



## The Millbrook Power (Gas Fired Power Station) Order

### Explanatory Memorandum (Revision 3) (Tracked Changes) – Submitted at Deadline 7

Planning Act 2008  
The Infrastructure Planning  
(Applications: Prescribed Forms and Procedure) Regulations 2009

<b>PINS Reference Number:</b>	EN010068
<b>Document Reference:</b>	3.2
<b>Regulation Number:</b>	Reg. 5(2)(c)
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Revision	Date	Description
3	August 2018	Examination Version





## MILLBROOK POWER LIMITED

### THE MILLBROOK GAS FIRED GENERATING STATION ORDER 201\*

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## EXPLANATORY MEMORANDUM

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### Introduction

1. This explanatory memorandum has been prepared to explain the purpose and effect of the provisions of the draft Millbrook Gas Fired Generating Station Order 201\* ("**the Order**"), in accordance with regulation 5(2)(c) Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. This document should be read alongside the Order and the various documents submitted in respect of this application for the Order.
2. This memorandum 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, the Planning Inspectorate Advice Note 13 (Preparation of a draft order granting development consent and explanatory memorandum, April 2012) notes (at page 4) that the Planning Inspectorate finds it helpful to receive a 'track change' version of the draft development consent order, showing the departures from the model provisions. This explanatory memorandum therefore also notes variations from the model provisions. The 'track change' version of the Order compared to the model provisions can be found at Appendix 1 to this document.

### The Purpose of the Order

3. Millbrook Power Limited ("**MPL**") has made an application pursuant to the Planning Act 2008 to the Secretary of State for a development consent order for the construction, operation and maintenance of the Millbrook Power gas fired generating station project (referred to in the Order as "**the authorised development**").
4. The authorised development comprises an onshore electricity generating station in England with a capacity of more than 50MW and therefore it constitutes a nationally significant infrastructure project ("**NSIP**") under section 15(2) of the Planning Act 2008. Accordingly, it requires development consent under section 31 of the Planning Act 2008. Development consent may only be granted by order following an application to the Secretary of State under section 37 of the Planning Act 2008.
5. In accordance with sections 120(3) and 122 of [the](#) Planning Act 2008, the Order would, in addition to providing for the construction operation and maintenance of the authorised development, authorise the acquisition of land and rights over land, and the extinguishment or suspension of, or interference with, interests in or rights over land. The Book of Reference (Document Reference 4.3) sets out what land is to 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 (Document Reference 4.1) which accompanies the application and which sets out the justification for the acquisition or interference with each relevant plot of land. The plots of land are shown on the Land Plans (Document Reference 2.5, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Land Plans to be certified by the Secretary of State](#)).
6. The matters for which development consent is sought under the Order can be summarised as follows:

In Central Bedfordshire:

6.1 The **Power Generation Plant** comprises:

6.1.1 a new Power Generation Plant in the form of an open cycle gas turbine (OCGT) peaking power generation station (Work Nos. 1A to 1D in Schedule 1 to the Order) fuelled by natural gas with a rated electrical output of up to 299 MWe. This is the output of the generating station as a whole, measured at the terminals of the generating equipment, The Power Generation Plant comprises:

- (a) generating equipment including one Gas Turbine Generator with one exhaust gas flue stack and Balance of Plant (the "**Generating Equipment**") which are located within the **Generating Equipment Site**.
- (b) works to an existing access road and construction of a new access road (the "**Access Road**") running from Green Lane (Work No. 2 in Schedule 1 to the Order) comprising:

Work No. 2A: the creation of a new junction between Green Lane and the existing access road comprising numbered work 5A in the Rookery South (Resource Recovery Facility) Order 2011 (in the event that the new junction is not completed prior to commencement of the authorised development) and the maintenance of the existing access road including permanent road surface and kerb stones, fencing, safety barrier(s), signing and road markings works, footway, drainage (including culverts), electricity and telecommunications connections and other services and other incidental works; and

Work No. 2B: a section of road of up to 1.4km in length connecting the existing access road to the Generating Equipment Site, including permanent road surface and kerb stones, safety barrier(s), signing and road markings works, footway, drainage (including culverts), electricity and telecommunications connections and other services and other incidental works.;

- (c) a temporary construction compound (numbered work 8) required during construction only (the 'Laydown Area');

6.2 an electrical connection (the **Electrical Connection**, Works No. 5, 6 and 7 in Schedule 1 to the Order) to export electricity from the Generating Equipment to the National Electricity Transmission System ("**NETS**") comprising an underground double circuit Tee-in. This would require one new tower (which will replace an existing tower and be located in the existing Grendon – Sundon transmission route corridor, thereby resulting in no net additional towers). This option would require two sealing end compounds ("**SECs**"), one located on each side of the existing transmission line, and both circuits would then be connected via underground cables approximately 500 m in length to a new substation (the "**Substation**")-; and

6.3 a new underground gas pipeline approximately 1.8km in length (the "**Pipeline**") comprising numbered work 4A to bring natural gas to the Generating Equipment from the National Transmission System in Schedule 1 to the Order (the **Gas Connection**) The Gas Connection incorporates an Above Ground Installation (the "**AGI**"), comprising a minimum off-take connection and a pipeline inspection gauge facility (Work No. 3A in Schedule 1 to the Order) together with a new means of access off Houghton Lane and other incidental works (Work No.3B in Schedule 1 to the Order).

7. Whilst certain street works are being carried out in the area of Bedford Borough Council, these works do not amount to development and as such Bedford Borough Council is not mentioned in Schedule 1 to the Order.

8. A further, more detailed, description of the various elements of the authorised development is provided in Schedule 1 to the Order (and the corresponding section of this Explanatory Memorandum below) and in Section 3 of the Environmental Statement (Document Reference 6.1, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Environmental Statement to be certified by the Secretary of State](#)) which accompanies this application.
9. The Power Generation Plant (including the Access Road and the Laydown Area) form an integral part of the nationally significant infrastructure project. The Gas Connection (including the Pipeline and the AGI) and the Electrical Connection constitute associated development within the meaning of section 115 of the 2008 Act.

### **Associated development**

10. Pursuant to section 115 of the 2008 Act, development consent can be granted for the NSIP and associated development. Associated development is development associated with the NSIP as set out in section 115 of the 2008 Act, and having regard to guidance on associated development issued by the Secretary of State for Communities and Local Government (the "**Guidance**"). The Guidance illustrates the types of development that may qualify as associated development and sets out the defining characteristics of associated development. Associated development must not be an aim in itself. In most cases it is a type normally brought forward with the primary development, and may include measures necessary to mitigate the effects of the primary development or innovative development ideas otherwise fulfilling the principles of the Guidance. It should be proportionate to the nature and scale of the primary development.
11. MPL has considered numbered works 3 to 7 against the policy and criteria in the Guidance. It is clear that all of these numbered works fall within the Guidance and are clearly capable of being granted development consent by the Secretary of State pursuant to section 115.
12. In particular, numbered works 3 to 7 are all:
  - 12.1 directly associated with the NSIP, as they are all required for the construction, maintenance or operation of the generating station, or to mitigate its impacts (paragraph 5(i) of the Guidance);
  - 12.2 subordinate to the NSIP - none of them are an aim in themselves (paragraph 5(ii));
  - 12.3 proportionate to the nature and scale of the NSIP (paragraph 5(iv));
  - 12.4 of a nature which is typically brought forward alongside a gas-fired generating station (paragraph 6);
  - 12.5 listed in or analogous to the types of associated development listed in Annexes A and B to the Guidance. Those annexes mention (of relevance to numbered works 3 to 7): – "Electricity networks", "Fuel and pipe-line networks", "Overhead / underground lines", "Substations", "Sealing end compounds" and "Gas pipelines and pressure reduction stations".
13. As the Order seeks to apply and modify statutory provisions, including those relating to the compulsory acquisition of land, the Order has been drafted as a statutory instrument, in accordance with sections 117 and 120 of the Planning Act 2008.

### **The Provisions of the Order**

14. The Order consists of ~~43~~44 operative provisions, each referred to as articles, and ~~12~~14 Schedules.

### **Parts 1 (Preliminary) and 2 (Principal Powers)**

15. 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. Article 2

provides for the interpretation of the rest of the Order, including the Schedules. 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 that are relevant in the context of the authorised development.

