numbers', each of which represents different sections or parts of the Authorised Project. This split of the Authorised Project between different work numbers enables the Order to refer to different parts of the Authorised Project by citing the relevant work number.
- 5.5 Article 4 (*Power to maintain authorised project*) provides for the maintenance of the Authorised Project. Article 4 reflects the terms of the model provisions, but text has been added to make it clear that the powers conferred by the Article do not negate the need for the undertaker to obtain further marine licences for offshore works not covered by the deemed marine licence included in the Order. This approach is precedented and the article is included in The East Anglia Three Offshore Wind Farm Order 2017.
- 5.6 Article 5(1) (*Benefit of Order*) overrides Section 156(1) of the 2008 Act (which is permitted by Section 156(2)) and provides that the benefit of the Order is for the undertaker, rather than anyone with an interest in the land. Given the nature of the Authorised Development and the fact that powers of compulsory acquisition are sought it would be impracticable and inappropriate for the Order to be 'open' as to who may implement it, as might occur without this provision. Overriding section 156(1) is common in DCOs that have been made, including the Walney Extension Offshore Wind Farm Order 2014 and East Anglia Three Offshore Wind Farm Order 2017.
- 5.7 Article 5 provides that the undertaker can, with the written consent of the SoS, either transfer the benefit of the Order and/or grant to another person the benefit of the provisions of the Order and such related statutory rights as may be agreed. The Order includes drafting which makes it clear that the provisions of Article 5 apply to the deemed marine licence and can be applied either whole or in part. The requirement to obtain the consent of the Secretary of State is unnecessary under the circumstances referred to in sub paragraph (8) of the Article. They include the following:
 - 5.7.1 where the transferee or lessee is a holder of a licence under the Electricity Act 1989; and
 - 5.7.2 where the time limits for claims of compensation in respect of the acquisition of land or effects upon land as a consequence of the Order has elapsed.

- 5.8 The 2009 Act includes provisions relating to the transfer of a deemed marine licence. This article makes it clear that the procedure included in sections 72(7) and (8) of that Act do not apply.
- 5.9 The provisions of Article 5 limits the transfer or grant to another person in respect of articles 8 (street works), 10 (temporary stopping up of streets), 16 (compulsory acquisition of land), 18 (compulsory acquisition of rights), 24 (temporary use of land for carrying out the authorised project) and 25 (temporary use of land for maintaining the authorised project). These powers may only be transferred or a lease granted where that person, in respect of the onshore works, is a licence holder under the Electricity Act 1989 and in respect of the functions under article 8 (street works) is a street authority.
- 5.10 Article 5 includes a procedure to be adopted when making an application to the Secretary of State for consent. This approach has also been taken in respect of the extant DCO applications for the Hornsea Project Three Offshore Wind Farm Order, Norfolk Vanguard Offshore wind Farm Order, and Thanet Extension Offshore Wind Farm Order and has been developed by the Applicant and its advisors on the basis of experience on other projects. It is considered necessary to provide certainty in the absence of any other statutory procedure for obtaining consent. The essential elements of this procedure are as follows:
- 5.10.1 Before any application is made to the Secretary of State the Undertaker shall consult with the Secretary of State and the Secretary of State will provide a response within four weeks of receipt of the notice;
 - 5.10.2 The Secretary of State may not provide consent before consulting the MMO;
 - 5.10.3 The Secretary of State shall determine an application for consent under this article within 8 weeks commencing on the date the application is received. This period can be extended where agreed in writing with the Undertaker;
 - 5.10.4 Where the Secretary of State is minded to refuse any application or fails to determine an application within 8 weeks of receipt then the Undertaker may refer the matter for determination under article 35 (arbitration);
 - 5.10.5 Prior to any transfer or grant taking effect the Undertaker is required to notify in writing the Secretary of State and so far as relevant the MMO and the relevant planning authorities. Sub paragraphs 10 to 12 of the Article stipulate the notification requirements that apply. In particular the notice must be received by the recipient a minimum of five days prior to the transfer taking effect.
- 5.11 Article 5(7) provides that where the Undertaker has transferred the benefit of the Order or granted the benefit of the Order to a lessee then:
- 5.11.1 the transferred benefit will include any rights that are conferred and any obligations that are imposed;
 - 5.11.2 the transferred benefit will reside exclusively with the transferee or the lessee and shall not be enforceable against the Undertaker;
 - 5.11.3 the benefits or rights conferred under sub paragraph (1) of the article is subject to the same restrictions, liabilities and obligations as applies to the Undertaker.
- 5.12 Article 5, with the exception of the procedure explained in paragraph 5.10, is precededented, see for example the East Anglia Three Offshore Wind Farm Order 2017.
- 5.13 Article 6 (*application and modification of legislative provisions*) dis-applies provisions of the Neighbourhood Planning Act 2017. This disapplication would provide that the temporary possession provisions in that enactment would not take effect at the expense of the temporary possession provisions contained in the Order. The Applicant's rationale for this is that the provisions relating to temporary possession in the Neighbourhood Planning Act 2017 have not yet come into force and that regulations required to provide more detail on the operation of the regime

have not yet been made. As such, it is considered appropriate to apply the 'tried and tested' temporary possession regime which has been included in numerous DCOs and Orders made under the Transport and Works Act 1992 to date.

