



The Planning Inspectorate
Yr Arolygiaeth Gynllunio

The Planning Act 2008

BOSTON ALTERNATIVE ENERGY FACILITY

Examining Authority's Report
of Findings and Conclusions

and

Recommendation to the Secretary of State for
Business, Energy and Industrial Strategy

Examining Authority

Max Wiltshire BSc, MSc, CEng, MICE

7 July 2022

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OVERVIEW

File Ref: EN010095

The application, dated 23 March 2021, was made under section 37 of the Planning Act 2008 and was received in full by The Planning Inspectorate on 23 March 2021.

The Applicant is Alternative Use Boston Projects Limited.

The application was accepted for examination on 20 April 2021.

The examination of the application began on 7 October 2021 and was completed on 7 April 2022.

The development proposed comprises an application for an Order granting development consent for the construction of a power generation plant in Lincolnshire.

Summary of Recommendation:

The Examining Authority recommends that the Secretary of State should grant development consent in the form of the Order attached only if Habitats Regulations Assessment (HRA) matters can be resolved.

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The Planning
Inspectorate **ERRATA SHEET – Boston Alternative Energy Facility**
Ref. EN010095

Examining authority’s Report of Findings and Conclusions and Recommendation to the Secretary of State for the Department of Business, Energy and Industrial Strategy, dated 07 July 2022

Corrections agreed by the Examining Authority prior to a decision being made

PDF Page No.	Paragraph	Error	Correction
194	Table C2	For disturbance effects on harbour seal of the Wash and North Norfolk Coast SAC, it is stated “No” in the column titled “AEoI alone excluded”	In paragraph 1.8.279 of appendix C on page 287, it is concluded for the same pathway, feature, and site “I am satisfied that this LSE pathway will not result in an AEoI of these European sites from the Proposed Development.”. The table seems to be incorrect, and should instead say “Yes”.
194	Table C2	For collision risk impacts on harbour seal of the Wash and North Norfolk Coast SAC, it is stated “No” in the column titled “derogations engaged and compensatory measures required?”	As the ExA does not exclude AEoI alone, this should say “yes”
35	4.8.10	An empty bullet point; potential missing text.	

1. INTRODUCTION

1.1. INTRODUCTION TO THE EXAMINATION

- 1.1.1. The application for an Order granting development consent for the construction, operation and maintenance of a power generation plant, known as the Boston Alternative Energy Facility in Lincolnshire (the Proposed Development) [APP-001 to APP-125] was submitted by Alternative Use Boston Projects Limited (the Applicant) to the Planning Inspectorate on 23 March 2021 under section (s) 31 of the Planning Act 2008 (as amended) (PA2008) and accepted for Examination under s55 of PA2008 on 20 April 2021 [PD-001].
- 1.1.2. The Proposed Development comprises:
- an energy recovery facility with a capacity to process up to 1,200,000 tonnes of waste refuse derived fuel per calendar year;
 - generators to generate up to 102 MW (gross) of energy;
 - an ash processing building to process bottom ash and boiler ash;
 - two carbon dioxide processing units;
 - a lightweight aggregate manufacturing facility;
 - an electrical substation;
 - a wharf facility to receive waste refuse derived fuel and imported clay and sediment, and export lightweight aggregates;
 - supporting buildings and facilities;
 - supporting infrastructure; and
 - temporary construction compounds.
- 1.1.3. The location of the Proposed Development is shown in the Environmental Statement (ES) [APP-038 to APP-119] and Land Plans, final updated versions of which were received at Deadline (D) 2 [REP2-024]. The site lies within the area administered by Boston Borough Council (BBC) in Lincolnshire and is wholly in England.
- 1.1.4. The legislative tests for whether the Proposed Development is a Nationally Significant Infrastructure Project (NSIP) were considered by the Secretary of State (SoS) for the Ministry of Housing, Communities and Local Government in its decision to accept the Application for Examination in accordance with s55 of PA2008 [PD-001].
- 1.1.5. On this basis, the Planning Inspectorate agreed with the Applicant's view stated in the application form [APP-003] that the Proposed Development is an NSIP as it is a generating station with an energy generating capacity greater than 50 megawatts, is within s15(2) of PA2008, and so requires development consent in accordance with s31 of PA2008. The Proposed Development therefore meets the definition of an NSIP set out in s14(1)(a) and 15(2) of PA2008.

1.2. APPOINTMENT OF THE EXAMINING AUTHORITY

1.2.1. On 30 April 2020, Max Wiltshire was appointed as the Examining Authority (ExA) for the application under s61 and s79 of PA2008 [PD-004].

1.3. THE PERSONS INVOLVED IN THE EXAMINATION

1.3.1. The persons involved in the Examination were:

- Persons who were entitled to be Interested Parties (IPs) because they had made a Relevant Representation (RR) (27 received) or were a statutory party who requested to become an IP.
- Affected Persons (APs) (28 received) who were affected by a compulsory acquisition (CA) and / or temporary possession (TP) proposal made as part of the application and objected to it at any stage in the Examination (no objections received).
- Other Persons, who were invited to participate in the Examination by the ExA because they were either affected by it in some other relevant way or because they had particular expertise or evidence that the ExA considered to be necessary to inform the Examination (there were no Other Persons).

1.4. THE EXAMINATION AND PROCEDURAL DECISIONS

1.4.1. The Examination began on 7 October 2021 and concluded on 7 April 2022.

1.4.2. The principal components of and events around the Examination are summarised below.

The Preliminary Meeting

1.4.3. On 17 August 2021, I wrote to all Interested Parties (IPs), Statutory Parties and Other Persons under Rule 6 of the Infrastructure Planning (Examination Procedure) Rules 2010 (EPR) (The Rule 6 Letter) inviting them to the Preliminary Meeting (PM) [PD-005], outlining:

- the arrangements and agenda for the PM;
- an Initial Assessment of the Principal Issues (IAPI);
- the draft Examination Timetable;
- availability of RRs and application documents; and
- the ExA's procedural decisions.

1.4.4. The Preliminary Meeting (PM) took place virtually in two parts, on 28 September 2021 and 7 October 2021. Audio recordings [EV2-001, EV3-002 and EV3-004] and a note of the meeting [EV3-006] were published on the Planning Inspectorate National Infrastructure website¹.

¹ <https://infrastructure.planninginspectorate.gov.uk/projects/north-east/boston-alternative-energy-facility-baef/?ipcsection=overview>

- 1.4.5. The ExA's procedural decisions and the Examination Timetable took full account of matters raised at the PM. They were provided in the Rule 8 Letter [PD-007], dated 14 October 2021.

Key Procedural Decisions

- 1.4.6. Most of the procedural decisions set out in the Rule 8 Letter related to matters that were confined to the procedure of the Examination and did not bear on the ExA's consideration of the planning merits of the Proposed Development. The decisions can be obtained from the Rule 8 Letter [PD-007] and so there is no need to reiterate them here.

Site Inspections

- 1.4.7. Site Inspections are held in PA2008 Examinations to ensure that the ExA has an adequate understanding of the Proposed Development within its site and surroundings and its physical and spatial effects.

- 1.4.8. Where the matters for inspection can be viewed from the public domain and there are no other considerations such as personal safety or the need for the identification of relevant features or processes, an Unaccompanied Site Inspection (USI) is held. Where an inspection must be made on land requiring consent to access, there are safety or other technical considerations and/ or there are requests made to accompany an inspection, an Accompanied Site Inspection (ASI) is held.

- 1.4.9. I held the following USIs:

- USI1, 6 July 2021 to allow me to gain a general understanding of the Proposed Development [EV1-001]; and
- USI2, 10 January 2022 to allow me to view specific aspects relating to the Proposed Development, and surrounding areas of interest associated with the Proposed Development [EV1-002].

A site note providing a procedural record of each USI can be found in the Examination Library under the above references.

- 1.4.10. I did not hold any ASIs. An ASI was scheduled for 17 November 2021 and notification was given on 26 October 2021 [PD-006] but this was cancelled due to unforeseen circumstances. It was later carried out as USI2 [EV1-002]. The reasons for this were set out in a Rule 17 letter on 19 November 2021 [PD-009].

- 1.4.11. The itinerary for the proposed ASI can be found in the Examination Library under the above reference.

- 1.4.12. I have had regard to the information and impressions obtained during my site inspections in all relevant sections of this Report.

Hearing Processes

- 1.4.13. Hearings are held in PA2008 Examinations in two main circumstances:

- To respond to specific requests from persons who have a right to be heard - in summary terms:
 - where persons affected by compulsory acquisition (CA) and/ or temporary possession (TP) proposals (Affected Persons) object and request to be heard at a Compulsory Acquisition Hearing (CAH); and / or
 - where IPs request to be heard at an Open Floor Hearing (OFH).
 - To address matters where I consider that a hearing is necessary to inquire orally into matters under examination, typically because they are complex, there is an element of contention or disagreement, or the application of relevant law or policy is not clear.
- 1.4.14. I held a number of hearings to ensure the thorough examination of the issues raised by the application. Issue Specific Hearings (ISHs) under s91 of PA2008 were held virtually throughout the Examination.
- 1.4.15. An ISH was held on the subject matter of the draft Development Consent Order (DCO) on:
- ISH1, 23 November 2021 [EV4-003].
- 1.4.16. An ISH was held on the subject matters of Environmental Matters on:
- ISH2, 24 November 2021 [EV4-005 and EV4-006].
- 1.4.17. ISH2 addressed the following subject matters:
- The overarching Environmental Statement (ES);
 - Air Quality;
 - Biodiversity, Ecology and Natural Environment (including Habitats Regulations Assessment (HRA)); and
 - Further questions arising from Deadline (D) 1 and D2 submissions.
- 1.4.18. Compulsory Acquisition Hearings (CAH) were not held under s92 of PA2008.
- 1.4.19. All persons affected by CA and/ or TP proposals (APs) were provided with an opportunity to be heard by notifying me of their wish to speak at a CAH by D1 [PD-007]. I did not receive any requests by the specific deadline. Therefore, the time reserved for a CAH on 26 November 2021 was cancelled as it was not required [PD-006].
- 1.4.20. All IPs were provided with an opportunity to be heard on any important and relevant subject matter that they wished to raise at an OFH by notifying me of their wish to speak at a OFH by D1 [PD-007]. I did not receive any requests by the specific deadline. An OFH was therefore not held under s93 of PA2008.

Written Processes

- 1.4.21. Examination under PA2008 is primarily a written process, in which the ExA has regard to written material forming the application and arising from the Examination. All of this material is recorded in the Examination

Library (Appendix A) and published online. Individual document references to the Examination Library in this report are enclosed in square brackets []. For this reason, this Report does not contain extensive summaries of all documents and representations, although full regard has been had to them in my conclusions. I have considered all important and relevant matters arising from them.

1.4.22. Key written sources are set out further below.

Relevant Representations

1.4.23. Twenty-seven Relevant Representations (RRs) were received by the Planning Inspectorate [RR-001 to RR-027]. All makers of RRs were notified of the Rule 6 Letter and were provided with an opportunity to become involved in the Examination as IPs. All RRs have been fully considered by me. The issues that they raise are considered in Chapters 4 and 5 of this Report.

Written Representations and Other Examination Documents

1.4.24. The Applicant and IPs were provided with opportunities to:

- make Written Representations (WRs) (Deadline (D) 1);
- comment on WRs made by the Applicant and other IPs (D2);
- summarise their oral submissions at hearings in writing (D3);
- make other written submissions requested or accepted by me; and
- comment on documents issued for consultation by me including:
 - A commentary on the draft Development Consent Order (dDCO) [PD-011] published on 11 January 2022 by D5; and
 - A Report on Implications for European Sites (RIES) [PD-014] published on 24 February 2022 by D9.

1.4.25. All WRs and other Examination documents have been fully considered by me. The issues that they raise are considered in later Chapters of this Report.

Local Impact Reports

1.4.26. A Local Impact Report (LIR) is a report made by a relevant local authority giving details of the likely impact of the Proposed Development on the authority's area (or any part of that area) that has been invited and submitted to the ExA under s60 PA2008.

1.4.27. LIRs have been received by the ExA from the following relevant local authorities:

- Boston Borough Council [REP1-047]; and
- Lincolnshire County Council (LCC) [REP1-053].

Comments on the LIRs were received from:

- the Applicant [REP2-007 and REP2-014];
- BBC [REP2-034], and
- Cllr Richard Austin [REP2-055].

The LIRs have been taken fully into account by me in all relevant Chapters of this Report.

Statements of Common Ground

- 1.4.28. A Statement of Common Ground (SoCG) is a statement agreed between the applicant and one or more IPs, recording matters that are agreed between them.
- 1.4.29. By the end of the Examination, the following bodies had concluded SoCGs with the Applicant:
- Natural England [REP10-033];
 - Environment Agency [REP10-032];
 - Anglian Water [REP10-030];
 - Boston Borough Council [REP10-028];
 - Boston and Fosdyke Fishing Society (not agreed by BFFS) [REP10-026];
 - Lincolnshire Wildlife Trust [REP10-024];
 - Marine Management Organisation [REP9-053];
 - Lincolnshire County Council [REP9-049] (I note this was only signed by the Applicant and not LCC. No matters turn on the contents of this SoCG);
 - UK Health Security Agency (UKHSA) (formerly Public Health England) [REP9-047];
 - Historic England [REP9-045];
 - Western Power Distribution (East Midlands) Plc [REP9-041];
 - Royal Society for the Protection of Birds (RSPB) [REP9-039]; and
 - Port of Boston [REP9-037].
- 1.4.30. The SoCG(s) have been taken fully into account by the ExA in all relevant Chapters of this Report.

Written Questions

- 1.4.31. I asked three rounds of written questions.
- First written questions (ExQ1) [PD-008] and procedural decisions were set out in the Rule 8 letter [PD-007], dated 14 October 2021.
 - Second written questions (ExQ2) [PD-010] were issued on 11 January 2022.
 - Third written questions (ExQ3) [PD-013] were issued on 15 February 2022.
- 1.4.32. The following requests for further information and comments under Rule 17 of the EPR were issued on:
- 19 November 2021 [PD-009]. This requested further information from the Applicant and RSPB to enable a USI on publicly accessible land.
 - 30 March 2022 [PD-015]. This requested further information from the Applicant, Natural England, RSPB and Lincolnshire Wildlife Trust, on matters relating to compensation sites and compensation measures,

Golden plover, Seals, the dDCO Schedule 11 and the Applicant's Deadline 9 submissions.

- 1.4.33. All responses to my written questions have been fully considered and taken into account in all relevant Chapters of this Report.

Requests to Join and Leave the Examination

- 1.4.34. There were no requests to join the Examination by persons who were not already IPs at or after the PM. Eastern Inshore Fisheries and Conservation Authority did not request to join the Examination but did make two submissions [REP7-022 and REP9-054] which were accepted at the discretion of the ExA at D7 and D9.
- 1.4.35. During the Examination, as a consequence of discussion at hearings and/or discussions between relevant IPs/APs and the Applicant, the following persons wrote to me to inform it that their issues were settled and their representations were withdrawn:
- Western Power Distribution (East Midlands) PLC, an IP and AP. It set out its full withdrawal of Relevant Representation [RR-002] at D10 [REP10-050] due to reaching satisfactory agreement and commercial terms with the Applicant for the protection of its apparatus.

1.5. ENVIRONMENTAL IMPACT ASSESSMENT

- 1.5.1. The Proposed Development is development for which an Environmental Impact Assessment (EIA) is required (EIA development).
- 1.5.2. On 7 June 2018, the Applicant submitted a Scoping Request to the Secretary of State (SoS) for Housing, Communities and Local Government under Regulation 10 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2263) (as amended) (the EIA Regulations) in order to request an opinion about the scope of the Environmental Statement (ES) to be prepared (a Scoping Opinion). It follows that the Applicant is deemed to have notified the Secretary of State under Regulation 8(1)(b) of the EIA Regulations that it proposes to provide an ES in respect of the Project.
- 1.5.3. In July 2018 the Planning Inspectorate provided a Scoping Opinion [APP-066]. Therefore, in accordance with Regulation 6(2)(a) of the EIA Regulations, the Proposed Development was determined to be EIA development, and the application was accompanied by an ES dated March 2021.
- 1.5.4. On 25 June 2021 the Applicant provided the Planning Inspectorate with certificates confirming that s56 and s59 of PA2008 and Regulation 16 of the EIA Regulations had been complied with [OD-002 and OD-003].
- 1.5.5. Consideration is given to the adequacy of the ES and matters arising from it in later Chapters of this Report.

1.6. HABITATS REGULATIONS ASSESSMENT

1.6.1. The Proposed Development is development for which a Habitats Assessment Regulations (HRA) Report or Reports has been provided.

1.6.2. Consideration is given to the adequacy of the HRA Report, associated information and evidence and the matters arising from it later in this Report.

1.7. UNDERTAKINGS, OBLIGATIONS AND AGREEMENTS

1.7.1. By the end of the Examination, the following bodies had entered into formal undertakings, obligations and / or agreements with the Applicant that are important and relevant considerations for the SoS:

- Final Draft Section 106 Agreement with BBC, LCC and Alchemy Farms Ltd (unsigned) [REP10-018]. In its final Cover Letter [REP10-001] the applicant stated:

"This version of the Section 106 agreement has been agreed by Boston Borough Council and Lincolnshire County Council. The Landowner's consent is subject to (and they have not agreed to be bound until) a separate indemnity is agreed. The Applicant will endeavour to submit the signed final Section 106 Agreement in the next two weeks following agreement of the indemnity with the Landowner."

1.8. OTHER CONSENTS

1.8.1. The application documentation [APP-033] and questions during this Examination have identified the following consents that the Proposed Development has obtained or must obtain, in addition to Development Consent under PA2008. The latest position on these is recorded below.

1.8.2. Where required, the following consents would be obtained outside the DCO by the Contractor once appointed and the detailed design is at a sufficiently advanced stage:

- Electricity Generation Licence. For the operation of the generating station – outstanding;
- Connection Offer Agreement – will be refined during detailed design;
- Environmental Permit. Required for the operation of the Facility – outstanding;
- Building Regulations Approval. Required in respect of buildings and structures forming part of the Facility – outstanding;
- Bespoke permit for discharge to surface water. May be required for discharge of water during the construction phase – outstanding;
- Land Drainage Consent from the Internal Drainage Board to discharge into their controlled network – outstanding;
- Section 61 Consent Control of noise on construction sites – outstanding;
- Flood Risk Activity Permit – outstanding;
- Trade effluent discharge consent – outstanding;

- Permit for Transport of Abnormal Loads – outstanding;
- Notification of Construction Works – outstanding;
- Hazardous Substances Consent – unlikely to be required due to amounts of substances stored on site; and
- Registration as a waste carrier, broker or dealer – outstanding.