16. Article 2 defines 'commencement' to exclude surveys, site investigations, temporary fencing and site notices.
17. As there are no ancillary works included in the Order, the authorised development is referred to as such throughout the Order and the concept within the model provisions of an "authorised project" has not been used in the Order (there are however, "ancillary matters" as defined in section 120(4) of the Planning Act 2008 including compulsory purchase powers).
18. Article 2 defines 'Order limits' as the limits shown on the works plans. Article 2 defines 'Order land' as land required for, or is required to facilitate, or is incidental to, or is affected by, the authorised development shown on the land plans and described in the book of reference. The Order land does not include all of the Order limits as compulsory acquisition powers and powers of temporary use are not being sought over part of Green Lane and Houghton Lane.
19. Article 3(1) (*Development consent etc. granted by the Order*) grants development consent for the authorised development. Schedule 1 describes the authorised development in detail, split into numbered works, each of which represents a different part of the authorised development. Article 3(2) requires that the works authorised by the Order are situated within the areas shown on the Works Plans (Document Reference 2.6, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Works Plans to be certified by the Secretary of State](#)). This is in order to provide certainty as to what has been consented by the Order. Article 3(3) permits construction within limits of deviation which are also specified on the ~~works plans~~ [Works Plans](#). Requirement 2 provides for maximum and minimum parameters for certain key elements of the project. This approach, whilst going beyond the model provisions, reflects a standard approach used in orders made under the Transport and Works Act 1992 and in recent development consent orders, including for example, the Progress Power (Gas Fired Power Station) Order 2015 and is appropriate in the current Order as it serves to precisely define the authorised development by reference to the plans, whilst preserving a sensible amount of flexibility in the implementation of the authorised development to allow for slight variances in ground conditions and choice of appropriate equipment and technology. The Environmental Statement accompanying the DCO Application (Document Reference 6.1, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Environmental Statement to be certified by the Secretary of State](#)) has assessed the authorised development within the full envelope provided by the limits of deviation.
20. Article 4 (*Maintenance of authorised development*) provides for the maintenance of the authorised development. Article 4(1) closely reflects the terms of the model provisions. Article 4(2) restricts maintenance to the Order limits in order to provide a defined parameter within which this power can be exercised. A definition of "maintain" has been included so that it is clear what the term involves. The Environmental Statement accompanying the DCO Application (Document Reference 6.1, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Environmental Statement to be certified by the Secretary of State](#)) has assessed maintenance as defined in the Order.
21. Article 5 (*Operation of authorised development*) permits the operation and use of the generating station comprised in the authorised development and is included pursuant to section 140 of the Planning Act 2008. Article 5(2) specifically preserves the need for any other operational consent that may be needed for the Power Generation Plant in addition to the Order.
22. Article 6-(1) (*Benefit of the Order*) makes clear that it is only ~~the undertaker~~ [MPL](#) who may take the benefit of the Order. ~~The "undertaker" is defined in Article 2 as MPL, as promoter of the scheme, and anyone who has the benefit of the Order pursuant to Articles 6 and 7. This definition follows the definition of undertaker in the Wrexham Gas Fired Generating Station Order 2017.~~ Article 6(2) provides that for the numbered works 3A, 5, 6 and 7 the benefit of the Order is for the ~~undertaker~~ [MPL](#) and National Grid (as National Grid may be best placed to carry out all or part of those works). A similar approach regarding the benefit of parts of the Order sitting with two undertakers has been taken in Article 6 of the Meaford Gas Fired Generating Station Order 2016

and Article 6 of Progress Power (Gas Fired Power Station) Order 2015. These precedents are relevant as they relate to projects similar to the Project (i.e. a gas generating station with an electrical connection and a gas connection). The Article refers to both ~~the undertaker MPL~~ and National Grid as it has not yet been determined whether ~~the undertaker MPL~~ or National Grid or both parties will construct parts of the Gas Connection and the Electrical Connection.

23. Article 7 (*Consent to transfer benefit of the Order*) makes detailed provision for the transfer of the benefit of the Order and supplements Article 6(1). Under Article 7(4) the consent of the Secretary of State is needed before the undertaker (which means MPL for the whole of the authorised development and MPL and National Grid in respect of numbered works 3A, 5, 6 and 7) can transfer the benefit of the Order but such consent is not required where (i) the transferee or lessee is the holder of a licence under section 6 of the Electricity Act 1989 or section 7 of the Gas Act 1986; or (ii) where the compensation provisions for the acquisition of rights or interests in land or for effects on land have been discharged or are no longer relevant. The justification for these provisions is that in such cases, the transferee or lessee will either be of a similar financial and regulatory standing to MPL so as to protect the provision for compensation for rights or interests in land that are compulsorily acquired pursuant to the Order, or there are no outstanding actual or potential compulsory purchase claims. Article 7(5) provides that where the consent of the Secretary of State is not needed, the undertaker must still notify the Secretary of State in writing prior to the transfer or grant of the benefit of the provisions of the Order. Articles 7(6) to (8) provide further detail on the notification that is to be given. This is based on the notification procedure contained in Article 7 of the Wrexham Gas Fired Generating Station Order 2017. Article 7(2) has been amended from the model provisions so that it refers to 'transfer, or grant', which is considered to be more accurate than 'agreement'.

### Part 3 (Streets)

24. Article 8 (*Power to alter layout etc. of streets*) allows the undertaker to alter the layout of a street or carry out any works in the street as are set out in Schedule 3 in the manner specified in Schedule 3. Article 8(2) allows for the alteration of the layout of any street within the Order limits for the purposes of construction, operation or maintenance, subject to obtaining the consent of the street authority and to the restoration of such streets to the reasonable satisfaction of the street authority. Article ~~8(5)~~41 (procedure in relation to certain approvals) applies to Article 8, and provides that where the consent from a street authority has been requested ~~pursuant to Article 8(4)~~ then, if the street authority fails to notify its decision within eight weeks (or such longer period as is agreed in writing), consent is deemed to have been given. This wording ~~is being discussed with the Local Authorities (Central Bedfordshire Council and Bedford Borough Council) and~~ will assist the undertaker in keeping the construction period for the authorised development as short as reasonably practicable. Similar wording has been used in other made Orders, including the National Grid (North London Reinforcement Project) Order 2014 and the Hirwaun Generating Station Order 2015 (see Article 8). ~~Wording regarding deemed consent is also included in~~ This deeming provision is applicable to Articles 11, 15, ~~17~~ and ~~42 and Schedule 12~~17.
25. Article 9 (*Street works*) is a model provision intended to permit in certain streets (as specified in Schedule 4) the carrying out of street works for the purposes of the authorised development. Article 9(3) brings in sections 54 to 106 of the New Roads and Street Works Act 1991 to apply to any street works carried out pursuant to Article 9(1). This provides protection for the street authority for the street in question.
26. Article 10 (*Construction and maintenance of new or altered means of access*) provides that new or altered means of access are to be constructed to the reasonable satisfaction of the street authority and maintained at the expense of the undertaker for a year. Any part of the new or altered means of access which are proposed to be public highway (as set out on the Rights of Way, Streets and Access Plan submitted with the undertakers' application for the Order (Document Reference 2.7, with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Rights of Way, Streets and Access Plan to be certified by the Secretary of State)) will then be maintained by the highways authority. Those parts of the new or altered means of access which are not intended to be public highway (such as private accesses which the undertaker is altering or creating and as also set out in the Rights of Way, Streets and Access Plan) will then be maintained by the street authority. Paragraphs (4) and (5) mirror the defence in section 58 of the Highways Act 1980 where the undertaker is subject to an action for damages

and has taken such care as was reasonably required in the circumstances to secure that the street was not dangerous to traffic.