- 5.14 Article 7 (*Defence to proceedings in respect of statutory nuisance*) provides that no one is able to bring statutory nuisance proceedings under the Environmental Protection Act 1990 in respect of noise, if the noise is created in the course of carrying out construction or maintenance or decommissioning of the Authorised Project and for which notice has been given under section 60 or consent obtained under section 61 or 65 of the Control of Pollution Act 1974 or which cannot be reasonably avoided as a consequence of the Authorised Project. Article 7 is a model provision.

Part 3 (Streets)

- 5.15 Article 8 (*Street works*) is a model provision and authorises the undertaker to carry out various works within the streets specified in Schedule 2 of the Order, which are within the Order limits. The works permitted by the article include (a) breaking up or opening a street, or sewer, drain or tunnel, (b) tunnel or boring under a street, (c) placing apparatus under a street or maintaining apparatus under a street or changing its position. The right given by the article is a statutory right for the purposes of 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the New Roads and Street Works Act 1991.
- 5.16 Article 9 (*application of the 1991 Act*) confirms that some of the provisions of the New Roads and Street Works Act 1991 apply to the carrying out of street works under article 8 and the temporary stopping up, alteration or temporary diversion of a street under article 10. The relevant provisions are referred to in sub-paragraph 2 of the Article. This is not a model provision, but is preceded in the Hornsea Two Offshore Wind Farm Order 2016 and the Hornsea One Offshore Wind Farm Order 2014.
- 5.17 Article 10 (*Temporary stopping up of streets*,) provides for the temporary stopping up, alteration or diversion of any streets, for the purposes of carrying out the Authorised Project.
- 5.18 This article largely follows the approach set out in the model provisions, save for:
- 5.18.1 There is an additional power given to the Undertaker which allows it to use any street temporarily stopped up as a temporary working site. The Undertaker may not use any street which is referenced in Schedule 3 without first consulting the street authority and any other street without having obtained the consent of the street authority who may attach reasonable conditions and such consent is subject to deemed consent provisions if the street authority does not notify the Applicant of its decision within 28 days of receiving an application;
- 5.18.2 The model provisions provide that where the street is specified in a Schedule to the Order that there is a requirement to consult the street authority, but there would be no need to obtain its consent. In respect of other streets, not specified in a schedule to the Order there would be a requirement to obtain the consent of the street authority. This mirrors Article 11 of the model provisions.
- 5.19 Article 11 (*temporary stopping up of public rights of way*) allows the Undertaker, where it is in connection with the carrying out of the Authorised Project, to temporarily stop up a public right of way where it is specified in Schedule 3 of the Order to the extent stipulated in the same schedule. This article is not a model provision, but it is preceded in the East Anglia Three Offshore Wind Farm Order 2017.
- 5.20 Article 12 (*Agreements with street authorities*) is a modified model provision. The article included in the Order allows street authorities and the Undertaker to enter into agreements relating to any stopping up, alteration or diversion of a street and the carrying out of any works referred to in Article 8(1). The Applicant has removed reference to the ability to enter into an agreement with a street authority to allow the construction of any new street and the maintenance of any bridge or tunnel carrying a street over or under the Authorised Project as those powers are not required for the Authorised Project. This same approach was taken in the East Anglia Three Offshore Wind

Farm Order 2017, the Hornsea One Offshore Wind Farm Order 2014 and the Walney Extension Offshore Wind Farm Order 2014.

Part 4 (Supplemental Powers)