1.8.3. In relation to the outstanding consents recorded above, I have considered the available information bearing on these and, without prejudice to the exercise of discretion by future decision-makers, have concluded that there are no apparent impediments to the implementation of the Proposed Development, should the SoS grant the application.

1.9. STRUCTURE OF THIS REPORT

1.9.1. The structure of this report is as follows:

- **Chapter 1** introduces the reader to the application, the processes used to carry out the Examination and make this Report.
- **Chapter 2** describes the site and its surrounds, the Proposed Development, its planning history and that of related projects.
- **Chapter 3** records the legal and policy context for the SoS' decision.
- **Chapter 4** sets out the planning issues that arose from the application and during the Examination.
- **Chapter 5** provides a more detailed response to individual planning issues.
- **Chapter 6** considers effects on European Sites and Habitats Regulations Assessment (HRA).
- **Chapter 7** sets out the balance of planning considerations arising from Chapters 4, 5 and 6 in the light of the factual, legal and policy information in Chapters 1 to 3.
- **Chapter 8** sets out the ExA's examination of Compulsory Acquisition (CA) and Temporary Possession (TP) proposals.
- **Chapter 9** considers the implications of the matters arising from the preceding chapters for the Development Consent Order (DCO).
- **Chapter 10** summarises all relevant considerations and sets out the ExA's recommendation to the SoS.

1.9.2. This report is supported by the following Appendices:

- **Appendix A** – Examination Library
- **Appendix B** – List of Abbreviations
- **Appendix C** – Detailed Findings and Conclusions in Relation to HRA
- **Appendix D** – Considerations for the Secretary of State
- **Appendix E** – the Recommended DCO

2. THE PROPOSAL AND THE SITE

2.1. THE APPLICATION AS MADE

- 2.1.1. The Applicant, Alternative Use Boston Project, applied under s37 of the Planning Act 2008 for an Order granting development consent for what was described as the Boston Alternative Energy Facility (BAEF) [APP-003]. The Proposed Development includes an Energy from Waste (EfW) plant with capacity to generate 102 MW (gross) electricity, grid connection arrangements, wharf facility, ash processing plant and lightweight aggregate manufacturing facility.
- 2.1.2. The draft Development Consent Order (dDCO) includes principal powers that relate to the compulsory acquisition of four plots of land; the interference with or extinguishment of existing rights in land. Temporary possession of land is also proposed. None of the Order land includes any areas of Common Land or public open space. The Statement of Reasons (SoR) explains the need for the Proposed Development and offers a public interest case for the land to be acquired compulsorily [APP-008]. The development contains construction activities which would extend within the marine environment and therefore dDCO makes provision for a Deemed Marine Licence (DML).
- 2.1.3. Chapter 5 of the ES provides a full description of the Proposed Development [APP-043]. The main works are summarised below.

The Application Site

- 2.1.4. Consideration of the details of the Proposed Development and its effects are set out in relevant Chapters below. However, what follows is a broad introductory overview of the application site and the proposal. The Works Plans [APP-013] show the following features.
- 2.1.5. The Proposed Development is located approximately 2 km to the south east of Boston town centre.
- 2.1.6. The Proposed Development covers 26.8 hectares (ha) and is split into two components: the area containing operational infrastructure for the EfW plant (the 'Principal Application Site'); and an area containing habitat mitigation works for wading birds (the 'Habitat Mitigation Area'). The Principal Application Site covers 25.3 ha and is neighboured to the west by the Riverside Industrial Estate and to the east by The Haven, a tidal waterway of the River Witham between The Wash and the town of Boston. The A16 public highway is located approximately 1.3 km to the west. The Habitat Mitigation Area covers 1.5 ha and is located approximately 170 m to the south east of the Principal Application Site, encompassing an area of saltmarsh and small creeks at the margins of The Haven.
- 2.1.7. The Principal Application Site is accessed by road via the Riverside Industrial Estate's existing road network from Nursery Road. Access to the site from the west to Marsh Lane is gained from Bittern Way.

- 2.1.8. The Boston Biomass UK No.3 Ltd gasification plant is located on the eastern boundary of the Principal Application Site. A waste management facility (but having ceased operation at the time of submission) which processed construction and demolition waste is located to the east of Nursery Road and is bounded by the Principal Application Site on all sides (but not included within the proposed Application Site itself).
- 2.1.9. A Household Waste Recycling Centre (HWRC) (built in 2018) is located to the west of the Principal Application Site, south of the junction with Nursery Road/Callen Road. Public access to the HWRC is from Bittern Way.
- 2.1.10. A Waste Transfer Station (WTS) operated by Lincolnshire County Council (LCC) is located to the south of the Principal Application Site, off Slippery Gowt Lane. The WTS receives all of the residual household waste from Boston Borough Council (BBC) and South Holland District Council areas, and some residual household waste from East Lindsey Council area. This waste is bulked and transferred to the North Hykeham energy from waste incineration facility (Lincoln).
- 2.1.11. The Principal Application Site comprises both undeveloped and previously developed land enclosed by a network of drainage ditches and forms part of a wider emerging industrial/commercial area allocated for industrial development in the local plan.
- 2.1.12. The eastern site margins of the Principal Application Site are defined in part by a primary flood defence bank along The Haven. Large and small industrial business units are located to the north, west and south of the site. A 132 kilovolt overhead powerline on pylons traverses the site from north to south and bisects the Application Site.
- 2.1.13. The Habitat Mitigation Area comprises the margins of The Haven, predominantly saltmarsh with several small tidal creeks. A small portion of this area extends below Mean High Water Springs and is therefore covered with estuarine water around high water on some tides.
- 2.1.14. There are several public rights of way that cross the Principal Application Site. The Boston Public Footpath No.14 starts in Boston and follows the A16 (London Road) south over The Haven and merges with the existing footpaths along The Haven (BOST/14/12, BOST/14/2, BOST/14/4, BOST/14/5 and BOST/14/7). Footpaths BOST14/4 and BOST14/5 follow the crest of the primary flood bank that routes in parallel to The Haven. Footpath BOST/14/11 and BOST/14/9, follow the route of Roman Bank (also known as 'Sea Bank'), which bisects the Principal Application Site and then continues south.
- 2.1.15. The part of the Application Site which will accommodate the wharf is approximately 750 m downstream from the existing Port of Boston.
- 2.1.16. The Haven is contained within flood banks (in good condition) which are located within the Principal Application Site at approximately 6.3 m Above Ordnance Datum.

- 2.1.17. The navigation channel is not dredged at this point. The bed level changes over time. Under normal conditions it gradually silts up but erodes when large water volumes are discharged from the sluices upstream.
- 2.1.18. A water main runs across the Principal Application Site from Bittern Way to the north-eastern corner of the Principal Application Site where it then crosses The Haven. Where the water main would cross the Principal Application Site it will be diverted, and this is subject to a separate application to Anglian Water on behalf of the landowner. The signed SoCG with Anglian Water states that an application has already been submitted for diverting the water main [REP10-030]. In its RR [RR-018] AW state:
- "Anglian Water has no in principle objection to the scheme ..."*
- 2.1.19. There are no existing buildings within any part of the Application Site that will require demolition.
- 2.1.20. The Proposed Development is located within National Character Area 46: The Fens (Natural England, 2013), the Reclaimed Saltmarsh Landscape Character Type and Welland to Haven Reclaimed Saltmarsh Landscape Character Area (LCA) (ECUS Ltd, 2009). However, the area is significantly influenced by urban/industrial features including electricity pylons, industrial units, cranes and gantries at the Port of Boston.

The Principal Works

- 2.1.21. The Applicant provides a detailed Description of the Scheme in ES Chapter 5 [APP-043]. A summary of the Proposed Development is provided at 1.1.2. above.

Other works within the Order limits

Mitigation Land

- 2.1.22. Works within the Habitat Mitigation Area are provided in order to mitigate the loss of the roosting and foraging habitats for waders, notably redshank.
- 2.1.23. It is intended that the works will enhance the habitat within this area to improve roosting and foraging habitat. This will involve the creation of shallow pools in the existing marshy habitat; re-profiling the edges of existing pools and a low bank; and, increasing the volume of 'roosting' rocks in the upper intertidal area by translocating rocks to this area that would otherwise be lost due to the development of the wharf.

Construction areas

- 2.1.24. The overall construction period, including commissioning, is assessed as being no greater than 48 months, from 2022 to 2026.

- 2.1.25. It is anticipated that temporary construction laydown areas will be required for the construction of the Proposed Development. These areas are within the Principal Application Site.

Wharf

- 2.1.26. The proposed wharf would replace sections of the current flood defence bank and will comprise the quay wall, the main area of the wharf and an area behind the wharf for associated infrastructure, such as the re-baling facility, workshop, transformer pen and welfare facilities.
- 2.1.27. The wharf facility would include a berthing pocket to allow ships to safely dock without restricting the navigable channel within The Haven.

Footbridge

- 2.1.28. It is proposed that a footbridge will be installed early in the construction programme to allow safe passing for the public over the Principal Application Site. This will be installed on the current public right of way which follows the route of Roman Bank along footpath sections BOST/14/11 and BOST/14/9 where it crosses the Principal Application Site.

2.2. THE APPLICATION AS EXAMINED

- 2.2.1. No material changes, as determined by the ExA, were made to the proposals during the course of the Examination. However, changes were made to plans and documents, to reflect ongoing discussions between the Applicant and other parties, including the ExA.
- 2.2.2. The current status of each document at the close of the Examination can be seen in the Application Guide submitted at Deadline (D)10 [REP10-002].
- 2.2.3. A final version of the dDCO (Revision 6) was submitted at D10 [REP10-004].

2.3. RELEVANT PLANNING HISTORY

- 2.3.1. With regard to planning history The Planning Statement [APP-031] states:
- "Following an online search of the Boston Borough Council and Lincolnshire County Council planning portals, no relevant planning history for the Application Site has been identified."*
- 2.3.2. The Local Impact Reports submitted by BBC [REP1-047] and LCC [REP1-053] do not contain record of any formal planning applications having been made on land within the Order limits.

3. LEGAL AND POLICY CONTEXT

3.1. THE PLANNING ACT 2008 (PA2008)

- 3.1.1. The PA2008 provides different decision-making processes for Nationally Significant Infrastructure Project (NSIP) applications where a relevant National Policy Statement (NPS) has been designated (s104) and where there is no designated NPS (s105). Paragraph 1.1.4 and 1.1.5 above identify that the application is for NSIP development. For reasons expanded upon in paragraph 3.2.1 below, this is an application to which s104 is applicable because it is subject to policy in a designated NPS.
- 3.1.2. s104(3) of PA2008 requires that the Secretary of State (SoS) must decide an application for development consent in accordance with any relevant NPS, except to the extent that the SoS is satisfied that, in summary doing so:
- would lead to the United Kingdom (UK) being in breach of its international obligations;
 - would lead to the SoS being in breach of any duty imposed on him under any enactment;
 - would be unlawful under any enactment;
 - the adverse impact of the proposed development would outweigh its benefits; or
 - fail to comply with any prescribed condition for deciding the application otherwise than in accordance with the NPS.
- 3.1.3. S104(2) of PA2008 sets out the matters to which the SoS must have regard in deciding an application. In summary, the matters set out include:
- any relevant NPSs;
 - any Local Impact Reports (LIR);
 - certain prescribed matters (which in respect of this application are referred to in Section 3.4); and
 - any other matters the SoS considers are both important and relevant to the decision.
- 3.1.4. The remainder of this Chapter addresses the identification and application of a relevant NPS, the LIR and identifies other legal and policy matters that are capable of being important and relevant considerations.

Consultation

Policy Background

- 3.1.5. The Applicant of a proposed NSIP, when meeting their statutory pre-application consultation obligations under s42 of the PA2008 must, where relevant, make diligent inquiries carrying out their own investigations and taking their own legal advice, as appropriate. It is the responsibility of the Applicant to ensure that their pre-application consultation fully accords with the requirements of the PA2008, including associated regulations, and that they have regard to relevant guidance.

3.1.6. All Environmental Impact Assessment (EIA) notification and consultation is made in accordance with the EIA Regulations.

Consultation bodies

3.1.7. Consultation bodies are defined under the EIA Regulations² as:

- a body prescribed under s42(1)(a) of the PA2008 (duty to consult) and listed in column 1 of the table set out at Schedule 1 to the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 where the circumstances set out in column 2 are satisfied in respect of that body;
- each authority that is within s43 of the PA2008 (local authorities for purposes of s42(1)(b)).

Regulation 11(1)(c) bodies

3.1.8. Regulation 11(1)(c) of the EIA Regulations relates to particular person(s) whom the Planning Inspectorate considers *"to be, or to be likely to be, affected by, or to have an interest in" a Proposed Development and who are "unlikely to become aware of the proposed development by means of the measures taken in compliance with Part 5 (applications for orders granting development consent) of the Act"*.

3.1.9. Applicants need to have regard to the requirements imposed under the EIA Regulations with regard to notifying and consulting Regulation 11(1)(c) persons³.

Acceptance stage

3.1.10. During the acceptance stage of this application for development consent the Planning Inspectorate, on behalf of the SoS, determined that the Applicant had complied with Chapter 2 of part 5 of the PA2008 (pre-application procedure).

Applicant's Approach

3.1.11. The Applicant's approach to consultation is detailed in 5.1 Consultation Report [APP-022].

3.1.12. Initially, a two-phase approach to consultation was proposed. A non-statutory consultation ran from 14 September to 19 October 2018 including early engagement with local political stakeholders and prescribed consultees through a series of meetings and briefings, and consultation with the local community near the proposed site through a series of Public Information Days (PIDs). This phase introduced the project and sought feedback on the overall plans.

3.1.13. Phase two, 21 January 2019 to 25 March 2019 – the Statement of Community Consultation (SoCC) was published in January 2019 after a

² Regulation 3(1) of the EIA Regulations

³ EIA Regulations 13, 16, 19, 20, 22 and 24 also refer to notification requirements with regard to Regulation 11(1)(c) persons

period of statutory and community consultation. It proposed that phase two was to comprise of statutory consultation, through consultation with the wider community, all prescribed stakeholders and those with an interest in the land. This phase intended to seek feedback on the Preliminary Environmental Information Report (PEIR), and the revised plans which had been shaped using feedback from phase one. However, the completed PEIR was not available for the dates that were fixed for the proposed PIDs for Phase Two. Consequently, rather than cancelling these events, this second phase provided an update on the project and the initial findings of the PEIR.

- 3.1.14. Due to the change to the initial approach, phase three of pre-application consultation was introduced, held between June to August 2019. The SoCC was updated to incorporate the addition of phase three and republished in May 2019.
- 3.1.15. Phase three, 25 June 2019 to 6 August 2019 – this comprised statutory consultation. This consultation sought feedback on the PEIR and potential mitigation of identified significant impacts, and the proposals as they had developed using input from previous consultation phases. The phase three consultation ran for six weeks.
- 3.1.16. Phase four, 10 August to 10 September 2020 - due to changes to the Proposed Development, a further statutory phase four of pre-application consultation was introduced. This was because a statutory notice had not been published in the Lloyd's List or an appropriate fishing trade journal as part of the phase three consultation. As a result, a notice was published in Lloyd's List and Fishing News Weekly to seek representations from those who may not have had an opportunity to respond earlier.
- 3.1.17. Further details on each of the four phases of consultation, including activity carried out and feedback received, can be found in Chapters 5 - 8 of 5.1 Consultation Report [APP-022].

Issues Arising During the Examination

- 3.1.18. Lincolnshire County Council (LCC) had questioned the s42 consultation on the revised technology for the plant which had changed from gasification to thermal treatment [AoC-003]. I deal with this issue more fully at 5.4 Good Design. I consider that the Applicant's response to this question was satisfactory [REP5-004].

Conclusions

- 3.1.19. I conclude that:
 - the Applicant has ensured that the Pre-application consultation fully accords with the requirements of the PA2008;
 - the EIA notification and consultation has been made in accordance with the EIA Regulations; and
 - taking all these matters into consideration I conclude that consultation matters have been considered appropriately at

acceptance and there is nothing to prevent the SoS from making a decision on the application.

3.2. NATIONAL POLICY STATEMENTS

3.2.1. The National Policy Statements (NPS) relevant to the Proposed Development include:

- The overarching NPS for Energy (NPS EN-1); and
- NPS for Renewable Energy Infrastructure (NPS EN-3).

They have been designated as the NPSs for energy infrastructure, for which the Secretary of State for the Department for Business, Energy and Industrial Strategy (BEIS) is the authority, and remain in force. They are relevant to this application because the Proposed Development comprises the construction of a generating station with an energy generating capacity greater than 50 megawatts. The Proposed Development is therefore a NSIP, and the NPSs provide the primary basis for decisions by the SoS.

The NPS for Ports is referenced in Section 5.8 Navigation but does not have policy implications relevant to the Proposed Development.

3.2.2. The NPSs set out the need for and Government's policies to deliver development of energy NSIPs in England and Wales. They also provide planning guidance for such projects and the basis for the Examination by the Examining Authority (ExA) and decisions by the SoS. Individual policy requirements and tests arising from the NPSs are addressed in Chapter 4 of this Report.

Conclusion

3.2.3. I conclude that this is an application to which s104 is applicable and so benefits from the need established in section 3.4 of NPS EN-1 and NPS EN-3.

Alternatives

3.2.4. Paragraph 4.4 of NPS EN-1 deals with the assessment of alternatives. Paragraph 4.4.2 includes the following requirements:

"applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility".

Applicant's Approach

3.2.5. Schedule 4 of the EIA Regulations requires an Environmental Statement (ES) to provide *"A description of the reasonable alternatives (for example in terms of development design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for*

selecting the chosen option, including a comparison of the environmental effects”.

- 3.2.6. The consideration of alternatives is set out in the ES in Chapter 4: Site Selection and Alternatives [APP-042]. This outlines the main alternatives studied and how the environmental effects have been taken into account.
- 3.2.7. The specific legal requirements have been addressed through the Habitats Regulations Assessment [APP-111] and the Water Framework Directive Assessment [APP-105] contained in the application documents. The sequential test for flood risk is included in the Flood Risk Assessment (FRA) [APP-106].
- 3.2.8. ES Chapter 4 details the rationale behind the selection of the site for the Proposed Development and the approach to determining the proposed technology and the size and scale of the facility. The selection of alternatives primarily relates to the principal application site and the infrastructure to be constructed and operated on this land. Consideration of the Habitat Mitigation Area is covered in section 4.7 of ES Chapter 4 [APP-042].

Issues Arising During the Examination

- 3.2.9. In response to the ExA’s questions and representations made by Interested Parties (IP’s) during the Examination the Applicant submitted documents containing a ‘without prejudice’ derogation case at Deadline (D) 2, including:
- Without Prejudice Habitats Regulations Assessment Derogation Case: Assessment of Alternative Solutions [REP2-011].
- 3.2.10. This issue is covered in detail Chapter 6 Findings and Conclusions in relation to Habitats Regulations Assessment (HRA) at 6.7 Consideration of Alternative Solutions.
- 3.2.11. I am satisfied that no feasible alternative solution exists that would represent a lesser adverse effect than the Proposed Development.