27. Article 11 (*Temporary prohibition or restriction of use of streets*) is slightly refined from the model provision and provides for the temporary alteration, diversion and prohibition or restriction on the use of streets for the purposes of carrying out the authorised development. Reference to temporary prohibition or restriction of use is a reference to the temporary control of how traffic and non-motorised users (including pedestrians) may use and pass along the streets in question. As per the model provision, this applies generally, and also applies specifically to certain streets which are set out in Schedule 6 to the Order. Article 11(2) confers a power on the undertaker, where the use of a street has been temporarily prohibited or restricted under the power in Article 11, to use such a street as a temporary working site. There are consultation requirements before this power can be exercised, in the case of any streets not specified in Schedule 6 the undertaker would need to secure the consent of the street authority prior to prohibiting or restricting use and compensation may be payable in respect of the loss or suspension of private rights of way. Similar wording has been used in other made Orders, including Article 11 of the Wrexham Gas Fired Generating Station Order 2017, Article 12 of the Meaford Gas Fired Generating Station Order 2016, Article 12 of Progress Power (Gas Fired Power Station) Order 2015 and Article 11 of the Hirwaun Generating Station Order 2015.
28. Article 12 (*Stopping up of streets*) is drawn from a model provision and permits the undertaker to stop up the streets specified in Schedule 7. This stopping up can only take place if either the substitute street (also specified in Schedule 7) has been provided to the reasonable satisfaction of the street authority and is open for use or a temporary diversion is in place until the substitute street can be opened.
29. Article 13 (*Access to works*) is a model provision which permits the undertaker to form new or to improve existing means of access in the locations specified in Parts 1 and 2 of Schedule 3. For clarity, temporary and permanent means of access are dealt with separately. Other means of access or works can also be provided in other locations reasonably required for the authorised development with the approval of the relevant planning authority in consultation with the highway authority.
30. Article 14 (*Agreements with street authorities*) is a model provision which authorises street authorities and the undertaker to enter into agreements relating to the construction of a street or the carrying out of works in the street and the alteration and diversion of the street. In addition to the model provisions, it provides for such agreements to deal with the strengthening, improvement or repair of any streets, which is common in many similar orders. Similar wording has been used in other made Orders, including the Hirwaun Generating Station Order 2015, the Progress Power (Gas Fired Power Station) Order 2015 and the Wrexham Gas Fired Generating Station Order 2017.
31. Article 15 (*Traffic regulation*) allows, with the consent of the traffic authority, the undertaker to regulate traffic on roads (defined as a public highway maintained by and at the expense of the traffic authority) to the extent that it is necessary for the purposes of or in connection with the construction of the authorised development. The Article gives effect to any prohibition, restriction or other provision made by the undertaker as if it was made by the traffic authority or local authority in whose area the road is situated. The Article is not in the general model provisions but there is a precedent for it in the Wrexham Gas Fired Generating Station Order 2017 (Article 14), which referred in its Explanatory Memorandum to its use in other made orders (including Article 37 of the Network Rail (Hitchin (Cambridge Junction)) Order 2011 and Article 38 of the Network Rail (Norton Bridge Areas Improvements) Order 2014). It is considered necessary to ensure that the authorised development can be constructed without unnecessary delay. ~~A provision has been added to provide that consent from the relevant traffic authority is deemed to have been given if that authority fails to notify the undertaker of its decision within eight weeks of the receipt of the application however the Article 41 (procedure in relation to certain approvals) applies to this Article.~~ The Article ensures that the traffic authority is given not less than 4 weeks' notice in writing that the undertaker intends to exercise its power under this Article. This provision is again considered necessary so that there is no delay to implementation of the authorised development.

#### Part 4 (Supplemental Powers)



32. Article 16 (*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 development 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 section 85 of the Water Resources Act 1991 has been deleted as this section has now been repealed and has been replaced with a reference to the Environmental Permitting (England and Wales) Regulations 2016 instead.
33. Article 17 (*Authority to survey and investigate the land*) is based on the model provision which allows the undertaker to survey and/or 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. The power extends to land "which may be affected by the authorised development" as surveys may need to be undertaken on such land to monitor the impacts of the authorised development (for example noise monitoring at residential receptors). The Article applies section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused. This is considered necessary so that there is no delay in the implementation of the authorised development.
34. Article 18 (*Removal of human remains*) is a model provision which provides for the removal of human remains from the Order land and for their reburial in such burial ground or cemetery in which burials may legally take place as the undertaker thinks suitable for the purpose or for their treatment according to the wishes of any personal representatives or relatives who come forward following the giving of the necessary notices. This article has been included as MPL has not been able to rule out the presence of any human remains within the Order land and is considered necessary so that there is no delay in the implementation of the authorised development.

#### **Part 5 (Powers of Acquisition)**

35. Article 19 (*Compulsory acquisition of land*) provides for the compulsory acquisition of such land as is required for the authorised development (or to facilitate the authorised development or is incidental to the authorised development). The Article broadly follows the model provision, reference to compensation for the extinguishment or suspension of a private right of way has been deleted as this is dealt with in Article 23 (*Private rights*). A similar approach was taken in the Wrexham Gas Fired Generating Station Order 2017.
36. Article 20 (*Statutory authority to override easements and other rights*) provides that by virtue of section 158 of the 2008 Act in carrying out or using the development authorised by the Order and doing anything else authorised by the Order, the undertaker may interfere with any easement, liberty, privilege, right or advantage annexed to land and affecting other land, including any natural right to support, or breach any restriction as to use of land arising by virtue of contract. It also provides that by virtue of section 152 of the 2008 Act, compensation may be payable under section 10 of the Compulsory Purchase Act 1965 for any such interference or breach. This is not a model provision, but is added to clarify the position with regard to rights burdening land required for the authorised development. It has precedent, for example, in the Wrexham Gas Fired Generating Station Order 2017.
37. Article 21 (*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. The date of the making of the Order has been used to align with the date from which the undertaker may exercise any powers of compulsory purchase that may be contained within the Order. MPL considers that 5 years is an appropriate time limit as it is consistent with the time limit for commencing the authorised development set out in requirement 1 of Schedule 2 of the Order.
38. Article 22 (*Compulsory acquisition of rights etc.*) is based on a model provision and entitles the undertaker to acquire rights over land which may be compulsorily acquired, including rights already in existence, or to create new rights or impose restrictions. The word "existing" has been deleted from the model provision wording in paragraph (3) in order to ensure 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 development is implemented. The article introduces Schedule 8, which amends existing compensation legislation in the case of a compulsory

acquisition under the Order of a right by the creation of a new right or the imposition of a restriction. Schedule 8 does not affect the entitlement to compensation, but generally ensures that the compensation code applies to the compulsory acquisition by the creation of new rights and the imposition of restrictive covenants. The article also provides for the transfer of the power to acquire new rights to a statutory undertaker with the consent of the Secretary of State. This is to allow for the creation of easements in favour of statutory undertakers in respect of their apparatus which would not otherwise be possible as the undertaker does not own the dominant tenement. Wording has been included at paragraph (6) to make clear that legislation governing the compensation for the compulsory purchase of land is to apply in relation to the creation of new rights and the imposition of restrictions.

39. Article 23 (*Private rights*) is based on a model provision and has the effect of extinguishing private rights and restrictions over land where: (1) land is subject to compulsory acquisition; (2) [where notified by the undertaker](#), the private right is inconsistent with a right being compulsorily acquired (in this case extinguishment will only be in so far as their continuance would be inconsistent with the exercise of the undertaker's right); and (3) land is owned by the undertaker. The Article also suspends private rights where the private right is inconsistent with a right being compulsorily acquired by the undertaker and also suspends private rights for as long as the undertaker is in temporary possession of land under the Order. The Article departs from the model provision in that it relates to all rights over land, not just rights of way, to ensure that any other rights that may exist cannot prevent the implementation of the Project. The Article follows the approach in Wrexham Gas Fired Generating Station Order 2017. Paragraph (4) limits the scope of the suspension of existing rights where temporary possession of land is taken pursuant to the Order.
40. Article 24 (*Application of the Compulsory Purchase (Vesting Declarations) Act 1981*) is a model provision that applies the vesting procedures in the Compulsory Purchase (Vesting Declarations) Act 1981 to the exercise of powers of compulsory acquisition pursuant to the Order and is a model provision. 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. These modifications have precedent in Schedule 14 to the High Speed Rail (London – West Midlands) Act 2017A, the Wrexham Gas Fired Generating Station Order 2017 and the Silvertown Tunnel Order 2018.
41. Article 25 (*Acquisition of subsoil only*) permits the undertaker to acquire only the subsoil of land which is to be compulsorily acquired, 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 development, where acquisition of the 'entire' freehold may not be required. This is based on the model provision but has been amended to reflect the drafting used in the Silvertown Tunnel Order 2018.
42. Article 26 (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 26 or 27 of this Order. These modifications have broad precedent in Schedule 14 to the High Speed Rail (London - West Midlands) Act 2017, the Wrexham Gas Fired Generating Station Order 2017 and the Silvertown Tunnel Order 2018.
43. Article 27 (*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 purposes of the authorised development without being required to acquire that land. Provision is made for the payment of compensation in certain circumstances (with slight refinements to the wording of the model provisions). This refined wording has precedent in the Progress Power (Gas Fired Power Station) Order 2015.
44. Article 28 (*Temporary use of land for carrying out the authorised development*) allows the land specified in Schedule 9 to be temporarily used for the carrying out of the authorised development. There are clear limits on the length of time that the undertaker can use land in this way, provisions around giving 14 days' notice and restoration of the land following the temporary works. Wording