- 5.21 Article 13 (*Discharge of water*) is a model provision which enables the Undertaker to discharge water into any watercourse, public sewer or drain in connection with the construction and maintenance of the Authorised Project with the approval of the owner of the watercourse, public sewer or drain (such approval not to be unreasonably withheld) and subject to certain other conditions. The reference from the model provisions to s.85 of the Water Resources Act 1991 has been deleted as this section has now been repealed - this has been replaced with a reference to the Environmental Permitting (England and Wales) Regulations 2016 instead. The article has also been updated to reflect the current approach to the drafting of statutory instruments and so that if the Undertaker makes an application for consent under the provisions of the article but the relevant party does not provide notification of its decision within 28 days of the Undertaker's application then consent will have been deemed to have been given.
- 5.22 Article 14 (*Protective work to buildings*) is a model provision that allows the Undertaker, at its own expense, to carry out protective works to any building within the Order limits. Such protective works can be undertaken at any time before or during the carrying out in the vicinity of the relevant building works forming part of the Authorised Project. Protective works can also be undertaken after the carrying out the of works forming part of the Authorised Project for a period of 5 years from the day on which that part of the Authorised Project was first opened for use.
- 5.23 In addition to the powers to undertake protective works the article includes powers to enter any building and land within its curtilage to survey to determine whether protective works are needed and there are powers to enter adjacent land to carry out any protective works.
- 5.24 There is a requirement, before utilising the powers in the article, to serve notice on owners and occupiers with at least 14 days' notice of the said works. In respect of some of the powers included in the article there is ability for a counter notice to be served by the land owner/occupier within a period of 10 days from the day on which the notice was served.
- 5.25 The article includes compensation provisions both in relation to the consequences of the protective works being undertaken, but also where protective works are undertaken but they are inadequate to protect the building or land from damage (within a period of 5 years from the date that part of the development is first opened for use).
- 5.26 The model provision has been modified to provide that section 13 (refusal to give possession to acquiring authority) of the Compulsory Purchase Act 1965 applies to the entry onto, or possession of land under this article to the same extent as it applies to the compulsory acquisition of land under this Order by virtue of section 125 (application of compulsory acquisition provisions) of the 2008 Act.
- 5.27 Article 15 (*Authority to survey and investigate the land*) is a modified model provision which allows the Undertaker to survey and investigate land, including bringing equipment onto the land and making trial holes. The power is subject to a number of conditions including a requirement for 14 days' notice to be given and is subject to the payment of compensation.
- 5.28 The model provision has been modified as follows:
- 5.28.1 sub paragraph 4 provides that no trial holes may be made in land forming part of a railway or land held by or in right of the Crown without the consent of Network Rail or the Crown respectively;
- 5.28.2 trial holes may not be made in a highway or private street without the consent of the highway or street authority. If a highway or street authority after having received an application to make trial holes within a highway or private street fails to notify the undertaker within 28 days of having received the application it will have been deemed to have provided consent. Similar provisions do not apply in relation to Network Rail or the

Crown. This approach has been adopted in the Walney Extension Offshore Wind Farm Order 2014, the Hornsea One Offshore Wind Farm Order 2014, the Hornsea Two Offshore Wind Farm Order 2016 and the East Anglia Three Offshore Wind Farm Order 2017.

- 5.28.3 Section 13 (*refusal to give possession to acquiring authority*) of the Compulsory Purchase Act 1965 will apply in respect of entry onto, or possession of land under the article.

Part 5 (Powers of Acquisition)

- 5.29 Article 16 (*Compulsory acquisition of land*) provides for the compulsory acquisition of such land as is required for the Authorised Project (or to facilitate the Authorised Project or is incidental to the Authorised Project). Article 19 makes consequential provision for the extinguishment of rights in the land in order to ensure that they cannot impact on implementation or use of the Authorised Project. The article broadly follows the model provision, although reference to compensation for the extinguishment or suspension of a private right of way has been deleted as this is dealt with in article 19 (private rights).
- 5.30 Article 17 (*Time limit for exercise of authority to acquire land compulsorily*) is a model provision which imposes a time limit of 5 years for the exercise of powers of compulsory acquisition.
- 5.31 Article 18 (*Compulsory acquisition of rights*) entitles the undertaker to acquire rights over land and impose restrictive covenants which may be compulsorily acquired, including rights already in existence, or to create new rights.
- 5.32 The article provides that in respect of the Order land specified in Schedule 5 of the Order the undertakers powers of acquisition are limited to the purposes specified in that same schedule. The ability to acquire new rights ensures that the undertaker is able to seek a lesser interference with land where this is appropriate (whether in the context of new or existing rights) as the Authorised Project is implemented.
- 5.33 Sub paragraphs 5 and 6 provide, where the acquisition of new rights or the imposition of a restriction under the Order is required for a statutory undertaker, the undertaker may, with the consent of the Secretary of State transfer the powers to the statutory undertaker.
- 5.34 This article is a departure from the model provisions, but is preceded in the East Anglia Three Offshore Wind Farm Order 2017.
- 5.35 Article 19 (*Private rights*) is based on a model provision and has the effect of extinguishing private rights over land where: (1) land is subject to compulsory acquisition under article 16 of the Order; or (2) land is subject to compulsory acquisition of rights or the imposition of restrictive covenants under article 18. The article also suspends private rights for as long as the undertaker is in temporary possession of land under the Order.
- 5.36 In sub-paragraph 4 reference is made to section 152 of the 2008 Act to make it clear that compensation is payable and that such compensation would be payable under this section of the 2008 Act rather than the Compulsory Purchase Act 1965.
- 5.37 Article 20 (*Application of the Compulsory Purchase (Vesting Declarations) Act 1981*) applies the vesting procedures in the Compulsory Purchase (Vesting Declarations) Act 1981 to the exercise of powers of compulsory acquisition pursuant to the Order. It gives the Undertaker the option to acquire land via the process set out under the 1981 Act, rather than the notice to treat procedure. This article has been updated to incorporate and reflect the changes brought about by the Housing and Planning Act 2016.
- 5.38 Article 21 (*Acquisition of subsoil only*) permits the Undertaker to acquire only the subsoil of land which is to be compulsorily acquired (either pursuant to article 16 or 18), and gives the Undertaker the ability to minimise the extent of interests acquired from owners. This article is appropriate in the context of cables or pipes to be laid underground as part of the Authorised Project, where acquisition of the 'entire' freehold may not be required. This is a model provision.