Conclusions

- 3.2.12. I conclude that:
- in accordance with paragraph 4.4.2 of NPS EN-1 the Applicant has included within the ES information about the main alternatives they have studied and provided an indication of the main reasons for choice, taking into account the environmental effects; and
 - taking all these matters into consideration I conclude that alternatives matters have been considered by the applicant and there is nothing to prevent the SoS from making a decision on the application.

Draft NPSs

- 3.2.13. During the Examination the Government undertook a review of the existing NPSs and published drafts for consultation on 6 September 2021. I asked the Applicant to identify any aspects of the Proposed Development which could be affected by wording in the draft NPSs by comparison to the currently designated NPSs in ExQ1 Q12.0.7 [PD-008].
- 3.2.14. The Applicant answered this question by providing a 'Review of Draft Overarching National Policy Statements' [REP2-009]. The Applicant commented that *"Many of the proposed changes to the Energy National Policy Statements are designed to prioritise climate change targets and build more flexibility into the policy framework to reflect the fact that the future energy generation mix will be more complex with energy coming from a wider range of sources. The Applicant acknowledges that the draft ENPSs are not in force yet and as such compliance is not mandatory. However, the Applicant considers that the Facility's compliance with the draft ENPSs further strengthens the case for the consent of the Facility as the ENPSs are reflective of the government's position and attitude to new energy infrastructure."*
- 3.2.15. During the Examination United Kingdom Without Incineration Network (UKWIN) considered that draft NPS EN-3 Paragraphs 2.10.4 and 2.10.5 are of particular relevance to the Proposed Development.
- 3.2.16. The Applicant's position was summarised in Table 1-1 [REP5-009] as follows:

"The Applicant considers that Paragraph 2.10.4 is not a relevant consideration relating to site selection for applicants and is also unnecessary given the provisions retained in EN-3 at Para 2.17.7., for waste combustion generating station proposals to have to demonstrate that they accord with the waste hierarchy and national and local waste management targets, or to demonstrate why a conflict with those targets is nonetheless appropriate. Similarly, Para 2.10.5 is an isolated and otiose inclusion which is not quantified in any way and which appears to place a limit on EfW projects; something which is not considered appropriate in the context of EfW remaining a technology which will play an important role in the UK meeting its climate change commitments."
- 3.2.17. UKWIN's position is summarised [REP7-036], the key differences stated include the following statements:

"UKWIN maintains our position that draft EN-3 Paragraphs 2.10.4 and 2.10.5 are not only "potentially capable of being important and relevant considerations in the decision-making process", but are in fact of particular relevance to the consideration of the proposed Boston proposal. ...

UKWIN maintains our position that the currently adopted NPS statement also provides protections against incineration overcapacity and against proposals that could prejudice the management of waste in line with the Waste Hierarchy."

Conclusions

3.2.18. I conclude that:

- compliance with the draft ENPSs is not mandatory;
- however, the Applicant has appropriately considered the recently consulted draft energy NPSs and adequately demonstrated the Proposed Development's compliance; and
- taking all these matters into consideration I conclude that draft NPSs matters do not weigh against the Order being made.

3.3. UK LEGISLATION

Marine and Coastal Access Act 2009

3.3.1. The Marine and Coastal Access Act 2009 (MCAA2009) is relevant to the decision. The Marine Management Organisation (MMO) is an IP for the Examination of the draft Development Consent Order (dDCO) because the development contains construction activities which would extend within the marine environment. Article 46 of the dDCO makes provision for a Deemed Marine Licence (DML) to be granted on the terms set out in Schedule 9 pursuant to Part 4 of the MCAA2009.

Environmental Legislation

The Wildlife and Countryside Act 1981

3.3.2. The Wildlife and Countryside Act 1981 (WACA1981) is the primary legislation which protects animals, plants, and certain habitats in the UK. It provides for the notification and confirmation of Sites of Special Scientific Interest (SSSI's). In England, these sites are identified for their flora, fauna, geological or physiographical interest by Natural England (NE). WACA1981 contains measures for the protection and management of SSSIs.

3.3.3. The WACA1981 is divided into four parts: Part I relating to the protection of wildlife, Part II relating to designation of SSSIs and other designations, Part III on public rights of way and Part IV containing miscellaneous provisions. If a species protected under Part I is likely to be affected by development, a protected species licence will be required from NE.

3.3.4. The Act is relevant to the application in view of the sites and species identified in the ES [APP-038 to APP-119]. Relevant considerations are discussed in Chapter 4 of this Report.

Natural Environment and Rural Communities Act 2006

3.3.5. The Natural Environment and Rural Communities Act 2006 (NERCA2006) makes provisions for bodies concerned with the natural environment and rural communities, in connection with wildlife sites and SSSIs. It includes a duty that every public body must, in exercising its functions, have regard so far as is consistent with the proper exercising of those functions, to the conservation of biodiversity (the biodiversity duty). In

complying with the biodiversity duty, regard must be had to the United Nations Environment Programme (UNEP) Convention on Biological Diversity of 1992. The Act also requires that, as respects England, the SoS must publish a list of the living organisms and types of habitat which in the SoS's opinion are of principal importance for conserving biodiversity. I have had regard to NERCA2006 and the biodiversity duty in all relevant Chapters of this Report.

Other Environmental Conservation Legislation

3.3.6. The following additional legislation contains relevant provisions that must be met and are considered in this Report:

- Protection of Badgers Act 1992;
- The Environment Act 1995;
- The Hedgerows Regulations 1997;
- Countryside and Rights of Way Act 2000;
- Conservation of Habitats and Species Regulations 2017 as amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019;
- Eels (England and Wales) Regulations 2009; and
- Salmon and Freshwater Fisheries Act 1975.

Environmental Regulation and Other Consents

Climate Change

3.3.7. PA2008 s10(3)(a) requires the SoS to have regard to the desirability of mitigating, and adapting to, climate change in designating an NPS. The Climate Change Act 2008, and The Climate Change Act 2008 (2050 Target Amendment) Order 2019 establishes statutory climate change projections and carbon budgets, which have been taken into account in this report.

Other Specific Statutory Duties

The Public Sector Equality Duty (PSED)

3.3.8. The Equalities Act 2010 established a duty (the public sector equality duty (PSED)) to eliminate discrimination, advance equality of opportunity and foster good relations between persons who share a protected characteristic and persons who do not. The PSED is applicable to the ExA in the conduct of this Examination and reporting and to the SoS in decision-making.

Human Rights Act 1998

3.3.9. The Compulsory Acquisition (CA) of land can engage various relevant Articles under the Human Rights Act 1998. The implications of this are considered later in this Report.

3.4. EUROPEAN LAW AND RELATED UK REGULATIONS

Leaving the European Union

- 3.4.1. The UK left the European Union (EU) as a member state on 31 January 2020. The European Union (Withdrawal Agreement) Act of January 2020 gave effect to the transition arrangements until the 31 December 2020. This provided for EU law to be retained as UK law and also to bring into effect obligations which may come into force during the transition period.
- 3.4.2. This Report has been prepared on the basis of the retained law and references in it to European terms such as 'Habitats' have also been retained for consistency with the examination documents. However, where terminology has changed, for example 'national sites network' (NSN) rather than 'Natura 2000 network', the amended terminology will be utilised where necessary.
- 3.4.3. It will be a matter for the SoS to satisfy itself as to the position on retained law and obligations at the point of decision.

The Habitats Directive

- 3.4.4. The Habitats Directive (92/43/EEC) forms a cornerstone of Europe's nature conservation policy. It is built around two pillars: a network of protected sites, and a system of species protection.
- 3.4.5. Habitat types requiring the designation of Special Areas of Conservation (SAC) are listed in Annex I of the directive. Animal and plant species of interest whose conservation requires the designation of SACs are listed in Annex II. SACs form part of the Natura 2000 ecological network of protected sites. Annex IV lists animal and plants species of interest in need of legal protection. All species listed in these annexes are identified as European Protected Species.

The Birds Directive

- 3.4.6. The Birds Directive (2009/147/EC) is a comprehensive scheme of protection for all wild bird species naturally occurring in the European Union. It requires classification of areas as Special Protection Areas (SPAs) comprising all the most suitable territories for these species. All SPAs form part of the Natura 2000 ecological network.

The Habitats Regulations

- 3.4.7. The Conservation of Habitats and Species Regulations 2017 are the principal means by which the Habitats Directive and the Birds Directive are transposed into the law of England and Wales. Assessment processes taking place pursuant to these regulations are referred to as HRA.
- 3.4.8. These directives and regulations are relevant to this application in view of the presence of The Wash SPA; The Wash and North Norfolk Coast SAC; and The Wash Ramsar site near the Proposed Development [APP-091]. Chapter 5 gives further detailed consideration to these matters.

The Water Framework Directive

- 3.4.9. Directive 2000/60/EC established a framework for community action in the field of water policy (the Water Framework Directive or (WFD)) which includes objectives such as preventing and reducing pollution, environmental protection, improving aquatic ecosystems and mitigating the effects of floods. It provides for the production of River Basin Management Plans to provide for the sustainable management of rivers.
- 3.4.10. The WFD is transposed into law in England and Wales by The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017.
- 3.4.11. The WFD is relevant to the application as the Proposed Development will have effects on the Witham and Wash Inner transitional water bodies [APP-105].

The Air Quality Directive

- 3.4.12. The UK Air Quality Strategy establishes the UK framework for air quality improvements. The UK Air Quality Strategy establishes a long-term vision for improving air quality in the UK and offers options to reduce the risk to health and the environment from air pollution. Individual plans prepared beneath its framework provide more detailed actions to address Limit Value (LV) exceedances for individual pollutants. In turn, these plans set the framework for action in specific local settings where LV exceedances are found, including the designation of Clean Air Zones and more localised Air Quality Management Areas (AQMA) where Air Quality Management Plans are prepared by local authorities.
- 3.4.13. There are two statutory designated AQMAs in Boston, both were declared by Boston Borough Council (BBC) for exceedances of the annual mean air quality Objective for Nitrogen Dioxide (NO₂). The Haven Bridge AQMA is located on the A16 John Adams Way, approximately 1.5 km northwest of the Proposed Development. The Bargate Bridge AQMA is located on the A16 Spilsby Road, approximately 1.8 km north-northwest of the Proposed Development [APP-052].

3.5. OTHER RELEVANT LEGAL PROVISIONS

United Nations Environment Programme (UNEP) Convention on Biological Diversity 1992

- 3.5.1. The UK Government ratified the Convention in June 1994. Responsibility for the UK contribution to the Convention lies with the Department for Environment, Food and Rural Affairs (DEFRA) who promote the integration of biodiversity into policies, projects and programmes within Government and beyond.
- 3.5.2. As required by Regulation 7 of the Infrastructure Planning (Decisions) Regulations 2010, the UNEP Convention on Biological Diversity 1992 has been taken into account in consideration of the likely impacts of the Proposed Development and of appropriate objectives and mechanisms for

mitigation and compensation. The UK EIA and transboundary assessment processes referred to below satisfy with regard to impacts on biodiversity the requirements of Article 14 of the Convention (Impact Assessment and Minimizing Adverse Impacts).

- 3.5.3. This is of relevance to the biodiversity and ecological considerations and landscape and visual impact which are discussed in Chapter 4 of this Report.

3.6. MADE DEVELOPMENT CONSENT ORDERS

- 3.6.1. The dDCO includes wording derived from other made DCOs as explained in the Explanatory Memorandum (EM) [APP-006]. These include:

- the Riverside Energy Park Order 2020;
- the Immingham Open Cycle Gas Turbine Order 2020;
- the A14 Cambridge to Huntingdon Improvement Scheme Order 2016;
- M42 Junction 6 Order 2020; and
- M4 Motorway (Junctions 3 to 12) (Smart Motorway) Order 2016

3.7. TRANSBOUNDARY EFFECTS

- 3.7.1. The project is of local and regional impact. A transboundary screening [APP-063] under Regulation 32 of the 2017 EIA Regulations was undertaken on behalf of the SoS on 18 October 2018 following the Applicant's request for an EIA Scoping Opinion. No significant affects were identified which could impact on another European Economic Area member state in terms of extent, magnitude, probability, duration, frequency or reversibility.

- 3.7.2. The Regulation 32 duty is an ongoing duty, and on that basis, I have considered whether any facts have emerged to change these screening conclusions, up to the point of closure of the Examination. No mechanisms whereby any conceivable transboundary effects could occur emerged.

3.8. OTHER RELEVANT POLICY STATEMENTS

- 3.8.1. The other policies⁴ that give rise to important and relevant considerations for the SoS include the following:

National policies

- National Planning Policy for Waste (October 2014); and
- The East Inshore and Offshore Marine Plans.

Regional policies

- Lincolnshire Minerals and Waste Local Plan: Core Strategy and Development Management Policies (June 2016); and

⁴ List includes policies raised and referred to by the Applicant in its Planning Statement [APP-031]

- Lincolnshire Minerals and Waste Local Plan: Site Allocations (December 2017).

Local policies

- South East Lincolnshire Local Plan 2011 – 2036 (March 2019).

3.9. THE NATIONAL PLANNING POLICY FRAMEWORK

- 3.9.1. The National Planning Policy Framework (NPPF) (July 2021) and its accompanying Planning Practice Guidance (PPG) set out the Government's planning policies for England and how these are expected to be applied, for the purposes of making Development Plans and deciding applications for planning permission and related determinations under the Town and Country Planning Act 1990 (as amended) (TCPA1990). Paragraph 5 of the NPPF makes it clear that it does not contain specific policies for NSIP decision-making as these are determined in accordance with the decision-making framework in the PA2008 as well as relevant NPSs and any other matters which are relevant, which may include the NPPF.

3.10. LOCAL IMPACT REPORTS

- 3.10.1. LIRs have been received from the following relevant local authorities:
- BBC [REP1-047]; and
 - LCC [REP1-053].

3.11. THE DEVELOPMENT PLAN

- 3.11.1. In its LIR BBC [REP1-047] stated that the statutory development plans were: "*... the SELLP (South East Lincolnshire Local Plan) adopted March 2019 and the Lincolnshire County Council Minerals and Waste Local Plan (LCCM&WLP). The Core Strategy and Development Management Policies DPD was adopted in June 2016 and the Site Locations DPD was adopted in December 2017.*"
- 3.11.2. As stated in paragraph 4.1.5 of NPS EN-1, if there is any conflict between the above documents and an NPS then the NPS takes precedence due to the national significance of the infrastructure.

4. THE PLANNING ISSUES

4.1. MAIN ISSUES IN THE EXAMINATION

4.1.1. I made an initial assessment of principal issues (IAPI) based on the application documents and the Relevant Representations (RR), which were provided to all recipients of the Rule 6 letter [PD-005 Annex C]. The IAPI was an item for discussion at the Preliminary Meeting (PM) Part 1 [EV2-001]. No matters were raised at the PM that required amendment to the IAPI.

4.1.2. The remainder of this Chapter addresses the broad planning issues from the IAPI. The IAPI identified the following Principal Issues, they are listed in alphabetical order:

- air quality;
- compulsory acquisition;
- Crown land;
- design, layout and visibility;
- Development Consent Order;
- economic and social impacts;
- habitats, ecology and nature conservation;
- landscape and visual impact;
- navigation;
- noise, lighting, dust and vibration;
- planning policy;
- transport and traffic; and
- water quality and flood protection.

4.1.3. Chapter 5 addresses the relevant planning issues.

4.1.4. Compulsory acquisition, temporary possession and other land or rights (including crown land) are reported on in Chapter 8. The detailed content of the draft Development Consent Order (dDCO) is reported on in Chapter 9.

4.2. ISSUES ARISING IN WRITTEN SUBMISSIONS

4.2.1. Broadly speaking, most of the issues raised by Interested Parties (IP) fell within the IAPI set out above and I go on to consider them further in Chapter 5 of this Report. Additionally, I have also considered assessment of alternative solutions, and climate change adaptation as separate issues.

4.2.2. The Examination processes and events are recorded in Chapter 1 and all relevant issues arising are taken into account in Chapter 5.

4.3. ISSUES ARISING IN LOCAL IMPACT REPORTS

4.3.1. Boston Borough Council's (BBC) Local Impact Report (LIR) sets out the local authority's assessment of the Proposed Development's positive, neutral and negative impacts in relation to the principal topics identified in the ExA's Rule 6 letter, along with its views on the relative importance

of each. No further main issues were raised. BBC is broadly supportive of the proposals.

4.3.2. Lincolnshire County Council's (LCC) LIR reviews the policy context and the main issues covered in the Environmental Statement (ES). No further main issues were raised. LCC is broadly supportive of the proposals.

4.3.3. All relevant individual LIR issues arising are taken into account in Chapter 5.

4.4. CONFORMITY WITH NATIONAL POLICY STATEMENTS

4.4.1. The Proposed Development conforms with the overarching NPS for Energy (NPS EN-1); and the NPS for Renewable Energy Infrastructure (NPS EN-3); because it is a generating station with a capacity greater than 50 megawatts; no other NPSs are relevant.

4.5. CONFORMITY WITH THE MARINE POLICY STATEMENT AND MARINE PLANS

4.5.1. Sections of the Marine Policy Statement (MPS) and East Inshore Plan are relevant to the Proposed Development.

4.6. CONFORMITY WITH DEVELOPMENT PLANS

4.6.1. Relevant DPs and their policies are detailed at paragraph 3.11.

Conclusion

4.6.2. Conformity of the Proposed Development against other relevant policies is detailed in Chapter 5.

4.7. APPLICATION OF OTHER POLICIES

4.7.1. Other relevant policies are detailed in Chapter 3.

Conclusion

4.7.2. Conformity of the Proposed Development against other relevant policies is detailed in Chapter 5.

4.8. ENVIRONMENTAL IMPACT ASSESSMENT

Introduction

4.8.1. As is recorded in Chapter 1 of this Report and for reasons set out there, the application is EIA development. This section records the documents comprised in the ES and changes to those documents provided during the Pre-Examination and Examination stages. It also records the environmental management documents proposed to be used by the Applicant in tandem with DCO provisions to secure the construction and operation of the Proposed Development and the application of mitigation

within the worst case parameters (the Rochdale Envelope) assessed in the ES.

- 4.8.2. This Section concludes on the question of whether the submitted ES and EIA process provide an adequate basis for decision-making by the SoS.

The Submitted ES

- 4.8.3. An ES was submitted with the application. The documents within it can be summarised as follows:

- ES Chapters 1 to 26 [APP-039 to APP-064];
- ES Figures [APP-067 to APP-093];
- ES Appendices [APP-094 to APP-119]; and
- ES Non-Technical Summary [APP-038].