has been added to paragraph 1(a)(ii) in order to allow Article 28 to be applicable in the context of land which may be the subject of compulsory ~~purchase~~acquisition, prior to any such compulsory ~~purchase~~acquisition taking place. New wording has also been added to paragraphs (3) and (4) to take in to account that MPL may, pursuant to Article 28(1)(a)(ii) temporarily use land that it may, eventually, compulsorily acquire. Should MPL compulsorily acquire the land that it is in temporary possession of, then MPL should remain in possession of such land. Wording has therefore been deleted in paragraph (8) to dovetail with the new drafting in paragraph (1). This wording closely follows that included within The Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014. Wording has been added at paragraph (9) to make clear that the Article does not preclude the creation or acquisition of new rights, imposition of restrictions or acquisition of rights in the subsoil of any part of the Order land. It has precedent in the Wrexham Gas Fired Generating Station Order 2017. Sub-paragraph 13 dis-applies the provisions of the Neighbourhood Planning Act 2017 that relate to temporary possession. MPL'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 (or even consulted on). MPL is of the view that it is not currently possible to understand or reflect accurately the temporary possession provisions as intended by Government in respect of DCOs. 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. This approach has also been taken in the draft DCOs submitted in respect of the applications for the Silvertown Tunnel, Eggborough CCGT and Tilbury 2.

45. Article 29 (*Temporary use of land for maintaining the authorised development*) provides for the temporary use of land for maintenance of the authorised development. There are clear limits on the length of time that the undertaker can use land in this way, provisions around giving 28 days' notice and restoration of the land following the temporary possession. This Article is broadly based on the model provision and provides for the payment of compensation for that temporary use of the land. The maintenance period has been adapted from the model provision to apply to the period 5 years beginning with the date of final commissioning as opposed to the date on which the project is opened for use as this is more appropriate for this type of development. Similar wording has been used in other made Orders for gas fired generating stations, including the Hirwaun Generating Station Order 2015, the Progress Power (Gas Fired Power Station) Order 2015 and the Wrexham Gas Fired Generating Station Order 2017. However, in order to be able to carry out the landscaping commitments set out in the landscaping and ecological mitigation and management strategy, the maintenance period has been extended to the period in the strategy approved pursuant to Requirement 3 subject to a maximum of 10 years. A similar provision was included in the North Wales Wind Farm Connection Order 2016. Sub-paragraph 12 dis-applies the provisions of the Neighbourhood Planning Act 2017 that relate to temporary possession for the reasons set out in paragraph 44 above.
46. Article 30 (*Statutory undertakers*) provides for the acquisition of land belonging to statutory undertakers within the Order land. This includes a power to move the apparatus of those statutory undertakers and to extinguish their rights. The model provision has been amended so as to allow for the suspension of rights of a statutory undertaker (for example where land is being temporarily used under the terms of the Order) rather than just extinguishment. This power is required over the whole of the Order land and similar wording has been used in made Orders for gas fired generating stations, including the Wrexham Gas Fired Generating Station Order 2017.
47. Article 31 (*Apparatus and rights of statutory undertakers in streets*) makes provision in respect of the apparatus and rights of statutory undertakers in streets which are altered or diverted or where use is temporarily prohibited or restricted under Articles 10 or 11 or where a street is stopped up under Article 12. It is a model provision but has been amended in that paragraph (2) onwards has been deleted from the model provision to avoid duplication with the protective provisions contained in Schedule 10 of the Order. For example, paragraph 4 of Part 1 of Schedule 10 deals with access to apparatus located in a street where there is a temporary prohibition or restriction on use under Article 11 and paragraphs 6 and 9 of Part 1 of Schedule 10 deal with the relocation of apparatus and payment of costs.
48. Article 32 (*Recovery of costs of new connections*) provides that persons who have to create a new connection following the exercise of powers under Article 32 may recover the costs of new connections from the undertaker. It is a model provision.

## Part 6 (Operations)

49. Article 33 (*Felling or lopping of trees and removal of hedgerows*) provides that the undertaker may fell or lop or cut back the roots of any tree or shrub within the Order limits to prevent it obstructing or interfering with the construction, maintenance or operation of the authorised development. Compensation is provided for if loss or damage is caused. It is a model provision. Paragraph (4) has been included in a departure from the model provisions to permit the removal of any hedgerows within the Order limits that may be required for the purposes of carrying out the authorised development. It should be noted that there are no protected trees or important hedgerows located within the Order limits.

## Part 7 (Miscellaneous and General)

50. Article 34 (*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 development 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 development. This provision is required to ensure that there is no impediment to the construction, use or maintenance of the authorised development.
51. Article 35 (*Cases in which land is to be treated as not being operational land*) is a model provision which has the effect of ensuring that the land on which the authorised development is constructed is not excluded from being "operational land" under the Town and Country Planning Act 1990 by the effect of section 263 of that Act. A similar provision has been included in other made Orders for gas fired generating stations, including the Hirwaun Generating Station Order 2015, the Progress Power (Gas Fired Power Station) Order 2015 and the Wrexham Gas Fired Generating Station Order 2017.
52. Article 36 (*Defence to proceedings in respect of statutory nuisance*) provides that no one shall be 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 of the authorised development and for which notice has been given under section 60 or consent obtained under section 61 of the Control of Pollution Act 1974 or which is an unavoidable consequence of the authorised development. A similar provision has been included in other made Orders for gas fired generating stations, including the Hirwaun Generating Station Order 2015, the Progress Power (Gas Fired Power Station) Order 2015 and the Wrexham Gas Fired Generating Station Order 2017.
53. Article 37 (*Protective provisions*) provides for Schedule 10, which protects the interests of certain statutory undertakers, to have effect.
54. Article 38 (*Modifications to and amendments of statutory provisions*) provides for Schedule 11, which provides for modifications to and amendments of the Rookery South (Resource Recovery Facility) Order 2011. These modifications and amendments are explained further in the section on Schedule 11 below. The modifications are made pursuant to the power contained in ~~s-section~~ [section 120\(5\) of the Planning Act 2008](#), which permit in certain circumstances the amendment of "statutory provisions", defined in ~~s-section~~ [section 120\(6\)](#) as including an instrument made under an Act. The Rookery South (Resource Recovery Facility) Order 2011 is such a statutory instrument, and the amendments fall within the circumstances within which amendments are permitted. They are amendments of provisions which relate to matters for which provision may be made in the order or which it is necessary or expedient to make in connection with this Order, being the means by which conflicts between the works and powers contained within the two development consent orders are to be avoided.
55. Article 39 (*Certification of plans etc.*) is a model provision which provides for the submission of the book of reference, plans and documents referred to in the Order to the Secretary of State in order that they may be certified as being true copies.
56. Article 40 (*Service of notices*) deals with the service of notices pursuant to the Order. These provisions are based on those appearing in the Transport and Works (Model Provisions for Railways and Tramways) Order 2006.