- 5.39 Article 22 (*Modification of Part 1 of the Compulsory Purchase Act 1965*) modifies the provisions of Part 1 of the Compulsory Purchase Act 1965 as applied to the Order by section 125 of the 2008 Act. This provision reflects recent changes introduced by the Housing and Planning Act 2016. Paragraphs (1) to (3) amend the provisions of the Compulsory Purchase Act 1965 so they are consistent with the terms of the Order and paragraph (4) makes it clear that the notice periods introduced by the Housing and Planning Act 2016 do not apply to the temporary possession or use of land under articles 22 or 23 of this Order. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017 and are reflected in the Wrexham Gas Fired Generating Station Order 2017.
- 5.40 Article 23 (*Rights under or over streets*) is a model provision which allows the Undertaker to enter on and appropriate interests within streets where required for the purpose of the Authorised Project without being required to acquire that land. Provision is made for the payment of compensation in certain circumstances.
- 5.41 Article 24 (*Temporary use of land for carrying out the authorised development*) allows all of the Order Land to be temporarily used for the carrying out of the Authorised Project, where no notice of entry or general vesting declaration has been served.
- 5.42 In addition to the ability to enter on and take temporary possession of Order land Article 24(1)(b)-(f) stipulate various activities that can be undertaken pursuant to the Article. This list has been modified from the model provision to stipulate project specific activities (e.g. removal of agricultural plant).
- 5.43 There is a limit on the length of time that the Undertaker can use land under this article: being a period of 1 year beginning on the day of completion of that part of the Authorised Project, unless the Undertaker has already served a notice to treat or general vesting declaration.
- 5.44 In addition the article includes several other provisions, including:
- 5.44.1 the Undertaker must provide at least 14 days' notice to the relevant owner/occupiers' before entering the land;
 - 5.44.2 before giving up occupation of land the Undertaker must remove the temporary works and restore the land to the reasonable satisfaction of the owner. The model provision has been modified to specify certain operations that are not required to be removed. This approach is specific to the Authorised Project and is necessitated by the Authorised Project; and
 - 5.44.3 compensation provisions are included to compensate owner/occupiers' affected by their land being temporarily used for carrying out the Authorised Project.
- 5.45 The article is a departure from the model provisions, but is precededented: see the East Anglia Three Offshore Wind Farm Order 2017
- 5.46 A similar provision is made in article 25 (*Temporary use of land for maintaining the authorised project*) for the temporary use of land for maintenance of the Authorised Project. The maintenance period in which the power can be exercised is beginning with the date on which a phase of the Authorised Project first exports electricity to the national electricity transmission network. The article is model provision and it allows an Undertaker to take temporary possession of land within the Order limits if it is reasonably required to maintain the Authorised Project and it also allows temporary works and buildings to be constructed if reasonably necessary. The power is limited and cannot be exercised in respect of a house, garden or any other building where it is occupied.
- 5.47 There are several provisions that apply:
- 5.47.1 The Undertaker must provide at least 28 days notice to the relevant owner/occupiers' before taking temporary possession;

- 5.47.2 The Undertaker may only retain possession for as long as is reasonably necessary to carry out the maintenance;
- 5.47.3 When returning the land after the temporary possession the Undertaker must remove temporary works and restore the land to the reasonable satisfaction of the owners;
- 5.47.4 Compensation provisions are included to compensate owner/occupies affected by their land being temporarily used for the maintenance of the Authorised Project.

- 5.48 Article 26 (*Statutory undertakers*) is based on the model provision subject to some amendments and it provides for the acquisition of land belonging to statutory undertakers that is identified in the Book of Reference. This includes a power to move the apparatus of those statutory undertakers and to extinguish their rights. This article is subject to the protective provisions (see article 38 below) included at Schedule 7 of the Order.
- 5.49 Article 27 (*Recovery of costs of new connections*) provides that persons who have to create a new connection following the exercise of powers under article 27 may recover the costs of new connections from the Undertaker. It is a model provision.

Part 6 (Operations)