Addendums to the ES

- 4.8.4. Following the submissions and acceptance of the application, amendments were made to the ES comprising the following documents, which include those relating to the Applicant's amendments to the application:

- Chapter 17 Marine and Coastal Ecology and Appendix 17.1 - Habitats Regulations Assessment - Ornithology Addendum [REP1-026];
- Addendum to Environmental Statement Chapter 17 and Appendix 17.1 - Marine Mammals [REP1-027]; and
- Addendum to Chapter 17 and Appendix 17.1 - Benthic Ecology, Fish and Habitats [REP1-028];

Environmental Management Documents

- 4.8.5. The ES is supported by the following existing and intended environmental management documents:

- a Register of Environmental Actions and Commitments (REAC) [APP-125]
- an outline Landscape and Ecological Mitigation Strategy [APP-123]; and
- following approval, the Construction Environmental Management Plan (CEMP).

- 4.8.6. These documents are mostly defined and secured in the Schedule 2 Requirements in the dDCO [REP10-004]; the CEMP is defined and secured in Schedule 9 of the Deemed Marine Licence. Schedule 2 provides that the various schemes, details and plans to be approved must reflect the mitigation measures set out in the REAC which contains all of the mitigation commitments made in the ES. This is the mechanism to ensure that environmental mitigation is secured by the DCO.

- 4.8.7. Schedule 9 further requires that a final version of the CEMP is to be prepared, submitted and approved by the Marine Management Organisation prior to commencement of a licensed activity.

The Applicable Regulations

- 4.8.8. The EIA directive⁵ is transposed into law for Nationally Significant Infrastructure Projects in England and Wales by The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations), which came into force on 16 May 2017. This case is proceeding under the 2017 EIA Regulations.

An Adequate Environmental Impact Assessment Process and Environmental Statement

- 4.8.9. The ES, together with the other information submitted by the Applicant during the Examination, is adequate and meets the requirements under the EIA Regulations. Full account has been taken of all environmental information in the assessment of the application and in the recommendation to the SoS.

Conclusion on the Environmental Impact Assessment and the Environmental Statement

- 4.8.10. Taking the EIA process, and the submitted ES, I conclude as follows:
- The Proposed Development is EIA development.
 - The submitted ES has provided a generally adequate assessment of the environmental effects of the Proposed Development, sufficient to describe the Rochdale Envelope for it and, as referred to within the dDCO, to secure its delivery within that envelope.
 -

4.9. HABITATS REGULATIONS ASSESSMENT

Introduction

- 4.9.1. As is recorded in Chapter 1 of this Report and for reasons set out there, the application is subject to HRA. This section sets out the documents submitted to support the HRA process for this application.

Habitats Regulations Assessment Documentation

- 4.9.2. The application was accompanied by a HRA Report [APP-111], together with screening and integrity matrices. The assessment considered impacts arising from the construction and operation phases of the proposed facility on The Wash Special Protection Area (SPA) and Ramsar site and The Wash and North Norfolk Coast Special Area of Conservation (SAC) together with functionally connected habitats within The Haven.
- 4.9.3. The report concluded:
- that the increased presence of vessels would not have a significant effect on bird numbers, SPA-wide distribution and behaviour and therefore no adverse effect on integrity of the SPA and Ramsar site;

⁵ Directive 85/337/EEC was amended three times and codified by 2011/92/EU, which has itself been amended by 2014/52/EU

- in terms of potential impact for seals from vessel activity no adverse effect on the integrity of The Wash and North Norfolk Coast SAC; and
- no adverse effect due to emissions.

4.9.4. Natural England (NE), the Royal Society for the Protection of Birds (RSPB) and Lincolnshire Wildlife Trust submitted RRs containing comments relevant to HRA matters. NE's submission combined both its Written Representation (WR) and RR.

4.9.5. These conclusions were not supported by NE, the RSPB and other nature conservation bodies. I raised questions and sought advice throughout the course of the Examination. At the close of the Examination these issues were generally not agreed.

4.9.6. Chapter 6 addresses issues relating to the content of the HRA report and submissions on it. Relevant HRA issues that might have implications for the wider planning balance of the decision are identified under the relevant natural environment heading in Chapter 5.

Conclusion on the Habitats Regulations Assessment

4.9.7. Taking the HRA process, the submitted HRA report and related evidence into account, I conclude as follows:

- The HRA evidence submitted to the Examination provides an adequate basis on which the SoS can make an appropriate assessment (AA);
- Consideration of factual matters and conclusions on HRA are reserved to Chapter 6 of this Report.

5. FINDINGS AND CONCLUSIONS IN RELATION TO THE PLANNING ISSUES

5.1. INTRODUCTION

5.1.1. This Chapter contains a number of sections, each of which deals with a significant topic that was assessed during the Examination. These are based upon the Initial Assessment of Principal Issues (IAPI) and other issues which were important and relevant raised during the course of the Examination. The issues are dealt with alphabetically.

5.1.2. The sections all follow a common structure:

- *Introduction*: detailing what issues will be considered in each section;
- *Policy Background*: which identifies the main policy against which the issue has been examined, principally from the NPS EN-1 and NPS EN-3;
- *Applicant's Approach*: which summarises the main features of the approach that the Applicant has undertaken, as described in the application documents;
- *Issues Arising During the Examination*: which identifies matters that arose in the course of the Examination and my reasoning in respect of these issues;
- *Conclusions*: which sets out conclusions on each issue to be carried forward to Chapter 7.

5.1.3. The position between the Applicant and most of the main parties was updated through the course of the Examination in the SoCG; Natural England (NE) submitted its own risk and issues log in place of an interim Statement of Common Ground (SoCG). The Boston and Fosdyke Fishing Society (BFFS) declined to submit a joint SoCG; the Applicant submitted a "not agreed" SoCG at Deadline (D)10. The position at the close of the Examination was summarised at D10 in the Applicant's Statement of Commonality for SoCG [REP10-015].

5.2. AIR QUALITY AND EMISSIONS

Introduction

5.2.1. This section considers the effects of the Proposed Development in relation to air quality, emissions, dust and odour. Matters relating to climate change are separately considered under Section 5.4 climate change adaptation.

5.2.2. In its submission NE noted that impacts from changes in air quality on priority habitats was not included on the list of IAPIs and whilst this may be in part considered under Habitats, Ecology and Nature Conservation; it advised that an update to the air quality assessment is required and relates to this item [PDA-006]. Issues relating to impacts from changes in air quality on priority habitats are dealt with in this chapter. Air quality impacts on the Habitat Mitigation Area are dealt with in Chapter 6 HRA.

5.2.3. In its submission at Procedural Deadline A, United Kingdom Without Incineration Network (UKWIN) [PDA-005] suggested that climate change and technology choice be added to the title of this Principal Issue, and that the following issues be added:

- the impacts associated with the anticipated feedstock composition; and
- emissions from traffic to and from the Proposed Development.

I have dealt with these matters in the following sections:

- climate change: section 5.3;
- technology choice: 5.4 Design, layout and visibility;
- feedstock: 5.12 Waste management; and
- emissions from traffic to and from the Proposed Development: 5.2 Air Quality.

Policy Background

5.2.4. The Overarching National Policy Statement for Energy (NPS EN-1) provides the primary basis for decision making. The policy tests for air quality and emissions are given in NPS EN-1 Section 5.2.

5.2.5. During the construction, operation and decommissioning of energy infrastructure, NPS EN-1 requires the Applicant to describe any significant air emissions, its mitigation and any residual effects generated by the project (NPS EN-1, 5.2.7).

5.2.6. In addition to the air quality legislation referred to in NPS EN-1 the Waste Incineration Directive (WID) is also relevant to waste combustion plant. It sets out specific emission limit values for waste combustion plants (NPS EN-3, 2.5.39).

5.2.7. In reaching a decision the SoS should:

- give air quality considerations substantial weight where a project would lead to a deterioration in air quality, even if this does not lead to any breaches of national air quality limits (NPS EN-1, para 5.2.9); and
- consider whether mitigation measures would be needed both for operational and construction emissions, which could be codified through a construction management plan (NPS EN-1, para 5.2.11).

Applicant's Approach

5.2.8. The Applicant's assessment of air quality matters is primarily contained within Chapter 14 (Air Quality) of the ES [APP-052]. This Chapter is supported by the following reports:

- Appendix 14.1 Construction Phase Dust and Particulate Matter Assessment Methodology;
- Appendix 14.2 Dispersion Modelling Methodology; and
- Appendix 14.3 Tabulated Assessment Results.

5.2.9. The Applicant's air quality assessment included a consideration of the following impacts:

Construction phase:

- Dust and particulate matter emissions;
 - Construction plant exhaust emissions;
 - Road traffic exhaust emissions;
 - Vessel exhaust emissions; and
 - Odour emissions.
- Operational phase:
- Facility stack emissions;
 - Vessel exhaust emissions;
 - Road traffic exhaust emissions; and
 - Odour emissions.

5.2.10. The resulting air quality assessment determined the likely significant effects in respect of air quality impacts associated with the Proposed Development during construction, operation and decommissioning. Where significant effects were identified mitigation measures were proposed. Residual effects were estimated to range between 'not significant' to 'minor adverse'.

5.2.11. I am satisfied that the Applicant's assessment:

- has satisfied the policy tests of NPS EN-1 Section 5.2;
- has assessed any significant air emissions, its mitigation and any residual effects generated by the project; and
- has adequately considered the emission limits for air quality legislation referred to in NPS EN-1 and NPS EN-3.

Issues Arising During the Examination

Air quality and dust management plan

5.2.12. In order to confirm details regarding air quality and dust management, the Applicant was requested to submit an Air Quality and Dust Management Plan to the Examination ExQ1 2.0.11 [PD-008]; an Outline Air Quality and Dust Management Plan was submitted at D3 [REP3-015].

5.2.13. Natural England's Advice on the Outline Air Quality and Dust Management Plan [REP5-014] advised that the Applicant is still to confirm that the dust impact mitigation measures and monitoring would also be in place at Havenside Local Nature Reserve (LNR). In ExQ3 I asked the Applicant to confirm what dust mitigation measures would be in place to ensure no adverse effects on the Havenside LNR ExQ3.2.0.17 [PD-013].

5.2.14. The Applicant confirmed [REP7-007] that mitigation measures and site controls to limit emissions of dust are applied at source, first, to prevent dust generation and second, to prevent transport beyond the site

boundary towards sensitive human and ecological receptors, including Havenside LNR. These dust mitigation measures are secured via the development consent order (DCO).

- 5.2.15. I also asked the Applicant what dust monitoring is proposed at boundary locations to ensure the dust management controls are being effective and to provide quantifiable evidence in the event of complaints, and what measures are proposed to address any concerns ExQ1 2.0.1 [PD-008]. The Applicant responded that dust monitoring and management procedures during the construction period for the Facility would be detailed in the Outline Air Quality and Dust Management Plan, part of the Code of Construction Practice, as secured by Requirement 10(3)(d) of Schedule 2 of the draft DCO. Dust monitoring would involve regular visual checks by construction personnel, automatic monitoring of dust concentrations in the atmosphere at the construction site boundaries and dust deposition monitoring, together with continuous monitoring of meteorological conditions [REP2-008].

ExA reasoning

- 5.2.16. Regarding the air quality and dust management plan I consider that mitigation measures for operational and construction emissions have been adequately identified through the Code of Construction Practice, which is secured via the dDCO.

Environmental permit

- 5.2.17. The issue of securing an Environmental Permit (EP) had been raised by the Environment Agency (EA) from the start of the Examination. I asked the Applicant to provide an update on progress with securing an EP from the EA and explain any requirements for ongoing monitoring of air quality in ExQ1 2.0.14 [PD-008].
- 5.2.18. The Applicant responded that the EP would not be lodged for 'some months'. The Applicant is not proposing monitoring as the air quality impact assessment identified that there would be no significant air quality impacts [REP2-008]. However, it was noted that the EA may want monitoring as part of the EP.
- 5.2.19. The Applicant and EA continued discussions regarding the EP throughout the Examination. In its final SoCG [REP10-032] the EA stated that from a permitting perspective there are three distinct processes within the proposed design: the Energy from Waste (EFW) plant, the Carbon Capture Plant (CCP) and the Lightweight Aggregate (LWA) Plant. The EA acknowledged that both the EFW plant and the CCP plant would utilise recognised technology/process typical of what has been permitted previously in the UK. The CCP plant would utilise a process which is proven on a smaller scale and which permits have been issued, however the exact design would need to be assessed through the EP process. Regarding the LWA plant the EA acknowledged the possible benefits but noted it would be a novel process requiring careful consideration because of the potential environmental impact. The EA would determine the

permits once an application is made. The status of environmental permitting is 'under discussion' in the final SoCG.

- 5.2.20. With regard to heavy metal monitoring the Applicant was asked to confirm if the EP would contain a requirement for monitoring levels of heavy metals, ExQ1 2.0.15 [PD-008].
- 5.2.21. The Applicant responded with details of regular monitoring proposals for heavy metals discharged in the flue gasses from the five stacks as a provision in the EP, along with specification requirements [REP2-008].
- 5.2.22. With regard to a permit for the discharge of surface water the Applicant confirmed that should an EP for a surface water discharge activity be required, either during construction or the operational phases, then this would be applied for through the EP process [REP2-008].
- 5.2.23. I asked the Applicant to provide details regarding an End of Waste Determination/ Quality Protocol which is required by the EA when considering the application for the Environmental Permit ExQ3.3.0.6 [PD-013]. The Applicant confirmed that the process of preparing an application for an End of Waste Determination including consideration of Article 6 of the Waste Framework Directive had begun and provided details of the steps to be carried out [REP7-007].

ExA reasoning

- 5.2.24. In summary I am satisfied that the Applicant and EA have engaged constructively during the Examination regarding permits for the Proposed Development and that the EA would determine the permits once an application is made. I note that the EP regime is distinct from the PA2008 process and the prior approval of EPs is not required for the SoS to determine the DCO. I consider that the approach taken is broadly acceptable to the EA as evidenced by the status of environmental permitting being marked as 'under discussion' in the final SoCG. Therefore, with regard to this matter there is no impediment to the Order being made.

Sensitivity of the saltmarsh

- 5.2.25. Environmental Statement (ES) Chapter 14: Air Quality [APP-052] paragraph 14.4.61 states that nitrogen deposition was quantified at all habitats in locally designated sites within the study area (Table 14.10), *"however, only the deposition at the Havenside Local Nature Reserve (LNR) was compared to a Critical Load value. Similar to The Wash, the saltmarsh was only considered in relation to nitrogen deposition, as the habitat is not sensitive to acid deposition."* NE were asked to confirm that it agrees with the statement by the Applicant that the saltmarsh at The Wash is not sensitive to acid deposition, ExQ1 2.0.4 [PD-008].
- 5.2.26. NE advised *"...that the saltmarsh where the deposition is likely to occur is outside of the designated sites boundaries. However, saltmarsh is a priority habitat and afforded protection under Section 40 of The NERC Act 2006. Therefore all impacts should be avoided, reduced and mitigated to*

this habitat. Natural England advises that this is not agreed as many of our outstanding concerns remain under discussion and further information/evidence is required from the Applicant.” [REP2-041].

- 5.2.27. At D4 an Air Quality Deposition Monitoring Plan was submitted [REP4-016]; this would form part of the Landscape and Ecological Mitigation Strategy. This proposes passive diffusion tubes for the purposes of monitoring ambient concentrations of compounds that contribute to nitrogen deposition for a minimum of 12 months. The aim is to establish one representative monitoring point within each of the discrete areas of saltmarsh and other designated sites.
- 5.2.28. The Applicant was asked to provide further details regarding the number and locations for monitoring effects of deposition on the saltmarsh and designated sites, ExQ2.2.0.4 [PD-010]. The Applicant proposed nine locations [REP5-004].
- 5.2.29. In ExQ3.2.0.4 [PD-013] I asked:
- whether the final numbers and locations of deposition monitoring locations had been agreed with NE and the EA. If not, when is it expected that they would be agreed;
 - if monitoring at these locations identifies significant effects, what measures would the Applicant use to reduce adverse effects and how would these measures be secured; and
 - do NE/EA have any outstanding concerns regarding the Air Quality Deposition Monitoring Plan.
- 5.2.30. The Applicant responded [REP7-007] that significant effects were highly unlikely, however if any were identified a series of proposals to identify the source were given. The Applicant stated that the most appropriate method for securing these measures would be through an Improvement Condition, within the EP, which would be issued by the EA to the facility operator. I consider that this is an appropriate proposal for dealing with this issue.
- 5.2.31. The Applicant has identified on Figure 1 of the Air Quality Deposition Monitoring Plan [REP6-027] where the 9 monitoring locations would be; these locations have not yet been agreed with NE.
- 5.2.32. I note from NE’s cover letter at D10 that because of resource limitations, principally due to COVID complications, NE have been unable to update its advice on air quality issues since D5 [REP10-036].

ExA reasoning

- 5.2.33. I consider that mitigation measures for likely deposition on the saltmarsh have been adequately identified through the Air Quality Deposition Monitoring Plan. If significant effects occur they would be dealt with via the EP process.

Deposition on the saltmarsh

- 5.2.34. ES Chapter 17: Marine and Coastal Ecology [APP-055] paragraphs 17.8.240 – 17.8.246 provide a dialogue on the effects of deposition on saltmarsh habitats and concludes that the overall effect is minor adverse. I asked the Applicant to explain what the predicted effect for the Havenside LNR is, given that this would experience an exceedance of the Critical Load, ExQ1 2.0.6 [PD-008].
- 5.2.35. The Applicant responded that Havenside LNR was used as it is the site which would be most impacted by the Proposed Development. The typical emissions of NO_x and NH₃ from the Facility would result in total deposition below the Critical Load and no significant impacts would occur. At the Environmental Permitting stage of the project, the EA would take into consideration impacts on designated habitats in determining the emission limits which the Facility must comply with during operation. These may be more stringent than the Emission Limit Values which were modelled as part of the ES, and would ensure that Critical Load is not exceeded [REP2-008].
- 5.2.36. The Applicant submitted a 'Comparison of Predicted Critical Load and Level Results Using Maximum Permissible Emissions Limits and Realistic Emission Scenarios' [REP6-035]. The additional information shows that the in-combination Predicted Critical Load at The Wash would be less than 1% of the Critical Load and, therefore, impacts at this location can be considered to be insignificant. Other locations were predicted to experience in-combination Process Contributions (PC) above 1%, with total Predicted Environmental Concentrations (PEC) below the lower Critical Load range. NO_x and NH₃ concentrations were also still predicted to be above 1% at all locations; however, total PECs would be well below the Critical Levels. As such, the Applicant's view is that significant impacts are not expected to occur.
- 5.2.37. In my third written questions ExQ3.2.0.16 [PD-013] I asked whether NE agree with the conclusions provided in the Applicant's document at D6 'Comparison of Predicted Critical Load and Level Results Using Maximum Permissible Emissions Limits and Realistic Emission Scenarios' [REP6-035] that although the in-combination NO_x and NH₃ concentrations remain above 1% of the respective Critical Levels at all sites; due to the total PEC values being well below (i.e., less than 75% of) the Critical Levels, it is considered unlikely that significant effects would occur.