57. Article 41 (*Procedure in relation to certain approvals*) provides a procedure in relation to consents and approvals required pursuant to the Order. It applies to all such consents etc, bar those under requirements in Schedule 2, where a separate more detailed procedure is provided for in Schedule 12. Schedule 12 has been used in various draft development consent orders and can be seen in a similar form in the Wrexham Gas Fired Generating Station Order 2017. It also provides that the procedures set out in Schedule 12 apply to any consent, agreement or refusal which needs to be obtained under the requirements set out in Schedule 2 to the Order. Article ~~42~~ 41 clarifies the procedure which applies in respect of these additional consents, including by making clear that the appeals process set out in Schedule 12 applies.
58. Article 42 (*Arbitration*) is a general arbitration provision which provides that differences under the Order should be settled by arbitration unless another means of resolving a dispute is provided for in the Order. It is based on a model provision but has been amended to provide for an arbitrator to be appointed by the Centre of Effective Dispute Resolution in the event that the Secretary of State fails to appoint an arbitrator. This is to prevent any delay to the resolution of any disputes.
59. Article 43 (*Funding*) provides for a guarantee or other form of security for the payment of compensation to be put in place prior to exercising the compulsory acquisition powers granted by the Order. The article is based on Article 39 of the Wrexham Gas Fired Generating Station Order 2017.
60. Article ~~48~~ 44 (*Low Level Restoration Scheme*) ensures that MPL does not inadvertently find itself having breached the permitted low level restoration scheme for Rookery South Pit (planning permission reference number BC/CM/2000/8) through compliance with the requirements of Schedule 2 to the Order which have been approved by the relevant planning authority. This gives MPL certainty in discharging the requirements. The purpose of the article is to make it clear on the face of the Order that, given the overlapping nature of the permitted low level restoration scheme for Rookery South Pit (planning permission reference number BC/CM/2000/8) and the Order, any works carried out under the Order would not place the undertaker in breach of the permitted low level restoration scheme for Rookery South Pit (planning permission reference number BC/CM/2000/8). Its purpose also provides a useful record for the planning authority in terms of future monitoring where the land in question is subject to overlapping consents. The article confirms that the subsequent consent, the Order, takes precedence.

## Schedules

61. *Schedule 1 (Authorised development)* specifies the authorised development:
- 61.1 *Work Nos. 1A to 1D* describe the works necessary for the **Generating Equipment** - a simple cycle gas turbine power generation plant with a gross rated electrical output of up to 299 MWe, incorporating one gas turbine generator with an exhaust gas flue stack.
- 61.2 *Work No 2* describes the requirements for the integral means of access to the Generating Equipment required together with electricity and telecommunications connections and other services. An access road between Green Lane and Rookery South Pit has been constructed pursuant to numbered work 5A set out in the Rookery South (Resource Recovery Facility) Order 2011. However, the works to create a new junction between the access road and Green Lane have not yet been completed. Work No 2A therefore includes the construction of a new junction with Green Lane which would only be constructed in the event that the junction (which forms part of numbered work 5A set out in the Rookery South (Resource Recovery Facility) Order 2011) is not completed prior to the implementation of the Project. Work No. 2B provides for an access road from the existing access road to the site of the Generating Equipment.
- 61.3 *Work No. 3* describes the works necessary for the **Gas Connection**, an associated gas pipeline connection to bring natural gas to the Power Generation Plant from the National Transmission System in the vicinity of the authorised development. In more detail:

- 61.4 *Work No 3A* describes the **AGI** (above ground installation) which comprises a minimum offtake connection (**MOC**) and a pipeline inspection gauge facility (**PIG facility**). The MOC is a National Grid facility which contains the equipment required safely to operate a connection to the National Transmission System. This MOC generally contains the tie-in to the NTS along with a control and instrumentation kiosk, an electrical supply kiosk and a remotely operable valve allowing control of the gas supply to the downstream works (the downstream works in this instance being the Power Generation Plant).
- 61.5 *Work No 3A* also comprises a PIG launching facility which is a compound which houses a connection to a pressure vessel which allows for inline inspection of a stretch of buried pipeline. The launching facility is matched at the other end of the pipeline by a Receiving facility (as part of *Work No. 1B*).
- 61.6 The underground pipeline itself (the **Pipeline**) is described in *Work No.4A* along with associated telemetry cabling and related works. *Work No 4B* describes the associated construction laydown area and site and welfare offices and workshops.
- 61.7 *Work No 3B* describes the necessary access works to allow a construction and operational access to the AGI to be delivered together with electricity and telecommunications connections and other services.
- 61.8 *Work Nos. 5, 6 and 7* describe the components of the associated **Electrical Connection** to export electricity from the Power Generation Plant to the NETS. In more detail:
- 61.9 *Work No 5* describes the new 400kV **Substation** required as well as related site works. A substation can either be an air insulated substation (AIS) or a gas insulated substation (GIS). MPL considers that a Substation with AIS technology is appropriate and acceptable in the location (within Rookery South Pit). The Substation would be approximately 200 m x 150 m.
- 61.10 *Work No 6* describes the underground cable connection from the Substation to the existing 400KV overhead transmission line. Two Sealing End Compounds are required and provide the location at which an electrical circuit can make the transition from being carried overground via a system of towers and wires (an overhead line) to being carried underground through an underground cable. The Sealing End Compounds contain the terminations from the underground cable, an overhead line tower and the connections between them.
- 61.11 *Work No 7* describes the temporary diversion works that would need to be undertaken by National Grid in order to deliver *Work Nos 5 and 6*. These temporary diversion works are anticipated to take no longer than six months.
- 61.12 *Work No. 8* describes the integral construction laydown area that will include hardstanding, site and welfare facilities.
62. *Schedule 2 (Requirements)* sets out the requirements which apply to the carrying out of and operation of the authorised development under the Order. They broadly follow those set out in the model provisions, where relevant, and where they have been amended this has been done following discussions with the relevant planning authority and/or other statutory consultees. The Order limits fall within the administrative areas of Central Bedfordshire Council and Bedford Borough Council. However, the majority of the Order limits falls within the administrative area of Central Bedfordshire Council. Central Bedfordshire Council and Bedford Borough Council have therefore decided that Central Bedfordshire Council is the appropriate relevant planning authority in respect of the majority of the requirements. Where the requirements cover aspects that are relevant to Bedford Borough Council then the approval of both Central Bedfordshire Council and Bedford Borough Council must be obtained. This has therefore been reflected in the drafting of the requirements. The requirements closely relate to the mitigation set out in the Environmental Statement (Document Reference 6.1, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Environmental Statement to be certified by the Secretary of State](#)).

- 62.1 *Requirement 1:* requires that the authorised development is commenced within five years from the Order coming into force. This broadly follows the model provision.
- 62.2 *Requirement 2:* requirement 2(1) sets out a list of plans in accordance with which the authorised development must be carried out. The requirement also notes that any documents approved pursuant to the requirements themselves will need to be complied with. This is more robust wording than that used in the model provisions but carries the model provision principle through. Requirement 2(2) sets out parameters for key elements of the authorised development and such parameters have been assessed within the Environmental Statement submitted with the application. Requirement 2(3) stipulates that to the extent that design principles for any numbered work are set out in the design principles statement located within the Design and Access Statement (Document Reference 10.2, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the design principles statement to be certified by the Secretary of State](#)), that numbered work must be designed substantially in accordance with the relevant [principle principles](#). Requirement 2(4) requires details of the layout, scale and appearance of key numbered works to be submitted and approved by the relevant planning authorities prior to work commencing on that numbered work (insofar as not already approved under requirement 5 which provides for approval of new highway accesses).
- 62.3 *Requirement 3 and Requirement 4:* secure the landscaping and ecological mitigation proposals set out in the Environmental Statement (Document Reference 6.1, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Environmental Statement to be certified by the Secretary of State](#)) through the submission of a written strategy (containing certain specified details in relation to hard and soft landscaping works and ecological mitigation measures) in respect of numbered works 1, 2, 3A, 4, 5, 6 and 7 for the approval of Central Bedfordshire Council. The strategy that is submitted for approval must be substantially in accordance with the outline landscape and ecological mitigation strategy appended to the Environmental Statement (Appendix 11.4 of Document Reference 6.2, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of Appendix 11.4 to be certified by the Secretary of State](#)). Requirement 4 deals with the implementation and maintenance of landscaping and ecological mitigation measures and requires all landscaping works and ecological mitigation measures to be carried out in accordance with the strategy approved pursuant to requirement 3.
- 62.4 *Requirement 5:* provides that numbered work 1 of the authorised development may not commence until either the Rookery South access road and numbered work 2B have been constructed or the new junction forming part of numbered work 2A and numbered work 2B have been constructed to a standard suitable for construction (so as to enable the carrying out of the construction phase of the authorised development).
- 62.5 Requirement 5(2) secures the submission to the relevant planning authorities (in consultation with the highway authority) of the details of siting, design and layout of any new or modified accesses being created onto the highway as a result of the authorised development. Such works have to be carried out in accordance with the approved details. This follows the principle of the model provision except that it clarifies that where the details have already been provided as part of the application for this Order, they do not need to be provided again. Requirement 5(4) has been included at the request of the relevant planning authority and secures that the visibility splay at the entrance to the Access Road by Green Lane is kept clear during operation. It is only relevant in the event that a new junction is constructed as part of numbered work 2A as, if the new junction pursuant to the Rookery South (Resource Recovery Facility) Order 2011 is constructed then the design for and requirements relating to that junction will be implemented.
- 62.6 *Requirement 6:* secures the submission of details to Central Bedfordshire Council for approval for all proposed permanent and temporary enclosures relating to numbered works 1, 3A, 4, 5, 6 and 7. Once approved, the details are to be implemented and maintained. This requirement broadly follows the model provision.
- 62.7 *Requirement 7:* requires that prior to the commencement of works 1, 2, 3A, 5 and 6, written details of the surface and foul water drainage strategy for the construction and operational phases of the authorised development have been submitted to and approved by Central