- 5.50 Article 28 (*Operation of generating stations*) permits the operation and use of the solar generating station and energy storage facility comprised in the Authorised Project. Article 28(2) specifically preserves the need for the undertaker to obtain any other operational consent that may be needed, in addition to the Order.
- 5.51 Article 29 (*deemed marine licence under the 2009 Act*) grants the deemed marine licence included in schedule 9 (*deemed marine licence*) in relation to Work No. 9 (maintenance of flood defence). The deemed consent is provided for under 149A of the 2008 Act and under section 65 of the 2009 Act. The terms of the deemed marine licence have been agreed with the MMO.
- 5.52 It is important to note that the deemed marine licence, and associated drafting, has been included as an alternative to the modifications proposed to the 2011 Order in the same Article.
- 5.53 The context here is that the Environment Agency has the benefit of an exemption under the 2011 Order, such that it is not required to apply for a marine licence under the 2009 Act in respect of maintaining a flood defence. It is the intention of the Applicant and Environment Agency that the Applicant would be responsible for the maintenance of the existing flood defence on the Order Land (Work No. 9) in the event the Authorised Project is implemented. The Applicant, Environment Agency and the MMO have agreed that the scope of works comprised in Work No.9 constitute maintenance works that would be covered by the exemption if the works were undertaken by, or on behalf of, the Environment Agency.
- 5.54 Therefore, it would be sensible for the Applicant to have the benefit of the exemption if it undertook those works. The modification to the 2011 Order in Article 29 would achieve that. The Environment Agency has confirmed its support for this approach. Whilst the MMO has not objected to the approach, it has not been able to confirm its position before submission of the Application. However, the MMO has confirmed its support for the inclusion of a deemed marine licence and the terms of that included in the Order.
- 5.55 Therefore, alternative drafting is included in the Order, i.e. the modification of the 2011 Order, or the deemed marine licence, only one of these alternatives is required. Both alternatives are included so that they can be subject to examination and determination of the most appropriate by the Secretary of State. Further information on this is provided in the "*Position Paper – Flood Defence Works & Consents, August 2018*" that was agreed between the Applicant and the Environment Agency, and the correspondence between the Applicant and MMO, which is included in the Consultation Report.

Part 7 (Miscellaneous and general)

- 5.56 Article 30 (*Application of landlord and tenant law*) is a model provision which would override landlord and tenant law so far as it would prejudice the operation of any agreement for leasing the whole of the Authorised Project or the right to operate the same or any agreement entered into by the Undertaker for the construction, maintenance, use or operation of the Authorised Project.
- 5.57 Article 31 (*Operational land for purposes of the 1990 Act*) is a model provision which has the effect of ensuring that the land on which the Authorised Project is constructed will be "operational land" under section 263 of the 1990 Act.
- 5.58 Article 32 (*Felling or lopping of trees*) provides that the Undertaker may fell or lop or cut back the roots of any tree which is not subject to a tree preservation order or shrub to prevent it obstructing or interfering with the construction, maintenance or operation of the Authorised Project. Compensation is provided for if loss or damage is caused. The article is consistent with the model provision, except the Undertaker has further limited the power so that it does not apply to trees subject to a tree preservation order which are subject to article 33 (*Trees subject to a tree preservation order*).
- 5.59 Article 33 (*trees subject to tree preservation orders*) provides that the Undertaker may fell or lop or cut back the roots of any tree which is subject to a tree preservation order or shrub to prevent it obstructing or interfering with the construction, maintenance or operation of the Authorised Project. Compensation is provided for if loss or damage is caused. The article is a model provision save for that the article applies generally to any tree subject to a tree preservation order made before and after the date of the Order coming into effect and either within or overhanging the Order limits.
- 5.60 Article 34 (*Certification of plans and documents etc*) is a model provision which provides for the submission of the various documents referred to in the Order (such as the Book of Reference, Works Plans, Land Plans and ES) to the Secretary of State so that they can be certified as being true copies.
- 5.61 Article 35 (*Arbitration*) is an arbitration provision and it is a departure from the model provision. This drafting, and that in the associated schedule (9), has been included in the extant DCO applications for the Hornsea Project Three Offshore Wind Farm Order, Norfolk Vanguard Offshore wind Farm Order, and Thanet Extension Offshore Wind Farm Order, all of which are currently subject to examination. It is also included in Schedule 13 of the draft DCO submitted during the examination of the Millbrook Power (Gas Fired Power Station) Order. That examination closed on 13 September 2018 and the decision is due in March 2019. The Applicant and its advisors have developed an arbitration article which provides an arbitration process. It is considered that this approach will provide greater certainty to all parties involved in the process and is preferential to the approach adopted in the model provisions.
- 5.62 The article provides that differences under the Order should be settled by arbitration unless another means of resolving a dispute is provided for in the Order. The arbitrator will be appointed by the parties within 14 days of receipt of a notice of arbitration or failing agreement within this time period then by the Secretary of State following application by one of the parties. If the Secretary of State fails to make an appointment within 14 days of referral the referring party may refer to the Centre for Effective Dispute Resolution for appointment of an arbitrator.
- 5.63 Where the referral to arbitration relates to a difference with the Secretary of State and the parties cannot agree an arbitrator then either party may refer the matters to the Centre for Effective Dispute Resolution for appointment of an arbitrator.
- 5.64 It applies Schedule 9 of the Order which sets out further detail of the arbitration process. The detail of Schedule 9 is set out below.
- 5.65 Article 36 (*Requirements, appeals etc.*) has the effect of providing that section 78 of the 1990 Act applies to the discharge of requirements included in Schedule 1 of the Order. This means that the Undertaker has a right of appeal to the SoS if an application is made to discharge a requirement and that application is refused or not determined.