ExA reasoning

- 5.2.38. In my view, the Applicant's submission [REP6-035] assesses realistic emissions, all of which do not increase the PEC, and therefore I consider this issue is no longer outstanding. I consider that the Applicant has demonstrated that it is unlikely significant effects of deposition on the saltmarsh would occur.

Receptor R37

- 5.2.39. The Applicant was asked to clarify whether the effect on receptor R37 would be moderate adverse or minor adverse, given that paragraph 14.8.7 [APP-052] identifies a moderate adverse effect and paragraph 14.13.3 states the overall effects would be minor adverse ExQ1 2.0.5 [PD-008].
- 5.2.40. In response [REP2-008] the Applicant confirmed that the effect of annual average nitrogen dioxide concentrations at receptor R37 during the construction phase for the Facility would be categorised as “moderate adverse”.
- 5.2.41. In the ISH on environmental matters I asked the Applicant to explain if there are any mitigation measures which may be used to reduce impacts on receptor R37. The Applicant explained the assessment and how the effects could be reduced by amending the direction of construction traffic and use of Euro IV vehicles [EV4-005].
- 5.2.42. In ExQ2 [PD-010] I asked the Applicant to provide clarification of the mitigation measures which could be used to reduce adverse effects at receptor R37 and how they would be secured.
- 5.2.43. The Applicant responded [REP5-004] that the impact at receptor R37 arises from temporary increases in road traffic flows on the A52 Liquorpond Street, associated with the peak construction phase of the Facility. The key mitigation measures for this impact are minimising the additional road traffic movements, especially Heavy Goods Vehicles (HGV), along this section of road during the construction phase and ensuring that, as far as is practicable, HGVs are compliant with the current most stringent exhaust emission standards (Euro VI). The mechanism by which this mitigation would be secured is through Requirement 13 of the DCO, [REP10-004], the CTMP. The current oCTMP [APP-121] identifies the A52 Liquorpond Street in Appendix C as a Restricted Route and Paragraph 4.2.3 of the Plan states, “*HGVs will not be permitted to route through the A52 – Liquorpond Street at any time during construction and will need to be diverted to the A17 and A16 to the south.*” This will significantly reduce the presented air quality impact upon receptor R37 as emissions from HGV are substantially greater than those from light vehicles.

ExA reasoning

- 5.2.44. I am satisfied with the mitigation measures proposed to reduce impacts on receptor R37, which are secured through Requirement 13 of the DCO, the CTMP.

Other emissions

- 5.2.45. In order to provide clarity, the Applicant was requested to explain what the ‘other emissions’ are which are highlighted in the draft Code of Construction Practice Q2.0.12 [PD-008].

- 5.2.46. The Applicant responded [REP2-008] that there may also be other emissions of combustion-related air pollutants (nitrogen oxides, carbon monoxide, fine particulate matter) from vehicles, equipment and plant deployed on the site, together with emissions from construction-related road vehicles and ships. These have all been assessed in paragraphs 14.7.3 to 14.7.20 of the updated ES Chapter 14. This would be controlled by the Code of Construction Practice which would also contain an Air Quality and Dust Management Plan. I confirm that the Outline Air Quality and Dust Management Plan [REP3-015] sets out ways in which the 'other emissions' would be monitored.
- 5.2.47. The Applicant was asked to explain how it has taken into account emissions from the vehicles which would not be able to comply with Euro VI and can they confirm if they have assessed the worst case scenario in this instance Q2.0.13 [PD-008].
- 5.2.48. The Applicant responded [REP2-008] that the fleet composition contained in Emissions Factor Toolkit (EFT) version 10.1 was used in both the construction and operation phase road traffic air quality assessments, without modification for the planned use of all-Euro VI HGV by the Facility. Therefore, it is considered that this delivers worst case assessments as it includes a number of pre-Euro VI HGV vehicles within the fleet mix. I am satisfied that the worst case scenario has been assessed.
- 5.2.49. The Applicant was asked to provide details of the assessment conclusions of the significance of effects of predicted concentrations of dioxins and furans. Also to provide details of the quantitative assessment of deposition of pollutants (both dioxins and other pollutants, such as metals). In addition to answer the specific points contained in UK Health Security Agency's (UKHSA) (formerly Public Health England) RR under the heading 'Air Quality' [RR-023] Q2.0.3 [PD-008].
- 5.2.50. The Applicant responded [REP2-008] referencing Appendix 14.5 Human Health Risk Assessment [REP1-022]. The conclusion of these worst-case scenario assessments was that, for the maximally exposed individual, exposure to dioxins, furans, dioxin-like polychlorinated biphenyls and trace metals is not significant.
- 5.2.51. In answer to UKHSA's questions the conclusion of the worst-case scenario assessments was that, for the maximally exposed individual, exposure to dioxins, furans, dioxin-like PCBs and trace metals is not significant [REP2-008]. UKHSA confirmed agreement with this in the SoCG [REP9-047]. I am satisfied that the Applicant has adequately assessed the significance of effects of predicted concentrations of dioxins and furans.
- 5.2.52. The EA, in its RR, note that the application site is located within 250m of a landfill site that is potentially producing landfill gas and that the application does not currently include measures to investigate or mitigate this risk. I asked the Applicant to explain how it had addressed this in the assessments or how it intended to consider this matter Q3.0.15 [PD-

008]. The Applicant responded that R9 (now R10 in the dDCO [REP10-004]) has been amended in the dDCO submitted at D1 to specifically include ground gases, and require that the risk assessment required under sub-paragraph (2) must adopt the source-pathway receptor principle and take into account potential migration of off-site ground gases [REP2-008]. R9 (now R10 in the dDCO [REP10-004]) says that no part of the authorised development would commence until approved by the LPA. I consider this is an acceptable measure to investigate and mitigate this risk.

ExA reasoning

5.2.53. With regard to the other emissions discussed, I consider that the Applicant has provided justifiable responses to each issue.

Conclusions

5.2.54. I conclude that:

- In accordance with paragraph 5.2.7 of NPS EN-1 the ES has adequately described any significant air emissions, their mitigation and any residual effects generated by the Proposed Development;
- that the project is unlikely to lead to a breach of the air quality legislation referred to in NPS EN-1 and NPS EN-3, or a deterioration in air quality; and
- mitigation measures for operational and construction emissions have been adequately identified through:
 - the Code of Construction Practice;
 - the Outline Construction Traffic Management Plan; and
 - the Air Quality Deposition Monitoring Plan.
- Because of resource limitation NE have been unable to update its advice on air quality issues since D5.
- Taking all these matters into consideration I conclude that air quality and emissions matters do not weigh against the Order being made.

5.3. CLIMATE CHANGE ADAPTATION

Introduction

5.3.1. This section considers the effects of the Proposed Development in relation to climate change adaptation.

Policy Background

5.3.2. The policy tests for climate change adaptation are given in NPS EN-1 Section 4.8.

5.3.3. The NPS states at paragraph 4.8.6:

"The IPC should be satisfied that applicants for new energy infrastructure have taken into account the potential impacts of climate change using

the latest UK Climate Projections available at the time the ES was prepared to ensure they have identified appropriate mitigation or adaptation measures. This should cover the estimated lifetime of the new infrastructure.”

Applicant’s Approach

- 5.3.4. ES Chapter 21 Climate Change [APP-059] considers the contribution of the Proposed Development to regional and national greenhouse gas emissions, and its resilience to the projected effects of climate change. The results of the assessment show that net greenhouse gas emissions, accounting for the offset savings elsewhere in the UK energy generation sector, would not result in a significant effect on the UK’s ability to meet its 2050 carbon reduction targets. The climate resilience assessment identified the Proposed Development is not considered to be vulnerable to increased temperature, drought conditions, and surface and tidal flooding.
- 5.3.5. The assessment was undertaken with reference to several data sources, as detailed in Table 21-3 [APP-059]. The UK Climate Projections (UKCP) Database referenced is Met Office, 2018.
- 5.3.6. In addition the following documents are relevant:
- Climate Change - Further Greenhouse Gas Emissions Analysis and Consideration of Waste Composition Scenarios [REP1-019];
 - Comparative Analysis of Greenhouse Gas Emissions from Road and Marine Vessel Transport Options to the Site [REP1-020]; and
 - Technical Note on the Carbon Recovery System [REP4-019].

Issues Arising During the Examination

- 5.3.7. Comments on climate change were raised by LCC [RR-014], BBC [RR-019] and UKWIN [RR-001]. ExQ1 Q12.0.3 [PD-008] also requested details of how the proposed incinerator would not exacerbate climate change. Further comments on climate change were submitted by UKWIN in subsequent submissions throughout the Examination.
- 5.3.8. LCC raised that varying compositions of RDF could affect greenhouse gas emissions and therefore ‘Further Greenhouse Gas Emissions Analysis and Consideration of Waste Composition Scenarios’ [REP1-019] was submitted by the Applicant. LCC also requested details on the carbon capture system (Q12.0.4 in ExQ1 [PD-008] also refers) and in response the Applicant provided a technical note regarding the carbon recovery technology [REP4-019]. Following further responses submitted separately to LCC on remaining concerns, all points on climate change and sustainability were agreed within the final SoCG [REP9-049].
- 5.3.9. In response to a comment from UKWIN, further analysis in document Comparative Analysis of Greenhouse Gas Emissions from Road and Marine Vessel Transport Options to the Site [REP1-020] was submitted, which compared greenhouse gas emissions from transporting the waste via road to marine vessels.

5.3.10. With regards to BBC, the Applicant has been in ongoing discussions throughout the Examination. The SoCG with BBC shows agreement on the topic of climate change [REP10-028].

5.3.11. During the Examination [REP2-057]; [REP3-036] [REP3-037]; UKWIN:

- questioned the approach undertaken in the document 'Climate Change – Further Greenhouse Gas Emissions Analysis and Consideration of Waste Composition Scenarios' [REP1-019] to determine potential greenhouse gas emissions from different waste compositions;
- raised queries as to whether the carbon content ranges would be representative of current or future feedstocks, and the assumed fossil carbon percentages in the scenarios considered in the document 'Climate Change – Further Greenhouse Gas Emissions Analysis and Consideration of Waste Composition Scenarios' [REP1-019]; and
- questioned the approach of comprising potential emission figures from the Proposed Development and other waste treatment pathways such as landfill.

5.3.12. The Applicant's position was summarised in Table 1-1 [REP5-009] as follows:

"The original Greenhouse Gas (GHG) emissions assessment set out in Chapter 21 of the ES Climate Change (APP-059) has been developed as a cautious worst-case scenario, consistent with the best practice approach to Environmental Impact Assessment (EIA). The further sensitivity analyses conducted in the document 'Climate Change – Further Greenhouse Gas Emissions Analysis and Consideration of Waste Composition Scenarios' (REP1-019) were incorporated to provide an "envelope" around this central case assessment. The range of carbon and fossil carbon scenarios considered in the approach were within likely parameters for Refuse Derived Fuel (RDF) feedstocks.

The Applicant notes that RDF feedstocks are likely to have a higher carbon content compared to some other waste streams. Due to uncertainties in the future of waste compositions, and the source of the RDF feedstock, no attempt was made to try and predict RDF compositions in the future. However, it is likely that current and future RDF feedstocks will be within the parameters considered within the additional analysis (REP1-019).

A comparison of potential emissions from a range of waste compositions with respect to carbon and fossil carbon contents was carried out. It is acknowledged that some of the scenarios are not exactly the same, but the analysis presented shows that emissions of greenhouse gases (GHGs) from processing waste at the proposed Facility would be lower under most scenarios than if the waste was sent to landfill."

5.3.13. UKWIN's position is summarised [REP7-036], the key differences stated include the following statements:

"... that the Applicant's main assessment and their further scenarios include assumptions, methodologies and comparators 'counterfactuals')

that significantly underestimate the adverse climate change impacts of the proposal both in terms of direct emissions and emissions compared to alternative fates for the same feedstock.

... that the Applicant's approach is not consistent with the best practice approach to EIA ...

... that it would be reasonable to expect the Applicant to provide a best guess estimate of current and potential future RDF feedstock compositions accompanied by calculations for the impact of this material being incinerated at Boston or alternatively being landfilled both with and without biostabilisation or being sent to a European incinerator with CHP.

... maintains its position that if best practice were applied to the assumptions and methodologies that it would find that the proposed facility could have significantly worse GHG impacts than sending the same waste to landfill, ...".

ExA reasoning

5.3.14. I consider that:

- the approach taken by the Applicant to determine potential greenhouse gas emissions from different waste compositions has been reasonably justified;
- that the assumed carbon content ranges of current or future feedstocks, and the assumed fossil carbon percentages in the scenarios considered has been argued to be reasonably representative; and
- the approach of comprising potential emission figures from the Proposed Development and other waste treatment pathways such as landfill has been reasonably justified by the Applicant.

Conclusions

5.3.15. I conclude that:

- the Applicant has taken into account the potential impacts of climate change using the latest UK Climate Projections available at the time the ES was prepared, covering the estimated lifetime of the Proposed Development;
- all points on climate change were agreed within the final SoCGs with BBC and LCC.
- Taking all these matters into consideration I conclude that climate change adaptation matters do not weigh against the Order being made.

5.4. GOOD DESIGN

Introduction

5.4.1. This section considers the effects of the Proposed Development in relation to design, and technology choice. Landscape and visual impacts are considered at section 5.7.

Policy Background

5.4.2. Section 4.5 of Overarching National Policy Statement for Energy (NPS EN-1) sets out the requirements for “good design”.

5.4.3. Paragraph 4.5.3 states:

“... the IPC should satisfy itself that the applicant has taken into account both functionality (including fitness for purpose and sustainability) and aesthetics (including its contribution to the quality of the area in which it would be located) as far as possible. Whilst the applicant may not have any or very limited choice in the physical appearance of some energy infrastructure, there may be opportunities for the applicant to demonstrate good design in terms of siting relative to existing landscape character, landform and vegetation.”

5.4.4. Paragraph 4.5.4 states:

“ ... applicants should be able to demonstrate in their application documents how the design process was conducted and how the proposed design evolved. ... In considering applications the IPC should take into account the ultimate purpose of the infrastructure and bear in mind the operational, safety and security requirements which the design has to satisfy.”

Applicant’s Approach

5.4.5. The main elements of the Proposed Development are listed at paragraph 1.1.2.

5.4.6. The Applicant’s approach to design is detailed in the Design and Access Statement (DAS) [APP-032]. The application was accompanied by this DAS, and would be a certified document under the DCO.

5.4.7. Section 6 of the DAS outlines the design process. This summarises it as follows:

“The design process has been iterative. The design process has evolved over the pre-application stage. The design process has been shaped by stakeholder input, consultation events (refer to the Consultation Report, document reference 5.1) and the changes in technology from gasification to conventional combustion-based thermal treatment EfW (see Section 6.5.4). This process will continue following development consent being granted and detailed design is finalised.”

5.4.8. In accordance with NPS EN-1, climate change has been considered throughout the design stage of the Proposed Development. The Applicant’s Summary of Case [REP10-019] states:

“The Facility incorporates key design features that will help reduce the amount of greenhouse gas (GHG) emissions associated with its operation compared to the alternatives for the refuse derived fuel (RDF) – export

abroad to northern Europe for energy recovery in incineration facilities; or disposal via landfill. ...

The Facility has been designed so that waste is transported to the Principal Application Site via sea going vessel rather than by road, thereby reducing emissions, whilst expanding multi-modal transport potential. The decision to locate the Facility at the Riverside Industrial Estate was based on development plan allocation, land availability and its location in proximity to The Haven.”

- 5.4.9. Section 6.3 of the DAS considers good design principles including robustness or durability; usefulness or efficiency; and an aesthetically pleasing appearance.

Issues Arising During the Examination

- 5.4.10. Lincolnshire County Council (LCC) had questioned the s42 consultation on the revised technology for the plant which had changed from gasification to thermal treatment [AoC-003]. I asked the Applicant to provide details of the differences between the two processes in ExQ1 (Q1.0.3) [PD-008]. In ExQ2 I also asked the Applicant to answer LCC’s subsequent point that gasification technology was higher up the waste hierarchy than just waste incineration (Q2.1.0.3) [PD-010]. The Applicant stated that it took the decision to move away from gasification due to the proposed supplier of the technology removing themselves from the market, alternative providers at this scale were not identified and a decision to use thermal technology was taken due to the lack of proven gasification technology that would be available at the required scale. The Applicant acknowledged that this solution may be lower on the waste hierarchy but is a proven technology [REP5-004].
- 5.4.11. With regard to allowance having been made for construction of a potential new pylon on the application site; the Applicant confirmed that a potential new pylon has been included within the assessment, specifically in the Landscape and Visual Impact Assessment [APP-047] where the most significant impacts would be anticipated in its response to ExQ1, Q3.0.1 [REP2-008].
- 5.4.12. Regarding defining a minimum stack height to ensure the adequate dispersal of pollutants, the Applicant confirmed that a minimum stack height of 80m would be identified in Requirement 4 of Schedule 2 of the version of the Development consent Order (DCO) to be submitted at Deadline 3, noting that this is the same as the maximum stack height. The assessment of stack height and impacts on air quality within the Environmental Statement (ES) are all based on 80m in its response to ExQ1, Q3.0.3 [REP2-008].
- 5.4.13. With regard to ensuring that the Proposed Development (and its loading, unloading, holding etc) does not result in waste entering the local environment around the site including the river in its response to ExQ1, Q6.0.1 [PD-008], the Applicant confirmed the proposed measures for preventing litter from intended operations [REP2-008]. The Applicant stated that to ensure appropriate measures are secured, the draft DCO

would be updated to include the management of litter from vessels or land derived sources as part of the Marine Pollution Contingency Plan approved under Condition 6 of the draft Deemed Marine Licence (DML). Additionally, the Applicant expects litter reduction and management would also be covered by the Environmental Permit (EP).

Conclusions

5.4.14. I conclude that:

- the applicant has taken into account functionality and aesthetics as far as possible in designing the Proposed Development;
- the applicant has demonstrated good design in terms of siting the Proposed Development; and
- the application documents demonstrate how the design process was conducted and how the design process evolved.
- Taking all these matters into consideration I conclude that good design matters do not weigh against the Order being made.