Bedfordshire Council. The Requirement secures that the surface and foul water drainage system is to be constructed prior to the commencement of the operational phase of that part of the authorised development.

- 62.8 *Requirement 8*: requires that none of numbered works 1 to 8 may commence until a scheme for that numbered work to deal with the contamination of any land, including groundwater, which is likely to cause significant harm to persons or pollution of controlled waters or the environment has been submitted to and approved in writing by Central Bedfordshire Council. The Requirement details that the scheme must include an investigation and assessment report prepared by a specialist consultant approved by the relevant planning authority to identify the extent of any contamination and the remedial measure required. Remediation must be carried out in accordance with the approved scheme unless otherwise agreed in writing by the relevant planning authority. The requirement also secures that ground conditions and stability and foundation design measures are taken into account in the scheme. This requirement has been worded to reflect discussions with the Environment Agency.
- 62.9 *Requirement 9*: is derived from a model provision and requires that none of numbered works 3A, 4A, 6 and 7(a) may commence until a written scheme of archaeological investigation has been submitted to and approved by Central Bedfordshire Council. The Requirement specifies particular provisions that must be made in the written scheme of archaeological investigation and specifies that the investigation must be carried out in accordance with the approved scheme unless otherwise agreed in writing by Central Bedfordshire Council. This requirement has been worded to reflect discussions with Central Bedfordshire Council.
- 62.10 *Requirement 10*: is not a model provision, although it does incorporate several separate provisions. The requirement secures the submission for approval by the relevant planning authorities of a construction environment management plan (CEMP). The final construction environment management plan must be substantially in accordance with the outline construction environment management plan appended to the Environmental Statement (Appendix 3.2 of Document Reference 6.2-~~(Revision 2)~~, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of Appendix 3.2 to be certified by the Secretary of State](#)). The requirement also specifies particular measures that the final CEMP must contain. All construction works are required to be undertaken in accordance with the approved CEMP.
- 62.11 *Requirement 11*: requires a construction traffic management plan be submitted to the relevant planning authorities prior to the commencement of numbered works 1 to 8. This plan must be substantially in accordance with the outline plan that is appended to the Environmental Statement (Appendix 12.4 of Document Reference 6.2, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of Appendix 12.4 to be certified by the Secretary of State](#)).
- 62.12 *Requirement 12*: requires that prior to final commissioning a noise scheme providing for the control of noise during operation must be submitted to and approved by Central Bedfordshire Council.
- 62.13 *Requirement 13*: requires a construction noise monitoring scheme to be submitted to and approved by Central Bedfordshire Council prior to the commencement of the authorised development.
- 62.14 *Requirement 14*: is based on a model provision and specifies the days on which and hours within which (provision for start up and shut down is made) construction works and the delivery and removal of materials can take place. The requirement does not prevent the undertaker from undertaking these works outside the specified hours but this can only be done with the prior, written approval of Central Bedfordshire Council.
- 62.15 *Requirement 15*: is based on a model provision and requires the submission of a written scheme for the management and mitigation of artificial light emissions for numbered works 1, 3A and 5 for the approval of Central Bedfordshire Council. The written scheme must be



substantially in accordance with the outline lighting strategy. The approved scheme must be implemented and maintained during the operation of the relevant numbered work.

- 62.16 *Requirement 16*: requires the submission to and approval by the relevant planning authorities of a written construction worker travel plan prior to the date of commencement of any numbered work. The construction worker travel plan submitted for approval must be substantially in accordance with certain measures in the travel plan that is appended to the Environmental Statement (Appendix 12.2 of Document Reference 6.2, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of Appendix 12.2 to be certified by the Secretary of State](#)) (save for measures which relate to the operational phase). The construction worker travel plan must be carried out as approved.
- 62.17 *Requirement 17*: specifies that the undertaker is not permitted to operate the generating station comprised in the authorised development for a greater number of hours than that assessed in the environmental statement.
- 62.18 *Requirement 18*: details that within 24 months of the Order land ceasing to be used for the purposes of electricity generation, a scheme for the demolition and removal of numbered work 1 must be submitted to Central Bedfordshire Council for approval. Demolition and removal of numbered work 1 must be implemented in accordance with the approved scheme. Paragraph (3) of this Requirement specifies that on the one year anniversary of the Order land ceasing to be used for the purposes of the electricity generation, the undertaker must notify Central Bedfordshire Council of the same.
- 62.19 *Requirement 19*: is based on a model provision and allows the relevant planning authority to approve amendments to details or plans already specified or approved. This is to allow flexibility, however this flexibility is given strict parameters in that it only applies to the extent assessed in the Environmental Statement (Document Reference 6.1, [with Table 11 in Schedule 14 to the Order confirming the revision number and date of the Environmental Statement to be certified by the Secretary of State](#)). A similar Requirement appeared in the Progress Power (Gas Fired Power Station) Order 2015.
- 62.20 *Requirement 20*: requires the low level restoration scheme baseline works (forming part of the permitted low level restoration scheme for Rookery South Pit (reference number BC/CM/2000/8)) to be completed prior to the commencement of the authorised development.
- 62.21 *Requirement 21*: relates to air safety and requires details of the flue stack to be submitted to the Defence Geographic Centre.
63. *Schedule 3 (Streets subject to permanent and temporary alteration of layout)* sets out the streets to be permanently altered (Part 1) or temporarily altered (Part 2).
64. *Schedule 4 (Streets subject to street works)* sets out the streets that would be subject to street works (including reference to the relevant plan, the location and the specific street).
65. *Schedule 5 (Access)* sets out those parts of accesses that are to be maintained at public expense or by the street authority (Parts 1 and 2 respectively) and those parts of works to restore temporary accesses that are to be maintained by the street authority (Part 3) which are referred to in Article 11 of the Order.
66. *Schedule 6 (Temporary prohibition or restriction of the use of streets)* sets out the streets that will be subject to a temporary prohibition or restriction on the use of that street (including reference to the relevant plan, the location and the extent of the temporary prohibition or restriction on use).
67. *Schedule 7 (Streets to be stopped up for which a substitute is to be provided)* sets out the street that will be subject to a permanent stopping up, contingent on the provision of a substitute street (including reference to the relevant plan, the location and the extent of the stopping up and the location and extent of the substitute street).
68. *Schedule 8 (Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of new restrictions)* modifies existing compensation legislation including

the Land Compensation Act 1973 and the Compulsory Purchase Act 1965, in the case of a compulsory acquisition under the Order of a right by the creation of a new right or the imposition of a restriction.