- 5.66 Article 37 (*Crown rights*) is not a model provision, but it reflects the terms of section 135 of the 2008 Act and is also precedented. It has been used in many made orders, including the East Anglia Three Offshore Wind Farm Order 2017.
- 5.67 The intention of the article is to protect the Crown in respect of its land and interests, both when it holds the land or where it is held by another person (such as a government department). In particular it provides that nothing in the Order authorises the undertaker (or licensee of the undertaker) to interfere with any land or rights in that land as follows:
- 5.67.1 Where it belongs to Her Majesty in right of the Crown and forms part of the Crown Estate without the consent in writing of the Crown Estate Commissioners;
 - 5.67.2 Where it belongs to Her Majesty in right of the Crown, but does not form part of the Crown Estate without the consent in writing of the government department that is managing that land; and
 - 5.67.3 Where it belongs to a government department or is held in trust for Her Majesty for the purposes of a government department without the consent of that government department.
- 5.68 Sub-paragraph 2 provides that the prohibition in sub-paragraph 1 of the article does not apply where it is proposed to compulsorily acquire an interest in crown land which is held by a person which is not Her Majesty in right of the Crown or it is not being held on the Crown's behalf provided consent is provided in writing by the appropriate Crown authority.
- 5.69 Article 38 (*Protective provisions*) provides for Schedule 7, which protects the interests of certain statutory undertakers, to have effect.
- 5.70 Article 39 (*Funding*) provides that the Undertaker may not exercise a number of powers prior to it putting into place a guarantee equal to liabilities upon the Undertaker to pay compensation under the relevant provisions (such sum to be approved by the Secretary of State) or an alternative form of security approved by the Secretary of State.
- 5.71 The relevant powers are article 16 (compulsory acquisition of land), article 18 (compulsory acquisition of rights), article 19 (private rights), article 21 (acquisition of subsoil only), article 23 (rights under or over streets), article 24 (temporary use of land for carrying out the authorised project), article 25 (temporary use of land for maintaining the authorised project) and article 26 (statutory undertakers).
- 5.72 The article provides that the funding guarantee or alternative form of security must be in a form which enables a person entitled to compensation to be able enforce the said guarantee or alternative form of security. The guarantee/alternative form of security is required to be in place for a maximum of 15 years from the date that the relevant power has been exercised.

6. **SCHEDULES**

- 6.1 Schedule 1 describes the Authorised Project in detail, split into 'work numbers', each of which represents different elements of the Authorised Project. This split of the Authorised Project between different work numbers enables the Order to refer to different parts of the Authorised Project by citing the relevant work number.

- 6.2 The works set out in Schedule 1 to the Order are explained in section 2 above.

Schedule 1 – Part 2 (requirements)

- 6.3 This part of Schedule 1 sets out the requirements which apply to the carrying out of and operation of the Authorised Project under the Order.

- 6.4 The requirements closely relate to the mitigation set out in the ES and a number of them specifically refer to the ES in order to ensure that the mitigation or other measures outlined in those documents are secured.
- 6.5 Many of the requirements require submission of details for approval to the Relevant Planning Authority. Those requirements are drafted with a view to enabling the Undertaker to obtain approval for part of the Authorised Project and not require it to discharge the requirement for the whole of the Authorised Project. This permits an appropriately flexible approach to the discharge of requirements by the Undertaker and provides an appropriate balance between development not starting until details are approved, and allowing other parts of the Authorised Project (where details are already approved) to be constructed.
- 6.6 Many of the requirements provide for a document (such as details, a method statement, a plan, a programme or scheme) specifying how the undertaker will construct, operate or maintain the Authorised Project to be submitted for approval to the Relevant Planning Authorities. The model provisions have been adapted throughout to provide that it is for the Relevant Planning Authorities to approve the relevant document (rather than, as in the model provisions, the Infrastructure Planning Commission).
- 6.7 A further departure from the model provisions is in relation to the duty to consult with a third party about a document submitted to the planning authority for approval. Where consultation is required under the draft Order it is, in each case, the Relevant Planning Authority's duty to carry it out before approving a document submitted to it (rather than, as in some of the model provisions, the undertaker's duty to carry it out before submitting the document for approval). Where it is considered that it would be particularly relevant for the Relevant Planning Authority to consult a third party, that third party has been named within the relevant requirement. For example this has been done in requirement 5 which requires Natural England to be consulted in respect of the discharge of the Landscape and Biodiversity Management Plan.
- 6.8 In all cases where a scheme or plan is to be submitted for approval to an approving authority there is a requirement for the Undertaker to implement the approved scheme or plan.
- 6.8.1 *Requirement 1: Time limits* - This requirement is based upon the model provisions, and places a limit of 5 years for commencement of the Authorised Project.
- 6.8.2 *Requirement 2 : Detailed design approval* – This requirement provides that the Undertaker must obtain approval from the Relevant Planning Authority for the details of:
- (a) the layout;
 - (b) scale;
 - (c) proposed finished ground levels;
 - (d) external appearance;
 - (e) hard surfacing materials;
 - (f) vehicular and pedestrian access and circulation areas;
 - (g) minor structures, such as furniture, refuse or other storage units, signs and lighting;
 - (h) proposed and existing functional services above and below ground, including drainage, power and communications cables and pipelines, manholes and supports; and
 - (i) implementation timetables for all landscape works;

of a particular phase prior to the commencement of the phase of the Authorised Project. The details submitted must be in accordance with the parameters set out in the ODP and Order Limits and Works Plans.