5.5. HABITATS, ECOLOGY AND NATURE CONSERVATION

Introduction

- 5.5.1. This section considers the effects of the Proposed Development in relation to habitats, ecology and nature conservation; in particular marine and coastal ecology and terrestrial ecology. Findings and conclusions in relations to Habitats Regulations Assessment (HRA) are dealt with in Chapter 6. Issues relating to lighting are covered in this section.
- 5.5.2. In its submission the EA asked that the water quality issues are addressed as part of habitats, ecology and nature conservation instead of as part of flood protection. This was because it considers that water quality issues are more closely connected with the impacts on inter-tidal habitats and hydro-morphological coastal change than with flood risk issues [PDA-003]. No significant water quality issues arose during the Examination; I have dealt briefly with water quality issues relating to the European sites in Chapter 6 HRA.
- 5.5.3. In its submission Natural England (NE) noted that matters relating to public rights of way were not included as a principal matter but given that a diversion of the England Coast Path (ECP) is required to deliver this project, and this is likely to be subject to a separate Habitat Regulations Assessment NE advised that this matter is a priority issue to be addressed [PDA-006]. This matter is dealt with from an HRA perspective in Chapter 6 HRA. The issue of diversion of the ECP from a Public Right of Way (PRoW) perspective is dealt within 5.11 Traffic and Transport.

Policy Background

- 5.5.4. There are various pieces of legislation applicable to terrestrial ecology which is summarised in section 12.2 of Chapter 12 of the Environmental Statement (ES) [APP-050].
- 5.5.5. There are various pieces of legislation applicable to marine and coastal ecology which is summarised in section 17.2 of Chapter 17 of the ES [APP-055].
- 5.5.6. Section 5.3 of National Policy Statement for Energy (NPS EN-1) details the specific requirements for biodiversity and geological conservation. In terms of decision making the following is stated:

"As a general principle development should aim to avoid significant harm to biodiversity and geological conservation interests, including through mitigation and consideration of reasonable alternatives where significant harm cannot be avoided, then appropriate compensation measures should be sought.

In taking decisions, ... ensure that appropriate weight is attached to designated sites of international, national and local importance; protected species; habitats and other species of principal importance for the conservation of biodiversity; and to biodiversity and geological interests within the wider environment."

Applicant's Approach

- 5.5.7. The Applicant's approach to habitats, ecology and nature conservation is contained in in the following of chapters of the ES:

- Chapter 12 - Terrestrial Ecology [APP-050]; and
- Chapter 17 - Marine and Coastal Ecology [APP-055].

- 5.5.8. The Applicant describes the terrestrial ecology assessment methodology as follows:

"This Ecological Impact Assessment (EcIA) has been undertaken in accordance with the Guidelines for Ecological Impact Assessment in the UK and Ireland: Terrestrial, Freshwater and Coastal (3rd Edition) (CIEEM, 2018). These guidelines aim to predict the residual impacts on important ecological features affected, either directly or indirectly by a development, once all the appropriate mitigation has been implemented."

- 5.5.9. All residual impacts during construction and operation were assessed as being not significant (negligible to minor adverse).

- 5.5.10. Several embedded and additional mitigation measures are included, including a commitment for pre-construction surveys for certain protected species. This commitment, as well as other management measures are covered within the Outline Landscape and Ecological Mitigation Strategy (OLEMS) [REP10-014]. The approval and implementation of the final Landscape and Ecological Mitigation Plan (which must be substantially in accordance with the OLEMS) is secured

by Requirement 6 of the Development Consent Order (DCO) [REP10-014].

- 5.5.11. The Applicant describes the marine and coastal ecology assessment methodology as follows:

"Potential effects have been assessed according to the methodology outlined in Chapter 6 Approach to EIA. Worst-case scenarios have been assessed where there is the potential for a range of impact levels to occur. Consideration of the sensitivity of each receptor to the potential effect is a key aspect, drawing on the tolerance to the change and recoverability potential of the receptor, together with the importance of the receptor (e.g. whether the receptor is of international, national, regional or local importance in a conservation context). The magnitude of the potential effect is also important and includes a prediction of the characteristics of the potential impact in terms of the resource affected, frequency and duration of change and the scale of effect. The impact is then assessed to determine the likely significance both before and after mitigation, if necessary."

- 5.5.12. The main potential impacts arising from the construction period are habitat loss/alteration, increased suspended sediment concentrations and increased noise and vibration caused by piling, dredging and ship movements. For the operational phase, the key potential impacts are changes in vessel traffic, speed and movement leading to increased ship wash, underwater noise, visual disturbance to birds and collision risk with marine mammals. Where these impacts were an issue in relation to HRA they are dealt with in Chapter 6. Within the ES, residual effects for both construction and operation are considered to be negligible to minor adverse.
- 5.5.13. The DML (Schedule 9 of the DCO [REP10-004]) requires the Applicant to submit a CEMP to the MMO for approval, following consultation with the PoB, NE (as the relevant statutory nature conservation body) and the EA. This includes a detailed methodology for the excavation and subsequent management of any dredged material and sediment sampling condition.

Issues Arising During the Examination

Scour protection

- 5.5.14. In Q3.0.5 of ExQ1 [PD-008] I asked the Applicant to provide examples of the scour protection methods that are likely to be used in order to avoid loss of habitats and disturbance due to increased water movement. The Applicant responded that depending on river currents it may not be necessary to provide scour protection to the river embankment at either end of the wharf; this would avoid the loss of habitat and is the preferred solution which would be prioritised under any detailed engineering design. If scour protection is absolutely necessary detailed design would include consideration of the various stated design options, with the key design principle being minimisation of habitat loss [REP2-008].

- 5.5.15. NE raised concerns in its RR [RR-021] regarding increased erosion of surrounding habitat from the placement of hard substrata in the location of the berth and the potential increase in suspended sediments. NE does not consider that a 2% change in the tidal prism is insignificant and advises that further assessment is undertaken and evidence presented to demonstrate that the impacts would be negligible.
- 5.5.16. An assessment of habitat loss with incorporation of scour protection is set out in the OLEMS [REP10-014]. Paragraph A1.8.1 states that:
- "Within the Principal Application Site there is approximately 1.54 ha of mudflat and 1 ha of saltmarsh which would be lost due to the direct loss within the footprint of the wharf and the dredge footprint, potential loss due to scour protection (which is a worst-case scenario) and some potential loss which could occur as a result of hydrodynamic changes following dredging."*
- 5.5.17. In its D3 submission the Marine Management Organisation (MMO) acknowledge that the Applicant is hoping not to use scour protection but wish to highlight that if scour protection is required, details of this should be submitted for approval within the method statement. Wording for this should be included within condition 12 (previously 13) of the Deemed Marine Licence (DML) [REP3-027]. I note that condition 12 of the DML requires approval of the CEMP by the MMO following consultation with the harbour authority, the relevant statutory nature conservation body and the EA. The MMO do not raise any further concerns with this matter in the final Statement of Common Ground (SoCG) [REP9-053].

ExA reasoning

- 5.5.18. In conclusion I am satisfied that the Applicant has undertaken an assessment of the worst case scenario of habitat loss associated with use of scour protection, that scour protection may not be required, and that if it is approval is secured in the draft Development Consent Order (dDCO) via a condition of the DML.

Impacts of light spillage on smelt

- 5.5.19. In Q.3.0.14 of ExQ1 [PD-008] I asked the Applicant to identify the location in the application documents of an assessment of light spillage across the estuary during the hours of darkness and potential impacts on the photo-tactic behaviour of any European smelt larvae present .
- 5.5.20. The Applicant responded that lighting impacts on European smelt larvae have not been specifically addressed in the ES. The Outline Lighting Strategy [APP-124] states that lighting would be designed to minimise spillage to The Haven to avoid attracting fish. The lighting to be used would be highly directional and targeted only where needed [REP2-008].
- 5.5.21. In Q3.3.0.14 of ExQ3 [PD-013] I asked NE if it had any outstanding concerns in relation to this matter, but the issue was not raised in its Risk and Issues log [REP10-040] or the SoCG [REP10-033]. I therefore conclude that this issue is resolved.

ExA reasoning

- 5.5.22. I am satisfied that the Applicant's lighting strategy will minimise light spillage and that the statutory body did not raise any concerns with this issue.

Biodiversity net gain

- 5.5.23. The Applicant was asked about biodiversity net gain (BNG) only being sought in connection with the saltmarsh and mudflats habitats and the bird species that use them. The National Planning Policy Framework and South East Lincolnshire Plan seek to secure overall net gain. In Q3.1.1 of ExQ1 [PD-008] the Applicant was asked what net gain is proposed in relation to the terrestrial habitats and the marine environment.
- 5.5.24. The Applicant noted in comments on RRs that the net gain calculations would be provided within the updated OLEMS. The Applicant noted that although net gain is being considered regarding creation/ enhancement of habitats elsewhere it is currently not a statutory requirement for Nationally Significant Infrastructure Projects (NSIP)s [REP1-035].
- 5.5.25. The Applicant submitted an updated OLEMS at D3 [REP3-007]. This included a baseline and post development calculation of BNG. BNG opportunities have been identified (and captured within the calculations) for onshore terrestrial receptors such as but not limited to hedgerow improvements, creation of new hedgerows, landscape planting etc. The proposed terrestrial habitat and biodiversity measures demonstrate a -36.80% total net unit change for habitats units (primarily associated with the loss of arable land) and a +57.27% net change for the hedgerows. The Applicant stated it was continuing to explore other off-site BNG opportunities with BBC, and that an update of the OLEMS would be submitted if suitable opportunities were identified. The marine environment net gain measures being pursued include assisting the restoration of saltmarshes through debris clearance and creation of wetland habitats where possible. NE confirm [REP9-063] that saltmarsh is not a SAC feature but would like to see some created to replace what is lost at the application site.
- 5.5.26. In response to the RSPB's suggestions regarding the beneficial use that could be made of arisings from dredging operations [REP3-033] and Q2.3.1.1 of ExQ2; the Applicant responded that any dredging arisings removed during the construction and operational phase would be used within the Lightweight Aggregate Plant as a binding agent. Given the use of the dredged material within the process no sediment would be available for any other usage [REP5-004].

ExA reasoning

- 5.5.27. I am satisfied that the Applicant has adequately sought to identify and pursue BNG opportunities. In doing so I consider this has satisfied NPS EN-1 paragraph 5.3.15 which states:

"Development proposals provide many opportunities for building-in beneficial biodiversity or geological features as part of good design."

Designated Sites

- 5.5.28. During the course of the Examination additional information was provided on features of the designated sites that may be affected by the Proposed Development. In Q3.3.1.7 of ExQ3 [PD-013], I asked environmental bodies to specify the qualifying features of The Wash SPA, The Wash Ramsar site, The Wash Site of Special Scientific Interest (SSSI), and The Wash and North Norfolk Coast SAC on which they consider there would be an adverse effect alone and those on which they consider that there would be an adverse effect in combination. In answer Annex 1 of NE's cover letter at D8 provides these details [REP8-021]. NE's key concerns for the SSSI are regarding aggregations of non-breeding birds at the mouth of the Haven and the application site, and in combination effects on common seal from Hornsea Project Three marine debris removal licence.
- 5.5.29. The Wash SSSI is the only designated site relevant to this Chapter; the other designed sites are European sites and are considered in Chapter 6 HRA. Key concerns for the other designated European sites were:
- The Wash SPA: the bird assemblage;
 - The Wash Ramsar site: the bird assemblage
 - The Wash and North Norfolk Coast SAC: harbour seal
- 5.5.30. The Wash SSSI is designated for intertidal mudflats and saltmarsh, also for breeding ground for common (harbour) seals; potential impacts on these features were identified.
- 5.5.31. Regarding intertidal mudflats and saltmarsh, potential impacts are habitat loss. The HRA [AS-006] concludes:
- "..the area of mudflat to be lost within Area A is small (1.5 hectare) (para A17.6.17.)*
- ... that mudflat and saltmarsh habitat loss would not constitute an adverse effect on the integrity for the SPA/Ramsar site." (para. A17.6.27).*
- The mudflats and saltmarsh are also priority habitats under the UK Biodiversity Action Plan as required by s41 of the Natural Environment and Rural Communities Act 2006, but are not priority habitats of the European sites. These have been covered in Chapter 6 HRA in relation to loss of habitat used by bird features of the European sites, as they would be lost due to the wharf construction.
- 5.5.32. An assessment of harbour seal numbers is contained in Figure 17.6 [APP-091]; potential impacts are:
- during construction: underwater noise effects from piling and dredging activities impacting on seals using the section of The Haven adjacent to the Proposed Development; disturbance effects from an increase in vessel numbers; disturbance effects at seal haul-out sites from an increase in vessel numbers; and increased risk of collision from an increase in vessel numbers.

- During operation potential impacts are changes in vessel traffic and movements leading to increased collision risk and above ground and underwater noise and visual disturbance and nitrogen oxides (NOx), sulphur dioxide (SO₂), nitrogen, acid and ammonia deposition within the boundaries of the European sites as a result of the emissions from the Proposed Development.

These have been covered in the Chapter 6 HRA.

Conclusions

5.5.33. I conclude that:

- the Applicant has sought to avoid significant harm to biodiversity conservation interests, including through mitigation.
- Taking all these matters into consideration I conclude that habitats, ecology and nature conservation matters do not weigh against the Order being made.

5.6. HISTORIC ENVIRONMENT

Introduction

5.6.1. This section considers the effects of the Proposed Development in relation to the historic environment.

Policy Background

5.6.2. NPS EN-1 Section 5.8 provides the policy background relating to protecting the historic environment and assessing the impact of any new energy infrastructure. It states that in considering the impact of a proposed development on any heritage assets, the decision maker should take into account the nature and significance of the assets and the value they hold.

5.6.3. The Infrastructure Planning (Decisions) Regulations 2010 contains provisions relating to listed buildings, conservation areas and scheduled monuments.

Applicant's approach

5.6.4. The Applicant's approach to historic environment matters is contained in Chapter 8 Cultural Heritage of the [APP-046]. I consider that the Applicant has adequately assessed the nature and significance of the historic environment assets and the value they hold in accordance with the NPS.

5.6.5. There are no designated assets within the redline boundary. The most notable non-designated asset is the 'Roman Bank'. This earthwork passes through the centre of the Principal Application Site and is an approximately 2m high (above surrounding ground level) earthen flood bank, currently undated, although research suggests it could be of Anglo-Saxon origin. A PRoW follows the length of the bank through the Principal Application Site.

- 5.6.6. The results of a geophysical survey conducted in August 2020 indicated the presence of a probable palaeochannel, a possible medieval earthwork or natural slight rise in topography, a possible enclosure ditch, and two locations of possible burning or production activity. Whilst the overall conclusion was that the results do not suggest the presence of significant or extensive archaeological features, there are areas of potential interest. LCC's Relevant Representation [RR-014] noted that *"it would be expected that the geophysical survey be followed by a programme of trial trenching including those parts of the site not covered by the survey"*. However, the Applicant's approach is to undertake the targeted geoarchaeological investigation post consent.
- 5.6.7. Following a cultural heritage meeting with LCC, BBC and HE on 9 August 2021, the Applicant undertook a programme of geoarchaeological investigation, targeted on features identified in the geophysical survey. This was in order to further inform the understanding of sub-surface deposits and the potential for buried archaeological and paleoenvironmental remains. The results of the borehole survey and subsequent deposit modelling are set out in the Geoarchaeological Borehole Survey [REP8-009]. No archaeological remains were encountered in any of the hand dug inspection pits or boreholes during the geoarchaeological survey undertaken in October 2021.

Issues arising

- 5.6.8. Representations submitted by BBC [RR-019] and HE [RR-027] resulted in me asking ExQ1 [PD-008] regarding:
- details of how minor adverse impacts would be mitigated (Q8.0.1);
 - what further archaeological work was planned and what further mitigation measures were proposed (Q8.0.2); and
 - what measures were proposed to limit the impacts of piling.
- 5.6.9. HE requested some changes for the Outline Written Scheme of Investigation (WSI) which were incorporated in the version submitted at D1 [REP1-012], this was agreed within the SoCG at D4 [REP4-007]. The final point on piling methodology was agreed within the SoCG submitted at D6 [REP6-010].
- 5.6.10. Regarding HE's points concerning the DCO; these were agreed by D1 as confirmed in the SoCG [REP1-042].
- 5.6.11. All points were agreed with HE at the close of the Examination as confirmed in the final SoCG [REP9-045].
- 5.6.12. An objection still remains from LCC with regards to a programme of trial trenching being undertaken post consent, however LCC are in agreement with the phased approach proposed which is detailed in the Outline WSI, which was updated and submitted at D9 [REP9-015]. The Applicant's overall summary of case [REP10-019] states at para 4.2.7:

"... The Applicant considers the approach of post-consent trial trenching accords with paragraph 194 of the National Planning Policy Framework

(NPPF) which requires that 'the level of detail should be proportionate to the assets importance'. This paragraph also states that this level of detail should be 'no more than is sufficient to understand the potential impact of the proposal on their significance'. The results of the desk-based assessment and field evaluation in the form of a geophysical survey and targeted borehole investigation have not demonstrated significant potential for archaeological remains to be present and remains of the highest, national importance have not been identified."

5.6.13. Both LCC's and the Applicant's position on this matter are set out within the Final SoCG submitted at D9 [REP9-049]. This point is also "not agreed" within the BBC SoCG submitted at D10 [REP10-028], however it is noted that there is an understanding of respective positions.

5.6.14. I consider that the outstanding matter with the LAs is relatively minor and can be resolved post-consent.

Conclusions

5.6.15. I conclude that:

- I consider that the Applicant has adequately assessed the nature and significance of the historic environment assets and the value they hold in accordance with the NPS;
- agreement has been reached with HE on all points;
- agreement has been reached with the LAs, the remaining point can be resolved post-consent; and
- the provisions within The Infrastructure Planning (Decisions) Regulations 2010 are not applicable.
- Taking all these matters into consideration I conclude that historic environment matters do not weigh against the Order being made.

5.7. LANDSCAPE AND VISUAL

Introduction

5.7.1. This section considers the effects of the Proposed Development in relation to landscape and visual impact. Issues relating to Historic Environment are dealt with at section 5.6.

5.7.2. In its submission Lincolnshire County Council (LCC) requested that Cultural Heritage could sit under this issue with a sub heading of impact on setting of historic assets/cultural heritage [PDB-005]. This is dealt with within section 5.6 Historic Environment.

Policy Background

5.7.3. Section 5.9 of NPS EN-1 requires a Landscape and Visual Impact Assessment (LVIA) to be undertaken as part of an ES. NPS EN-1 outlines generic LVIA methodology and landscape and visual effects that may result from biomass/ waste development.

5.7.4. NPS EN-3 paragraphs 2.5.46-52 provide details of the specific considerations that apply to biomass / waste impacts relating to landscape and visual. The Infrastructure Planning Commission (IPC) (now the Planning Inspectorate) are asked to take into account a range of considerations including:

"2.5.49 Good design that contributes positively to the character and quality of the area will go some way to mitigate adverse landscape/ visual effects. Development proposals should consider the design of the generating station, including the materials to be used in the context of the local landscape.