69. *Schedule 9 (Land of which temporary possession may be taken)* sets out the land temporary possession of which may be taken pursuant to Article 28. It also makes clear the purpose for which such temporary possession may be taken.
70. *Schedule 10 (Protective provisions)* includes draft protective provisions. Part 1 of Schedule 10 protects electricity licence holders, gas transporters and sewerage undertakers (save for National Grid which is protected by Part 3, Eastern Power Networks plc which is protected by Part 4, Anglian Water which is protected by Part 5 and Covanta Rookery South Limited (“**Covanta**”) which is protected by Part 6). Part 2 protects operators of electronic communications code networks.
71. In relation to Part 3, National Grid has confirmed that it agrees to the protective provisions as set out in that part ~~and a~~ A side agreement is in an agreed form and expected to be has also been completed ~~soon~~ between MPL and National Grid.
72. In relation to Part 4, Eastern Power Networks plc has confirmed that it agrees to the protective provisions as set out in that part and a side agreement has been entered into between MPL and Eastern Power Networks.
73. In relation to Part 5, Anglian Water Services Limited has confirmed that it agrees to the protective provisions as set out in that part.
74. In relation to Part 6, Covanta has confirmed that it agrees to these protective provisions. The interaction between the Rookery South (Resource Recovery Facility) Order 2011 and the authorised development is more fully described in the Planning Statement (Document Reference 10.1). In essence, in order to ensure that both the authorised development and the Rookery South Resource Recovery Facility are able to comfortably co-exist, the protective provisions in Part 6 place obligations on to MPL regarding:
- 74.1 obtaining Covanta’s consent (such consent not to be unreasonably withheld) as to the ~~location of the Access Road in the event that MPL implements the authorised development first;~~ written details for numbered work 2A prior to submitting the details to the relevant planning authority in accordance with requirement 5(2) (highway access);
- ~~74.2 consultation with Covanta regarding the location of landscape planting in the event that MPL implements the authorised development first;~~
- 74.2 ~~74.3~~ obtaining Covanta’s consent (such consent not to be unreasonably withheld) before exercising any power under the Order to carry out street works or temporarily stop up any street located within the limits of deviation set out in the Rookery South (Resource Recovery Facility) Order 2011; and
- 74.3 ~~74.4~~ co-operation between MPL and Covanta and their contractors in order to ensure that access is provided to both projects during construction and operation and that the parties work together to discuss construction programming and works where required.
75. Any disputes or differences between MPL and Covanta are to be referred to arbitration. Schedule 13 sets out the rules that are to apply to the arbitration.
76. In relation to Part 7, these provisions have been included to address concerns raised by Network Rail relating to the need to construct anti-dazzle fencing in the event ~~that train operators report of any~~ conflicts between the railway signals and the oncoming headlights of vehicles using the ~~Access Road~~ numbered work 2A and to ensure the safe operation of the Green Lane level crossing during construction.
77. *Schedule 11 (Modifications to and amendments of the Rookery South (Resource Recovery Facility) Order 2011)* comprises an amendment to Article 33 of the Rookery South (Resource Recovery Facility) Order 2011 to also refer to MPL (in addition to Network Rail) and the inclusion

in Schedule 7 of a Part 2, which contains protective provisions to govern the interaction between the authorised development and the development authorised by the Rookery South (Resource Recovery Facility) Order 2011. Covanta has confirmed that it agrees to the drafting contained in these protective provisions, without prejudice to Covanta's position that it considers an interface agreement is more appropriate.

78. As a matter of law it is possible for a DCO to include a provision that changes, or changes the effect of, certain other legislation. Section 120(5) PA 2008 provides that a DCO may:
- “(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order; [and]*
- (b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of a provision of the order or in connection with the order...”*
79. The term ‘statutory provision’ is wide enough to relate to the Rookery South (Resource Recovery Facility) Order 2011 as that term is defined in section 120(6) as being “a provision of an Act or of an instrument made under an Act” (emphasis added). The Rookery South (Resource Recovery Facility) Order 2011 is itself a statutory instrument made under an Act (the Planning Act 2008) and its provisions (i.e. its articles and schedules) are, therefore, ‘statutory provisions’ for the purposes of section 120(5)(a) and section 120(5)(b).
80. The meaning of the words ‘modify’ is wide and encompass both ‘textual amendments’ and ‘non-textual modifications’ (see paragraph 6.9 of the Office of Parliamentary Counsel Drafting Guidance (Dec 2017)).
81. In the same way that the Rookery South (Resource Recovery Facility) Order 2011 contains protective provisions for the benefit of statutory undertaker Network Rail, MPL proposes to modify the Rookery South (Resource Recovery Facility) Order 2011 to protect MPL as a prospective statutory undertaker.
82. The effect of Schedule 11 is to insert a new Part 2 into Schedule 7 to the Rookery South (Resource Recovery Facility) Order 2011 for the protection of MPL and to make the necessary consequential amendments to article 33 to give effect to that insertion. Apart from that, Schedule 11 does not amend any of the articles in the Rookery South (Resource Recovery Facility) Order 2011. The newly inserted protective provisions in Part 2 of Schedule 7 to the Rookery South (Resource Recovery Facility) Order 2011 do, however, modify the effect of the substantive provisions in the Rookery South (Resource Recovery Facility) Order 2011 and do so for the protection of MPL
83. Accordingly, Schedule 11 of the Order makes both ‘textual amendments’ and ‘non-textual modifications’.
84. These protective provisions would broadly do the following:
- 84.1 Paragraph 24 regulates the operation of the powers in the Rookery South (Resource Recovery Facility) Order 2011 and the Order in respect of the Millbrook access road land (a term defined in paragraph 23). Its effect is to restrict the application of Covanta’s powers over this land such as to permit MPL to construct, use and maintain its numbered work 2 (being the access road) in Schedule 1 of the Order. This is a clear modification of those powers, which are not themselves amended, but subject to a ‘non-textual modification’ for the protection of MPL.
- 84.2 Paragraph 25 provides that Covanta shall not exercise its powers under articles 10, 11, 12, 13, 15, 16, 17, 18, 26, 27 and 31 of the Rookery South (Resource Recovery Facility) Order 2011 over the "Millbrook Order land" (which is defined in paragraph 23 and does not encompass any of the land required for the Rookery South Resource Recovery Facility itself) without the prior written consent of MPL. The restrictions on the use of the statutory powers in the Rookery South (Resource Recovery Facility) Order 2011 proposed by Schedule 11 will therefore not apply to the access road or the land required for the NSIP authorised by the Rookery South (Resource Recovery Facility) Order 2011. This is a clear

modification of those powers, which are not themselves amended, but subject to a 'non-textual modification' for the protection of MPL.

- 84.3 Paragraph 26 requires Covanta to exercise its powers in such a way as to co-operate with MPL and use its reasonable endeavours to avoid any conflict between the carrying out of the two projects. This is again a clear modification of Covanta's powers, which are not themselves amended, but subject to a 'non-textual modification' for the protection of MPL.
- 84.4 Paragraph 27 provides that compliance with paragraph 25 shall prevent Covanta from being in breach of a requirement under Part 2 of Schedule 1 to the Rookery South (Resource Recovery Facility) Order 2011 and that it shall be a defence to an offence under section 161 of the Planning Act 2008 to prove that non-compliance with a requirement in Part 2 of Schedule 1 was due to the effect of paragraph 25. Again, this is clearly a non-textual modification' to the effect of those other statutory provisions for the benefit of Covanta.
85. Clauses such as that at paragraph 25 of the protective provisions requiring the consent of another party or undertaker prior to the exercise of powers are commonplace in protective provisions. The Rookery South (Resource Recovery Facility) Order 2011 already contains such a provision for the benefit of Network Rail (see paragraph 4 of Schedule 7). The Rookery South (Resource Recovery Facility) Order 2011 contains an arbitration provision (Article 34), which applies to "Any difference under any provision of this Order, unless otherwise provided for...". Therefore the arbitration of any differences under paragraph 25 of the protective provisions is provided for.
86. The 'textual amendment' of inserting a new Part 2 into Schedule 7 to the Rookery South (Resource Recovery Facility) Order 2011 makes a number of 'non textual modifications' to the effect of the articles in the Rookery South (Resource Recovery Facility) Order 2011. This falls within the concept of 'modification' as explained in the Office of Parliamentary Counsel Drafting Guidance (Dec 2017)) and is therefore permitted pursuant to section 120(5)(a) of the PA 2008.-
87. However, if the Secretary of State considers it more appropriate, the insertion of a new Part 2 into Schedule 7 to the Rookery South (Resource Recovery Facility) Order 2011 can be promoted as an 'amendment' to the 'statutory provisions' in the Rookery South (Resource Recovery Facility) Order 2011 under section 120(5)(b) of the PA 2008. The articles and schedules in the Rookery South (Resource Recovery Facility) Order 2011 are statutory provisions 'of local application' as its powers are limited to a defined area.
88. In order to utilise section 120(5)(b), the Secretary of State must be satisfied that the amendment is necessary or expedient. MPL considers the proposed amendments to be necessary and expedient for the following reasons:
- 88.1 The amendments are necessary to ensure that the authorised development (which is a NSIP) can be constructed, used and maintained without impediment. The Rookery South (Resource Recovery Facility) Order 2011 includes wide ranging statutory powers over a large area of land that is not required to implement the development authorised by the Rookery South (Resource Recovery Facility) Order 2011. The Rookery South (Resource Recovery Facility) Order 2011 was the first DCO made and such wide ranging powers would not be granted today.
- 88.2 If the Rookery South (Resource Recovery Facility) Order 2011 is not regulated, then the Order land would be sterilised, preventing not only the authorised development but also any other potential NSIP or other form of development from being constructed on the land. This is simply not a reasonable position, given the points in paragraphs 88.1 and 88.3 to 88.7.
- 88.3 There is no overlap between the generating station and the waste recovery facility (Work Nos. 1 and 2) in the Rookery South (Resource Recovery Facility) Order 2011 and the generating equipment and substation (Work Nos. 1A, 1B, 1C, 1D and 5) in the Order. This has been accepted by Covanta. Covanta has also confirmed that "*the works proposed in the Draft DCO [i.e. the Order] can be constructed and operated without causing any material adverse impacts to development authorised by the Rookery South Order*".