- 6.8.3 Requirement 3: *Phases of authorised development* – The requirement stipulates that no part of the authorised development may be commenced until a written scheme of the phases of the authorised development has been submitted and approved. The approving authority will be the Relevant Planning Authority. Once approved the scheme must be implemented as approved.
- 6.8.4 Requirements 4 and 5: *Landscaping and biodiversity management plan and implementation and maintenance of landscaping* – The Undertaker is required, before it commences any phase of the Authorised Project, to submit a written landscape and biodiversity management plan for that phase which accords with the outline landscape and biodiversity management plan for approval to the Relevant Planning Authority in consultation with Natural England. All works are required to be carried out in accordance with the approved document and the relevant recommendations of appropriate British Standard. If any tree or shrub which is planted is, within the period of five years following planting, removed by the undertaker, dies or becomes damaged or diseased then it must be replaced in the first available planting season with a specimen of the same species and size.
- 6.8.5 Requirement 6: *Highway accesses* – Construction of any phase of the authorised project shall not be commenced by the Undertaker until it has obtained the written approval, for that phase, for the siting, design, layout and any access management measures for any new, permanent or temporary means of access to a highway to be used by vehicular traffic or any alteration to an existing means of access to a highway to be used by vehicular traffic prior to commencement of the Authorised Project. The approving authority is the Relevant Planning Authority in consultation with the highway authority.
- 6.8.6 Requirement 7: *Public rights of way diversions* – The Undertaker is required to submit to the Relevant Planning Authority for approval a public rights of way management plan for any sections of highway to be temporary closed in a particular phase. The plan must include measures to minimise the length of the sections of public rights of way to be closed, and details of publicity and signage to be provided.
- 6.8.7 Requirement 8: *Fencing and other means of enclosure* – The Undertaker is required to obtain the written approval from the Relevant Planning Authority for any proposed permanent fences, walls or other means of enclosure for each phase prior to commencement of the phase in question of the Authorised Project. All temporary fences, walls or other means of enclosure must be provided in accordance with the outline code of construction practice. Construction sites must remain securely fenced in accordance with the code of construction practice and any temporary fencing must be removed once the works are complete.
- 6.8.8 Requirement 9: *Surface and foul water drainage* – There is a requirement for the Undertaker to obtain the written approval of the Relevant Planning Authority in respect of surface water treatment and where relevant foul water drainage system (including means of pollution control) for each phase of the Authorised Project. The Relevant Planning Authority will need to consult with the sewage and drainage authorities as well as the Environment Agency before providing approval.
- 6.8.9 Requirement 10: *Archaeology* – The Undertaker must submit to the Relevant Planning Authority a written scheme of archaeological investigation for each phase of the Authorised Project for approval, before commencement of the relevant phase of the Authorised Project. Thereafter the scheme must be undertaken in accordance with the approved details.
- 6.8.10 Requirement 11: *Construction environmental management plan* - The Undertaker must submit to the Relevant Planning Authority a construction environmental management

plan, which must be in accordance with the outline construction environment management plan, for approval before commencement of each phase of the Authorised Project. The construction of the Authorised Project must be in accordance with the construction environment management plan as approved.

- 6.8.11 Requirement 12: *Construction traffic management plan* - The Undertaker must submit to the Relevant Planning Authority a construction traffic management plan for approval before commencement of each phase of the Authorised Project. The Relevant Planning Authority is required to consult the relevant highway authority before approving the construction traffic management plan. The construction of the Authorised Project must be in accordance with the construction traffic management plan as approved.
- 6.8.12 Requirement 13: *Special protection area construction noise management plan* - The Undertaker must submit to the Relevant Planning Authority a special protection area construction noise management plan for approval before commencement of each phase of the Authorised Project. The construction of the Authorised Project must be in accordance with the special construction noise management plan as approved.
- 6.8.13 Requirement 14: *European Protected Species* – No phase of the authorised development may commence until final pre-construction survey work has been carried out for that phase to establish whether any European protected species are present on the affected land or in any of the trees to be lopped or felled. If the pre-construction surveys identify any European protected species then the relevant phase of the connection works cannot commence until the Relevant Planning Authority has approved a scheme of protection and mitigation measures or a European protected species licence has been granted. The scheme may only be approved by the Relevant Planning Authority in consultation with Natural England.
- 6.8.14 Requirement 15: *Operational noise* - The Undertaker must submit to the Relevant Planning Authority an operational noise assessment before commencement of each phase of the Authorised Project. The assessment must have details of the design of the authorised development and incorporated mitigation to ensure the operational noise rating levels as set out in the ES shall be complied with for that phase. The approved design must be implemented as approved.
- 6.8.15 Requirement 16: *Decommissioning* - Within 3 months of the Authorised Project no longer being in commercial operation, there is a requirement for the Undertaker to submit a decommissioning plan to the Relevant Planning Authority for approval.
- 6.8.16 Requirement 17: *Requirement for written approval* – This requirement confirms where the approval of a party is required that it must be in writing.
- 6.8.17 Requirement 18: *Amendments to approved details* – This requirement allows details which have been submitted and approved by the Relevant Planning Authority (or another person) to be amended/varied in writing by the Relevant Planning Authority. The amendment or variation must always be in accordance with the principles and assessment undertaken in the environmental statement and must not give rise to any materially new or different environmental effects from those assessed in the original environmental statement.
- 6.9 Schedule 2 (*Streets subject to street works*) sets out the streets that would be subject to street works (including reference to the location and the specific street).
- 6.10 Schedule 3 (*Streets to be temporarily stopped up*) sets out the streets to be temporarily stopped up. It references the street and the extent of the street that may be stopped up.
- 6.11 Schedule 4 (*Public rights of way to be temporarily stopped up*) sets out the public rights of way to be temporarily stopped up. It references the public right of way and the extent of the public right of way that may be stopped up.