2.5.50 Mitigation is achieved primarily through aesthetic aspects of site layout and building design including size and external finish and colour of the generating station to minimise intrusive appearance in the landscape as far as engineering requirements permit. The precise architectural treatment will need to be site-specific.

2.5.52 The IPC should expect Applicants to seek to landscape waste/ biomass combustion generating station sites to visually enclose them at low level as seen from surrounding external viewpoints. This makes the scale of the generating station less apparent, and helps conceal its lower level, smaller scale features. Earth bunds and mounds, tree planting or both may be used for softening the visual intrusion and may also help to attenuate noise from site activities."

Applicant's Approach

5.7.5. The Applicant's approach to landscape and visual impact is contained in Chapter 9 Landscape and Visual Impact Assessment (LVIA) of the ES [APP-047].

5.7.6. The Applicant describes the assessment methodology as comprising the following stages in para 9.4.1 [REP1-004]:

- *"Establishment of the baseline landscape and visual conditions within the Study Area, including reference to any existing landscape character assessments that may be available;*
- *Identification of potential landscape and visual receptors and assessment of their sensitivity to change;*
- *Commentary (and specific assessment where appropriate) of the effects of the Facility on receptors at the construction stage; and*
- *Assessment of the effects of the Facility after completion. Post completion stages to be assessed are at year 1 and at year 15. At year 1, the Facility would be complete but with no additional benefit of mitigation planting. At year 15, the Facility would be complete, and the effects of established mitigation planting can be taken into account."*

5.7.7. The Applicant concludes, page v [REP1-004]:

"Given the existing industrial context of the Principal Application Site and surrounding area the Facility will not cause significant effects to landscape character. Effects are predicted to be minor adverse during

construction and operation. There will be no significant physical landscape effects.

Effects to views during the construction stage are predicted to be the worst case scenario. Views from footpaths along the eastern bank of The Haven will be most affected with close range, open views to construction of the wharf and LWA Plant being most prominent. Effects may be moderate major adverse. Views from certain residential properties to the west of the Principal Application Site are predicted to be moderate adverse, with views of tall cranes and emerging buildings. Visual effects during operation will be slightly less adverse, although close range views of the Facility from The Haven corridor to the east will remain moderate adverse.

Mitigation measures to reduce landscape and visual effects will include additional tree and shrub planting within existing, established belts of vegetation and planting of new belts of dense tree, shrubs and hedgerow around the Facility. Long term establishment of tree and shrub planting will provide some screening to lower sections of buildings in certain views but will not reach sufficient height to fully screen tall buildings and structures.”

- 5.7.8. I conclude that the Applicant has complied with the requirements of NPS EN-1 in undertaking a LVIA as part of the ES.
- 5.7.9. An Outline Landscape and Ecological Mitigation Strategy (OLEMS) has been provided [REP10-014] which sets out the objectives behind mitigation and landscape proposals for the application site and outlines implementation techniques for landscape planting. The approval and implementation of the final Landscape and Ecological Mitigation Plan (which must be substantially in accordance with the OLEMS) is secured by Requirement 6 of the DCO [REP10-004].
- 5.7.10. In submitting an OLEMS (secured in the DCO) setting out objectives and outlining implementation techniques, I conclude that the Applicant has complied with the requirements of NPS EN-3 in demonstrating good design principles and setting out mitigation and landscape proposals to mitigate adverse landscape/visual effects.

Issues Arising During the Examination

Emissions stacks

- 5.7.11. The EA noted in its relevant representation [RR-013] that further information was required in terms of visible plumes from the stacks. In Q3.0.10 of ExQ1 [PD-008] I asked the Applicant to provide a photomontage that depicts the visible plumes that would be produced. Further information was provided within documents submitted at Deadlines 1 and 2 including an updated Chapter 9 LVIA [REP1-004] and Chapter 14 Air Quality [REP1-006] and updated photomontages [REP2-017] [REP2-019]. Following provision of this further information the EA confirmed its agreement of the LVIA within the SoCG submitted at Deadline 4 [REP4-005].

St Botolph's church

- 5.7.12. In Q9.0.1 of ExQ1 [PD-008] I asked the Applicant to confirm the methodology for assessing the impact of the Proposed Development on St Botolph's Church.
- 5.7.13. Regarding not obstructing a public view of St Botolph's Church or challenging its visual dominance I asked BBC whether the stack heights were acceptable in Q9.0.2 [PD-008]. In its response [REP3-024] BBC expressed residual concerns and stated "*... that there are mechanisms to ensure that the wider direct and in-direct residual effects. ... Boston Borough Council has proposed through its Relevant Representation how this could be achieved, ...*". In Q2.9.0.2 of ExQ2 [PD-010] I asked the Applicant to update the Examination on progress with this matter.
- 5.7.14. The final SoCG with BBC [REP10-028] states that BBC "*... has reviewed the responses to date on this point. We note the steps taken by AUBP to address and that there are proposals for mitigation being presented. It is likely that this matter will be agreed by a subsequent deadline once further submissions have been lodged formally, and a S106 concluded*". I am satisfied that adequate mitigation proposals have been developed. I note that all other matters in this SoCG are agreed.

Conclusions

- 5.7.15. I conclude that:
- an acceptable LVIA has been undertaken as part of the ES; and
 - in submitting an OLEMS (secured in the DCO) I conclude that the Applicant has demonstrated good design principles and set out mitigation and landscape proposals to mitigate adverse landscape/visual effects;
 - Taking all these matters into consideration I conclude that landscape and visual matters do not weigh against the Order being made.

5.8. NAVIGATION

Introduction

- 5.8.1. This section considers the effects of the Proposed Development in relation to navigation matters, including fishing matters.

Policy Background

- 5.8.2. The NPS for Ports does not provide any guidance or policy with regard to assessment of impacts to commercial navigation. It specifies thresholds for Port projects that would be considered NSIPs on their own merits. The wharf requirements for the Proposed Development do not meet the thresholds. Consequently, the Applicant determined the policy implications for the Proposed Development would instead be directed by the policies identified below, para 18.2 [APP-056]:

- The Marine Policy Statement (MPS)

The Applicant stated that *"The impact assessment which will be undertaken within the ES in consultation with the Port of Boston will address the requirements of the MPS."* Para 18.2.9 [APP-056]. The Port of Boston (PoB) is the Statutory Harbour Authority (SHA) for The Haven and out to the harbour limits within The Wash and can therefore be considered a key Interested Party.

- The East Marine Plan
- Local Planning Policy.

5.8.3. I consider that ES Chapter 18 Navigation Issues [APP-056] details the appropriate navigational policies relevant to the Proposed Development.

Applicant's Approach

5.8.4. The potential construction and operational impacts on navigation of all users affected by the Proposed Development (notably, impacts within The Haven as a confined water space) were assessed and the findings presented in ES Chapter 18 Navigation Issues [APP-056]. Impacts to commercial and recreational vessels were determined to not be of significance and manageable by the PoB. Residual impacts to the fishing fleet (represented by the Boston and Fosdyke Fishing Society (BFFS)) were however identified and mitigation through the implementation of a Navigation Management Plan (NMP) was identified and committed to.

5.8.5. As SHA the Applicant has sought the PoB's views on the ability to safely and efficiently manage the additional traffic that would arise as a result of the construction and operation of the Proposed Development.

5.8.6. The Applicant worked closely with the PoB to determine the timing and content of a draft Navigation Risk Assessment (NRA) [REP6-022] and a NMP (NMP Template submitted [REP8-011]), and a Pilotage Statement [REP6-036], for managing navigational matters for all users of the Haven.

5.8.7. The BFFS was the only party which sought to question the ability of the PoB to manage navigation within its jurisdiction (including its SHA obligations), objecting to the Proposed Development on the grounds that the increase in operational vessel traffic would have a *"considerable and significantly detrimental impact ... upon the working fishermen"* [RR-010].

5.8.8. The process to ensure relevant tasks are carried out has been defined within the NMP template [REP8-011], a DCO certified document, which would ensure the draft NRA [REP6-022] is further developed to include consideration of all users and management measures are put in place within the NMP to ensure safety of navigation is maintained. This would be achieved through a consultative process to include all IPs, with approval of the final NRA by both the PoB and the MMO.

Issues Arising During the Examination

Interested Parties

- 5.8.9. A number of IPs and users of the Haven were identified in application documents and during the course of the Examination. I sought the views of the IPs in ExQ1, ExQ2 and ExQ3. The main IPs were:
- BFFS;
 - Eastern Inshore Fisheries and Conservation Authority (EIFCA);
 - Inland Waterways Association (IWA)
 - MCA;
 - MMO;
 - PoB; and
 - Royal Yachting Association.
- 5.8.10. The concerns of the BFFS are dealt with under a separate heading below.
- 5.8.11. EIFCA responded to ExQ3 Q3.10.0.25 [REP7-022] regarding consultation by the Applicant and whether it had any concerns. The Applicant commented on the EIFCA's response at D8 [REP8-014]. In summary the EIFCA have requested that the NRA should be cognisant of the East Inshore and Offshore Marine Plan insofar as impacts from development on fishing activity or on access to fishing grounds should be avoided, minimised or mitigated. The Applicant confirmed that the purpose of the NMP would be to ensure measures are in place to effectively and safely manage vessel movements on the Haven.
- 5.8.12. The IWA submitted a relevant representation [RR-020]. A meeting was held with the local representative on the 10 February 2022 during which the Applicant provided additional information on the Proposed Development. No concerns relating to the Proposed Development were raised and it is noted that the IWA has not submitted any further representation to the Examination.
- 5.8.13. In response to ExQ3 Q3.10.0.24 requesting details of the MCA's response to the NRA; the MCA stated [REP7-025] as the Proposed Development is within the jurisdiction of the PoB, the PoB, as the Statutory Harbour Authority, is responsible for maintaining the safety of navigation. As such, the MCA stated it had *"no concerns to raise at this time with regards to the 'Navigational Issues' document, or the NRA, on the understanding that the Port of Boston are consulted on the acceptability of the assessment."* The MCA also confirms that it would be *"happy to continue to be consulted on the NRAs although would defer to the Port of Boston with regards to its acceptability"*.
- 5.8.14. The MMO's responsibilities include licensing construction works by way of a marine licence and submitted a RR [RR-008] primarily relating to comments on the dDCO and the Deemed Marine Licence (DML). The Applicant and MMO worked together throughout the Examination. The MMO's closing position [REP10-035] confirmed that *"The MMO and the Applicant have reached agreement on a number of issues raised during examination, the outstanding matters of disagreement are: Wording*

within the DML as detailed in the Statement of Common Ground...".
These matters are of a minor nature and are dealt with in Chapter 9.

- 5.8.15. In response to ExQ1 [PD-008] regarding the provisions and requirements of the UK Marine Policy Statement and East Marine Plan (Q10.0.6) the MMO confirmed that it considers that the Proposed Development complies with the provisions and requirements [REP2-040].

Navigation Management Plan

- 5.8.16. The requirement for the NMP is contained within condition 14 of the Deemed Marine Licence, within Schedule 9 (Deemed Marine Licence) to the dDCO [REP10-004]. Condition 14 requires that the NMP must be:
- Written in consultation with the PoB, the statutory nature conservation bodies and the EA;
 - Informed by the final NRA; and
 - Approved by the MMO before commencing licenced activities.
- 5.8.17. The NMP may be updated, in conjunction with the PoB (which would retain an approving role), the statutory nature conservation bodies and the EA, and each version must be submitted to, and approved by, the MMO. Through direct reference in the DCO the NMP Template would become an approved (certified) document and must be complied with as part of the development and operation of the Proposed Development.
- 5.8.18. As set out in Section 1.4 of the NMP template [REP8-011], the NMP would be produced in conjunction with the PoB in a structured and consultative manner following the generation of appropriately detailed designs for the marine aspects of the facility (notably the wharf) and selection of a principal contractor for the construction phase. The consultation process and provision for the adaptive management of the NMP is also set out within the NMP template (Sections 1.4 and 5.3 of the NMP template, respectively).
- 5.8.19. Throughout the Examination I asked the Applicant questions within ExQ1 and ExQ2 [PD-008] [PD-010] regarding progress of the NMP as well as securing it within the dDCO, as well as asking IPs for their comments and agreement; the following questions refer: Q10.0.1; Q10.0.2; Q10.0.3; Q10.0.9; Q10.0.10; Q10.0.13; and Q2.10.0.1.
- 5.8.20. In Q3.10.0.18 of ExQ3 I requested an Outline NMP, details of how the NMP post-consent would be secured, who would be the discharging authority and requested the IPs to comment on, or agree, the Outline NMP before the end of the Examination [PD-013].
- 5.8.21. The Applicant submitted a template NMP which had been produced in conjunction with the PoB [REP8-011]. The template sets out the requirement for the NMP, the documents that would inform it, the proposed structure for the NMP and an overview of the anticipated content of each section.

- 5.8.22. The PoB confirmed its involvement in preparing an outline NMP along with the process for consultation with statutory bodies and other IPs [REP7-030].
- 5.8.23. In its final comments [REP10-035] the MMO confirmed reaching agreement with the Applicant on a number of issues; outstanding matters do not relate to navigation issues.
- 5.8.24. The MCA confirmed that it had no concerns to raise with navigational issues on the understanding that the PoB are consulted [REP7-025].
- 5.8.25. Other users of The Haven, including recreational and commercial users, have not expressed any concerns regarding the increase in vessel movements and navigational safety.
- 5.8.26. The BFFS is the only party which has sought to question the ability of the PoB to manage navigation; this matter is dealt with in the following section.

Boston and Fosdyke Fishing Society concerns

- 5.8.27. The BFFS submitted a RR to the Examination [RR-010]. The BFFS's concerns were that the increase in vessels on the Haven associated with the Proposed Development would have the following impacts:
- navigational hazard through vessels transiting the river earlier in the tidal cycle;
 - vessels using the swinging hole would block the river;
 - vessels crossing the path of oncoming traffic; and
 - delays would lead to a lost day's work.
- 5.8.28. In response to the draft Examination timetable in relation to the proposed ISH on navigation and fishing matters provisionally set for Thursday 25 November 2021, the Applicant requested [PDA-002] that consideration of this topic was delayed until the period reserved for hearings in March 2022. This was to allow sufficient time for the ExA and IPs to consider the NRA, which the Applicant anticipated would be submitted at D2. D2 was two weeks before the proposed ISH on navigation and fishing matters.
- 5.8.29. This matter was discussed further at the Preliminary Meeting Part 1 [EV2-001]. I accepted this request for a delay in the hearing date in my Rule 8 letter [PD-007].
- 5.8.30. The Applicant's response to BFFS's RR is detailed in Table 1-14 [REP1-035]. This was also captured within the SoCG with BFFS (which was submitted to the Examination at D2 [REP2-005]).
- 5.8.31. In ExQ1 and ExQ2 [PD-008] [PD-010] I sought updates on progress on resolving the issues of dispute between the Applicant and the BFFS; the following questions refer: Q10.0.7; Q10.0.9; Q10.0.10; Q10.0.11; Q10.0.12; Q2.10.0.5; Q2.10.0.7; and Q2.10.0.15.

- 5.8.32. Having noted the BFFS's request to make oral representations at an ISH on navigation and fishing matters [REP1-063], having reviewed submissions to D5 regarding these matters and the lack of engagement the Applicant had been able to achieve with the BFFS and its representative, and to enable full participation I concluded that a hearing would not be the most productive method for resolving issues between the parties. Instead, I issued a third round of Written Questions (ExQ3) [PD-013] on Tuesday 15 February. This decision was notified in Rule 8(3) change to the timetable [PD-012].
- 5.8.33. The following third written questions (ExQ3) [PD-013] refer: Q3.10.0.16; Q3.10.0.17; Q3.10.0.19; Q3.10.0.20; Q3.10.0.21; Q3.10.0.22; Q3.10.0.26; and Q3.10.0.27.
- 5.8.34. I consider that the Applicant has taken the BFFS' concerns seriously throughout the course of the Examination. The Applicant has corresponded with the BFFS's representatives repeatedly, offering meetings to inform the Preliminary Environmental Impact Report and ES. Meetings were held on the 6 July 2021 and 29 September 2021 to help inform the draft NRA. The BFFS's legal representatives declined the opportunity to meet the Applicant to discuss the draft NRA in November 2021 with no further meetings held since that date despite offers from the Applicant. The Applicant's detailed response to each of the BFFS's concerns is given in the Navigation Summary [REP9-031].
- 5.8.35. In ExQ3 [PD-013] I asked the PoB to:
- advise any navigational requirements it considers that the Applicant should consider regarding the fishermen's interests (Q3.10.0.26 of ExQ3); and
 - what its view was of appropriate mitigation of effects to the fishermen (Q3.10.0.27 of ExQ3).
- 5.8.36. The PoB responded [REP7-030]:
- that it is content that the Pilotage Statement and outline NMP would provide further clarity on the impact of the Proposed Development on navigation, including the impact on the BFFS;
 - that the fishermen's concerns would be listened to such that their concerns should be incorporated into the further development of the NRA and NMP;
 - that the PoB has stated and explained why it is content that the additional vessels calling at the Proposed Development can be safely managed and can co-exist with BFFS current practices; and
 - that the increase in commercial shipping numbers (of itself) does not lead to any significant impact on the safety or efficiency of navigation in the Haven.
- 5.8.37. The BFFS commissioned an independent review of the NRA by Marico Marine [AS-004]. In response the Applicant submitted 'The Applicant's response to the Marico Review of the NRA' [REP9-035].

5.8.38. I have reviewed the above submissions regarding the NRA as well as considering the views expressed by the PoB [REP9-064] in respect of the Applicant's proposed NMP and the associated NRA. I note the following statements by the PoB:

"The Port is entirely satisfied with the submissions by the Applicant of an NMP template and draft NRA that together defines and controls the further ongoing management of navigational risk associated with the BAEF."

"the Port's view is that the ongoing development of an NRA and NMP for the BAEF post-consent is the most effective way to mitigate impacts on the safety of navigation since it permits ongoing consultation with all interested parties, and the ability to respond to the detailed design, construction and operational proposals."

"The Port has given much consideration to the concerns expressed by BFFS, particularly with regard to the impact of increased vessel numbers, but has concluded that there is little likelihood of any significant adverse impact on their activities."

5.8.39. I have noted that the BFFS have reiterated its concerns through to the end of the Examination in the following documents:

- Responses to Third Written Questions [REP7-033];
- Deadline 7 submission [REP7-034];
- Deadline 9 submission [REP9-066];
- Deadline 10 submission [REP10-047];
- culminating in the SoCG which was not agreed [REP10-026].