- 88.4 The restrictions on the use of the statutory powers in the Rookery South (Resource Recovery Facility) Order 2011 proposed by Schedule 11 will not apply to the access road or the land required for the NSIP authorised by the Rookery South (Resource Recovery Facility) Order 2011.
- 88.5 It is unclear from a review of the Rookery South (Resource Recovery Facility) Order 2011 [\(and no explanation was provided during the Examination by Covanta\)](#) precisely why the powers that MPL is seeking to regulate under proposed new paragraph 25 of Schedule 7 of the Rookery South (Resource Recovery Facility) Order 2011 are required by Covanta over the Millbrook Order land (as defined in the proposed new paragraph 23 of Schedule 7 to the Rookery South (Resource Recovery Facility) Order 2011). In any event, even if there is a need for such powers, that need cannot be for the Rookery South generating station or waste recovery facility (i.e. the NSIP) or its electrical connection, rather it would be most likely for mitigation works, such as landscaping. Whatever the “need” is, the regulation of the powers listed in the proposed new paragraph 25 of Schedule 7 of the Rookery South (Resource Recovery Facility) Order 2011 would not impact upon the construction and operation of the Rookery generating station or waste recovery facility or its electrical connection.
- 88.6 The powers have not been removed, rather the exercise of the powers requires MPL’s consent where it effects land required for the authorised development and such consent is not to be unreasonably withheld.
- 88.7 An interface agreement will not automatically bind successors to the Order or the Rookery South (Resource Recovery Facility) Order 2011. An interface agreement does not therefore provide sufficient protection to ensure that the authorised development can be constructed, used and maintained without impediment. Article 7 of the Rookery South (Resource Recovery Facility) Order 2011 permits the transfer of the benefit of all or part of the Rookery South (Resource Recovery Facility) Order 2011 to a third party. Whilst any transferee is automatically bound by the restrictions, liabilities and obligations set out in the Rookery South (Resource Recovery Facility) Order 2011, the transferee is not automatically bound by any obligations contain in a private interface agreement. Therefore, with no privity of contract binding the transferee, any private interface agreement that MPL enters into with Covanta would not be enforceable in respect of the exercise of the powers in the Rookery South (Resource Recovery Facility) Order 2011 by the transferee. This would be unacceptable. Within this context, MPL needs to ensure that there is no potential for the use of the broad statutory powers contained in the Rookery South (Resource Recovery Facility) Order 2011 to hinder or prevent MPL from constructing and/or operating the authorised development. Additionally, if either MPL or Covanta became insolvent and the benefit of either the Order or the Rookery South (Resource Recovery Facility) Order 2011 was transferred to a third party, the new undertaker would not automatically be bound by the provisions of the interface agreement. Neither MPL nor Covanta currently have a proprietary interest in the land that could be restricted to ensure that any interface agreement bound successors in title. MPL therefore strongly considers that an interface agreement alone is not sufficient, given there would be no certainty that the contractual arrangements regulating the statutory provisions of the Rookery South (Resource Recovery Facility) Order 2011 over the Order (as defined in paragraph 23) would be appropriately secured and binding.
89. Accordingly, for the reasons above, MPL considers that the Secretary of State can reasonable conclude that it is necessary and expedient to amend the Rookery South (Resource Recovery Facility) Order 2011 under section 120(5)(b).
90. MPL considers that it is appropriate for the protective provisions in Schedule 11 to contain provision such as that in paragraphs 27 and 28, deeming Covanta not to be in breach of any requirements of the Rookery South (Resource Recovery Facility) Order 2011 in specified circumstances and providing a defence to criminal proceedings under section 161 of the Planning Act 2008. The provisions ensure that Covanta is not put in difficulties as a result of what would otherwise be breaches of requirements, through no fault of its own.
91. The provisions serve related but separate purposes: paragraph 27 mitigates the risk of any non-criminal proceedings (for example, for injunctive relief) being brought in respect of any breach of

the requirements, whilst paragraph 28 provides a defence to criminal proceedings. As such, both are necessary.

92. Whilst there are no precedent provisions in development consent orders modifying earlier instruments (because no order has yet sought to modify an earlier instrument), provisions either deeming a person to have authority or to have complied with a particular requirements placed upon them, or dealing with defences to offences, are commonplace in law more generally. Examples in statute include ~~section 158~~ [section 158](#) (1) & (2) of the Planning Act 2008 and section 48(2) of the Water Resources Act 1991.
93. Closely comparable to the provision proposed in this case is the defence set out in Regulation 40(1) of the Environmental Permitting Regulations 2016. It is noted that this provision is contained in a statutory instrument rather than primary legislation.
94. The specific power to include drafting such as that in paragraphs 27 and 28 in a development consent order derives from the wide powers conferred by section 120 of the Planning Act 2008. Section 120(5)(a) empowers an application to “apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order”. By inserting a new Part into the existing protective provisions secured by the Rookery South Order, MPL is modifying a statutory provision which plainly relates to a matter for which provision may be in the order (i.e. the protection of third party interests as referred to in paragraph 10 of Part 1 to Schedule 5 of the Planning Act 2008).
95. Section 120 of the Planning Act 2008 does not make express provision as to how pre-existing statutory provisions may be modified. MPL considers that the scope of the power to modify includes an ability to modify pre-existing statutory provisions in a way that would have been acceptable at the time the Rookery South (Resource Recovery Facility) Order 2011 was made. This includes adding new provisions that would have fallen within the scope of the original order such as “the imposition or exclusion of obligations or liability in respect of acts or omissions” pursuant to section 120(3) and (4) and paragraph 11 of Part 1 of Schedule 5 to the Planning Act 2008. MPL therefore considers that the provisions at paragraph 27 and 28 of Schedule 11 to the Order are appropriate.
96. By using the Order to modify the Rookery South (Resource Recovery Facility) Order 2011, MPL ensures that in the event that the authorised development is not consented, the Rookery South (Resource Recovery Facility) Order 2011 would not be modified unnecessarily.
97. *Schedule 12 (Procedure for discharge of requirements)* provides a clear procedure for the discharge of requirements by the relevant planning authority. It sets out clear time limits for decisions to be made within (the deemed consent provision is being discussed with the relevant planning authorities on the basis that paragraph (1)(1)(c) allows for the parties to agree an extension to the eight week period, in writing) and makes provision for appeals to be made in the event of a refusal of an application in relation to a requirement or if the relevant planning authority requires further information to be provided in relation to that application.
98. *Schedule 13 (Arbitration rules)* sets out the rules that apply to the arbitration of any dispute between MPL and Covanta pursuant to Schedule 11. These rules have been included to ensure that there is no delay to the resolution of any dispute.

[Schedule 14 \(Documents and plans to be certified\) sets out in a Table all the documents and plans referred to in the Order and which need to be certified by the Secretary of State. The table identifies the relevant revision number and date of the document and plan.](#)