- 6.12 Schedule 5 (*Land in which only new rights etc. may be acquired*) specifies both the areas of land in which only new rights may be acquired by the Undertaker and the nature of the rights that may be acquired.
- 6.13 Schedule 6 (*Modification of compensation and compulsory purchase enactments for creation of new rights*) modifies existing compensation legislation including the Land Compensation Act 1973 and the Compulsory Purchase Act 1965. This has been updated to reflect any necessary changes arising as a result of the Housing and Planning Act 2016.
- 6.14 Schedule 7 (*Protective provisions*) sets out protective provisions for the benefit of statutory undertakers whose equipment may be affected by the Authorised Project. The undertaker has engaged with relevant statutory undertakers and will continue to do so following submission of the Application with a view to agreeing bespoke protective provisions for inclusion in the Order (or where appropriate to agreeing terms for such provisions outside the Order itself).
- 6.15 Schedule 8 (*Deemed Marine Licence*) sets out the marine licence referred to in article 30, which would be deemed to be granted for works comprised in the Authorised Project. The model provisions do not include a draft marine licence, but the Applicant has adopted a similar approach to previous DCOs for the Authorised Project. The terms of the deemed marine licence have been agreed with the MMO.

Part 1 – Licenced activities

- 6.16 Paragraph 1 (*Interpretation*) – provides the definition and interpretation of key terms used in the licence. Many of the terms included in this paragraph are identical to the terms in Article 2 of the Order.
- 6.17 Paragraphs 2 to 3 (Details of licenced marine activities) - provides details of the licensable marine activities as they relate to the generation assets, both in terms of construction as well as operation. It replicates the description of the Authorised Development in Schedule 1 of the Order and it also describes the substances that may be disposed of as part of construction of the Authorised Development.
- 6.18 Paragraph 4 sets out the grid co-ordinates for the Authorised Development comprising Work No.9.
- 6.19 Paragraph 5 confirms that the provisions of section 72(7) of the 2009 Act do not apply to any transfer of the deemed marine licence unless it is a transfer not falling within Article 5 of the Order. This is necessary to ensure that there is no conflict between the operation of Article 5 of the Order and Section 72(7) of the 2009 Act.
- 6.20 Paragraph 6 confirms that where any licenced activity is to be undertaken in accordance with a plan, protocol or statement approved under the licence, the approved details will include any amendments approved by the MMO.
- 6.21 Paragraph 7 confirms that any amendments made to any approved details must be in accordance with the principles and assessments set out in the ES.

Part 2 – Conditions

- 6.22 Conditions 1 to 4 comprise the standard notification requirements of the MMO.
- 6.23 Condition 5 comprises the standard pollution prevention measures and controls required by the MMO in relation to a project of this nature.
- 6.24 Condition 6 requires the removal of temporary structures and waste associated with the Authorised Development.
- 6.25 Schedule 9 (*Arbitration rules*) – As explained in relation to article 36 the Undertaker together with its advisors have developed an arbitration procedure, secured through the DCO. The intention is to achieve a fair, impartial and binding award on substantive differences between the parties. Further,

the objective is to achieve determination within 4 months from the date the arbitrator is first appointed to ensure that any disputes are resolved quickly. In the context of the pressing need for new power generation, particularly by renewable means, identified in the National Policy Statements, it is considered desirable that any disputes are resolved promptly to enable delivery of the Authorised Project as timely as possible.

- 6.26 This schedule refers to the person who commenced the arbitration as the Claimant and the other party as the Respondent.
- 6.27 The timetable for the process is as follows:
 - 6.27.1 Within 14 days of the Arbitrator being appointed the Claimant shall serve on the Respondent and the Arbitrator a statement of case and all supporting evidence to support the claim.
 - 6.27.2 Within 14 days of receipt of the Claimant's statement of case and supporting evidence the Respondent will serve a statement of defence and all supporting evidence to support its defence, together with any objections to the Claimant's documentation.
 - 6.27.3 Within 7 days of receipt of the Respondent's documentation the Claimant may make a Statement of Reply.
- 6.28 The parties would be liable for their own costs of the arbitration, unless otherwise directed by an award made by the arbitrator. Costs will include the arbitrator's costs together with the reasonable legal fees and other costs incurred by the other party.



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