5.8.40. I have noted the Applicant's response to BFFS's D9 submission (REP9-066) in Table 2-10 at 2.5 page 67 [REP10-020].

5.8.41. In conclusion, I am satisfied that the evidence supplied in relation to navigation within the ES and throughout the Examination and summarised in the Navigation Summary [REP9-031], is comprehensive and sufficient, and clearly shows that navigational safety throughout the lifetime of the Proposed Development would be maintained. This is supported by the evidence submitted by the PoB who have stated throughout the Examination that, with the implementation of a NMP that is supported by an NRA, the safety of navigation can be maintained for all Haven users. The PoB's Pilotage Statement [REP6-036] provides confidence and certainty that navigational safety on the Haven would be maintained.

Vessel Speed

5.8.42. It was identified that there have been some instances within documents submitted by the Applicant as part of the Examination that reference to vessels speeds on the Haven, and have incorrectly referred to a speed restriction of 6 knots.

5.8.43. The management of speed on the Haven falls to the PoB as SHA. PoB does not enforce a speed limit for vessels on the Haven but instead rely

on the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) safe speed. In the case of large shipping, safe speed is set by the onboard pilot and is based on the prevailing circumstances, conditions and proximity of other vessels.

- 5.8.44. The Applicant stated that it was "... reviewing all ... application documents to ensure consistency on this matter. A number of application documents will be re-submitted at Deadline 9 to correct any further instances where a speed limit is referred to. It should be noted that the changes do not affect any assessments presented in the Environmental Statement or other supporting documents." [REP9-031].
- 5.8.45. I note that all matters are agreed in the SocG with the PoB [REP9-037].
- 5.8.46. This change in vessel speed limits has implications relating to habitats matters; these are dealt with in Chapter 6.

Conclusions

- 5.8.47. I conclude that:
- the Applicant has identified appropriate navigational policies and applied them appropriately to the Proposed Development;
 - impacts on navigation of all users affected by the Proposed Development were appropriately assessed;
 - residual impacts to the fishing fleet (represented by the BFFS) were identified and mitigation through the implementation of a Navigation Management Plan (NMP) was identified and committed to;
 - the Applicant worked closely with the PoB as SHA on the ability to safely and efficiently manage the additional traffic that would arise from the Proposed Development; and
 - there is a satisfactory mechanism for resolving the fishermen's issues post consent via the NMP template, a DCO certified document.
 - Taking all these matters into consideration I conclude that navigation matters do not weigh against the Order being made.

5.9. NOISE AND VIBRATION

Introduction

- 5.9.1. This section considers the effects of the Proposed Development in relation to noise and vibration.
- 5.9.2. In its submission the EA [PDA-003] and LCC [PDB-005] requested that 'odour' be included within this issue. I have considered issues relating to odour at 5.2 Air Quality.

Policy background

- 5.9.3. NPS EN-1 provides the policy background relating to noise and vibration. NPS EN-3 signposts to NPS EN-1 in terms of noise assessment.

5.9.4. The specific assessment requirements for noise and vibration, as detailed in the NPSs are summarised in Table 10-1 of Chapter 10 of the ES [APP-048], together with an indication of where each is addressed within the ES.

5.9.5. In terms of IPC decision making NPS EN-1 states at para 5.11.9:

"The IPC should not grant development consent unless it is satisfied that the proposals will meet the following aims:

- *avoid significant adverse impacts on health and quality of life from noise;*
- *mitigate and minimise other adverse impacts on health and quality of life from noise; and*
- *where possible, contribute to improvements to health and quality of life through the effective management and control of noise."*

Applicant's Approach

5.9.6. The Applicant's approach to noise and vibration is contained in Chapter 10 Noise and Vibration of the ES [APP-048].

5.9.7. An assessment of on-site construction phase noise indicated minor effects at all receptors for daytime construction works. A moderate adverse effect was predicted at one of the nearby noise sensitive receptor locations during the evenings and weekends, but more detailed analysis identified that covering piles with a full-length shroud would reduce the predicted effect to minor adverse and therefore not significant. Vibration impacts from construction works were not considered because the distance between piling activities and the nearest receptors indicate that these would not be significant.

5.9.8. Operational noise levels at nearby receptors due to the Proposed Development were initially predicted to be significant at some receptors, leading to mitigation measures being incorporated into the design. Impacts from noise levels at nearby receptors due to operation of the Proposed Development were predicted to be minor adverse. The Applicant has proposed embedded mitigation in the design which would prevent any significant sources of vibration and therefore vibration impacts are considered to be non-significant. These measures are detailed in Table 10-31 [APP-048] and are considered standard industry practice for this type of the development; I consider these measures acceptable.

5.9.9. Vehicle movements generated by transportation of materials to and from the Proposed Development during the operational phase were assessed in the context of the site and surrounding road network. Residual effects were considered to be minor adverse and therefore not significant. Utilisation of vessels for bulk delivery of construction materials is a significant benefit of the proposals assisting to reduce noise from construction traffic.

5.9.10. An assessment of the noise impacts associated with vessel movements during the operational phase are predicted to be minor adverse at worst.

Issues Arising During the Examination

- 5.9.11. At D1 of the Examination, the Applicant submitted an Updated Piling Noise Assessment [REP1-029] following refinement of the construction programme associated with avoiding sensitive periods, where effects were predicted to be negligible to minor adverse.
- 5.9.12. In its RR BBC stated "*We will need to agree prior to works commencing a noise/vibration management plan. Continuous noise monitoring locations will need to be agreed*" [RR-019]. In Q11.0.1 of ExQ1, I requested details of the Construction Phase Noise and Vibration Monitoring Plan that would form part of the Code of Construction Practice [PD-008].
- 5.9.13. The applicant's Overall Summary of Case [REP10-019] confirmed that "*Details of the Outline Construction Noise and Vibration Monitoring and Management Plan are included in Section 8 of the Outline Code of Construction Practice (OCoCP) [APP-120]. This is secured within Requirement 11 of the DCO [REP10-004] for a Code of Construction Practice and will be approved by the relevant planning authority.*"

Conclusions

- 5.9.14. I conclude that:
- I accept the Applicant's proposals for mitigation of noise impacts which would meet the aims outlined at para. 5.11.9 of NPS EN-1, in particular:
 - avoiding significant adverse impacts on health and quality of life from noise; and
 - mitigating and minimising other adverse impacts on health and quality of life from noise.
 - Taking all these matters into consideration I conclude that noise and vibration matters do not weigh against the Order being made.

5.10. Socio-economic

Introduction

- 5.10.1. This section considers the effects of the Proposed Development in relation to economic and social impacts, including funding.

Policy Background

- 5.10.2. Section 5.12 of National Policy Statement for Energy (NPS EN-1) summarises the policy context relating to the socio-economic aspects of the development. This states that where the project is likely to have socio-economic impacts at local or regional levels, the Applicant should undertake and include in its application an assessment of these impacts as part of the Environmental Statement (ES).

- 5.10.3. This should consider all relevant socio-economic impacts, which may include:

- the creation of jobs and training opportunities;
- the provision of additional local services and improvements to local infrastructure;
- effects on tourism; the impact of an influx of workers during the different construction, operation and decommissioning phases of the energy infrastructure; and
- cumulative impacts.

5.10.4. NPS EN-1 further states that the decision maker " ... *should have regard to the potential socio-economic impacts of new energy infrastructure identified by the applicant ... supported by evidence*".

Applicant's Approach

5.10.5. The Applicant's approach to Socio-Economics is contained in Chapter 20 of the ES [APP-058].

5.10.6. The Applicant describes the assessment methodology as follows:

"The baseline position in terms of economic conditions and the current provision of community facilities was established before examining the potential impacts of the Facility and their significance. Opportunities for the mitigation of any adverse effects and the enhancement of beneficial effects were then examined, including any embedded mitigation elements of the Facility."

5.10.7. The socio-economic assessment considered a large number of factors including employment, housing market, community infrastructure (including primary and secondary education and health) and tourism during both the construction and operational phases of the Proposed Development. It also considered potential impacts on energy security/reliability due to the operational Proposed Development. All effects were predicted to be of either beneficial, negligible or minor adverse significance.

Issues Arising During the Examination

5.10.8. Regarding funding I asked the Applicant to confirm details of the timing and availability of funding in Q1.0.4 of ExQ1 [PD-008]. In answer the Applicant referred to the Funding Statement [APP-009] in identifying estimated costs for land to be acquired and construction, confirming that funding would be sourced from a combination of commercial debt and additional equity [REP2-008].

5.10.9. In Q2.1.0.4 of ExQ2 [PD-010] I asked the Applicant about funding concerning the ability to secure, deliver and maintain in perpetuity mitigation and compensation measures to address any adverse effects on the designated sites. In answer [REP5-004] the Applicant explained the process it was using to identify costs that may be required to construct and maintain mitigation and compensation measures as well as the mechanism to secure funds. The Applicant confirmed that any compensation measures required would be secured via a schedule to the Development Consent Order (DCO).

5.10.10. The Royal Society for the Protection of Birds (RSPB) made a number of comments [REP6-041] in relation to the Applicant's response regarding:

- funding of mitigation and compensation measures;
- compensation measures being fully functional prior to construction;
- having sufficient detail of compensation measures; and
- maintaining compensation following decommissioning.

In answer to the RSPB comments on responses to ExQ2, Table 2-2 Q2.1.0.4 [REP7-010] the Applicant referred to an updated compensation document submitted at Deadline 6 [REP6-025] that provides further details of the proposed compensation sites and a timescale for compensation. With regard to funding and decommissioning the Applicant referred to the without prejudice draft Schedule 11 'Ornithology Compensation Measures' to the DCO which details:

- the mechanism for estimating the cost of compensation measures;
- the mechanism for funding compensation measures; and
- the mechanism for decommissioning of the compensation measures.

Please refer to Chapter 9 Draft DCO and Related Matters where this matter is discussed further.

5.10.11. In general, with regard to funding I am satisfied that the Applicant has satisfactorily confirmed the ability to fund the Proposed Development.

5.10.12. Further to Boston Borough Council (BBC)'s Relevant Representation (RR) [RR-019] I requested details of the consideration which has been given to the promotion of renewable energy use locally. In response to my written question Q13.0.1, the Applicant stated [REP2-008] that a Combined Heat and Power (CHP) Assessment had been submitted with the application, and that Schedule 2 of the draft DCO sets out the requirement to submit for approval a report updating the CHP assessment.

5.10.13. Further to BBC's RR [RR-019] I requested details of the local connection to the local grid, and how it would improve capacity issues. In answer to my written question Q13.0.2, the Applicant responded [REP2-008] providing details and commenting that "... the connection from the Proposed Development will allow Boston Borough Council to attract further investment from other industries knowing that there is now additional local generation available ...".

5.10.14. Further to BBC's RR [RR-019] I requested details of how the Proposed Development would utilise the opportunities for socio-economic benefits presented by the scheme. In answer to my written question ExQ1 Q13.0.3, the Applicant responded [REP2-008] with details regarding:

- creating new, high-skilled, jobs in the renewable energy sector;
- maximising opportunities for local residents to access these employment opportunities;
- local businesses benefiting as a result of increased supply chain expenditure and trade connections;

- opportunities for local businesses in the retail and hospitality industries; and
- the uplift in demand for visitor accommodation and tourism attractions from construction and to a lesser extent operation workers.

I consider that these are positive economic and social impacts.

5.10.15. The Applicant has been in ongoing discussions with BBC and LCC throughout the Examination and have reached agreement on the terms of a Section 106 agreement [REP10-018] which includes providing apprenticeships and local labour and local business opportunities to support the local economy. The Statement of Common Ground (SoCG) with BBC issued at Deadline 10 shows all items agreed in relation to socio-economics and Section 106 [REP10-028].

Conclusions

5.10.16. I conclude that:

- the project is likely to have socio-economic impacts at local or regional levels, and that the Applicant has undertaken an adequate assessment of these impacts as part of the ES, supported by evidence; and
- the Applicant has considered all relevant socio-economic impacts.
- Taking all these matters into consideration I conclude that socio-economic matters weigh positively for the Order being made in terms of job creation, opportunities for local businesses and uplift in demand for visitor accommodation and tourism attractions from construction workers.

5.11. TRAFFIC AND TRANSPORT

Introduction

5.11.1. This section considers the effects of the Proposed Development in relation to traffic and transport.

5.11.2. In its submission at DA [PDB-005] LCC suggested that PRoW could be a sub heading under this issue; PRoW are dealt with below.

Policy Background

5.11.3. NPS EN-1 provides the policy background relating to traffic and transport. NPS EN-3 deals with transport infrastructure in relation to biomass or EfW generating station.

5.11.4. The specific assessment requirements for traffic and transport, as detailed in the NPSs are summarised in Table 19-1 of Chapter 19 of the ES [APP-057], together with an indication of where each is addressed within the ES.

5.11.5. In terms of IPC decision making NPS EN-1 states at paragraph 5.13.6:

"A new energy NSIP may give rise to substantial impacts on the surrounding transport infrastructure and the IPC should therefore ensure that the applicant has sought to mitigate these impacts, including during the construction phase of the development."

5.11.6. NPS EN-3 paragraph 2.5.25 states:

"... the IPC should expect materials (fuel and residues) to be transported by water or rail routes where possible."

Applicant's Approach

5.11.7. The Applicant's approach to transport and traffic is contained in Chapter 19 Traffic and Transport of the ES [APP-057].

5.11.8. Section 19.4 in Chapter 19 describes the assessment methodology, including data collation, effects and impact assessment criteria that were used in the traffic and transport assessment. The criteria for determining the significance of effects is described as a two-stage process that involves defining the sensitivity of the receptors and the magnitude of the effects.

5.11.9. The ES considered transport effects including those associated with pedestrian severance, pedestrian amenity, road safety and driver delay. Where appropriate, mitigation has been proposed to reduce the significance of effects (most notably it is proposed to divert traffic away from the A52 Liquorpond Street during peak construction). Mitigation measures would be secured through commitments contained in a Construction Traffic Management Plan (CTMP). An outline CTMP was submitted with the application [APP-121]. During construction and operation residual impacts are predicted to be not significant (between negligible to minor adverse significance).

5.11.10. Table 19-1 [APP-057] states:

"The Facility is located next to the Haven with proposals to construct a wharf to take deliveries of Refuse Derived Fuel (RDF) by barge during the operational phase. This is considered 'embedded mitigation' and as a result would remove the majority of equivalent Heavy Goods Vehicle (HGV) movements off the highway network during operation. The feedstock for the Facility is to be transported by water during the operational phase."

5.11.11. Table 19-3 [APP-057] states:

"The revised scheme design of the Facility involves the removal of manufactured aggregate by ship, thus removal of aggregate by road does not form part of the scope of the current Transport Assessment"

I note that deliveries of RDF and removal of aggregate are planned to be transported by water.

5.11.12. Within LCC's Relevant Representation [RR-014] comments were provided on traffic and transport which noted *"It [the Transport Assessment] finds that the proposed development would not be expected to result in an*

unacceptable impact upon highway safety or a severe residual cumulative impact upon the capacity of the existing local highway network. The Highway Authority concurs with that conclusion and do not consider that any off-site highway improvements would be required, through Planning Obligations, to make the proposal acceptable in planning terms."

Issues Arising During the Examination

- 5.11.13. LCC noted [RR-014] that as the assessment is reliant on using vessels to transport RDF there should be a "suitably worded requirement or planning obligation" to ensure this wouldn't be switched to road transport (ExQ1 Q14.0.1 also refers [PD-008]). Following further discussions, the Applicant agreed to specify the maximum number of daily operational heavy commercial vehicle movements in Requirement 17 of the dDCO submitted at D6 [REP6-002]; this states that they must not exceed a maximum of 30 two-way vehicle movements per day. Following this, all points on traffic and transport were agreed in the SoCG with LCC [REP6-005].
- 5.11.14. BBC requested [RR-019] *"that consideration be given to whether measures are required to ensure that in-direct impacts do not arise, particularly through the construction phase. For example, diversion of traffic using the existing estate on to lesser/minor roads which are not suitable ..."* In reply to ExQ1 Q14.0.2 [PD-008], the Applicant responded [REP2-008] and referenced ES Chapter 19 [APP-057] regarding the assessment methodology; details of embedded mitigation measures are contained in Table 19-15.

PRoW (including ECP)

- 5.11.15. BBC [RR-019], LCC [RR-014] and Natural England [RR-021] submitted representations regarding the PRoW diversions through the Proposed Development. ExQ1 Q12.0.6 requested a detailed assessment of the proposals for permanently closing PRoW and the mitigation proposed [PD-008]. ExQ2 Q2.12.0.6 [PD-010] and ExQ3 Q3.12.0.6 [PD-013] asked for NE's position regarding the Applicant's proposals for realignment of the ECP.
- 5.11.16. In response the Applicant submitted an Outline Public Right of Way (PRoW) Design Guide and Stopping Up Plan at D3 [REP3-017] and subsequently at D8 [REP8-007]. This plan provides outline guidance for measures to help mitigate the effects of proposed footpath stopping up and for the enhancement of the specific, retained sections of footpath that would provide the necessary diversion.
- 5.11.17. Following provision of this plan, this point was agreed within the SoCG with LCC at [REP4-003]. Following agreement of the S106 obligation, this point was also agreed by BBC within the SoCG [REP10-028].
- 5.11.18. NE confirmed in its submissions [REP5-015 and REP9-060] that the diverted route is an appropriate replacement to the existing PRoW. However, it had proposed an alternative route for the proposed ECP

(noting this is not yet designated in this location) shown within NE's D2 submission [REP2-047]. The Applicant considered this alternative route and is of the opinion this is not a preferred route due to (i) minor removal of terrestrial Biodiversity Net Gain that would be required (ii) operational noise affecting potential users of this alternative route reducing its usage and (iii) security issues. These are all set out in the Written Summary of the Applicant's Oral Case at ISH2 on Environmental Matters (Part 1) [REP3-023]. The Applicant considers that the diversion along the Roman Bank is appropriate, as per the initial DCO application.

5.11.19. The SoCG with NE [REP10-033] states the matter regarding the ECP is 'not agreed' and that NE's latest position on the ECP is provided in Appendix E3 [REP5-015].

5.11.20. NE states clear reasons in Appendix E3 [REP5-015] regarding its position for the alternative route suggested for the ECP which directly follows the coast, including:

"7. The Marine and Coastal Access Act 2009 places a duty on the Secretary of State and Natural England to secure a long-distance walking trail around the open coast of England.

8. Natural England therefore needs to ensure that access to the 'coast' must be restricted in the smallest possible way which is our reasoning for suggesting an alternative route as discussed above.

10. Natural England therefore advises that whilst the section of footpath involved is small (200m), it provides direct access to coast and would therefore uphold the aims of the ECP."

ExA reasoning

- I consider that the Applicant has proposed acceptable outline guidance for measures to help mitigate the effects of proposed footpath stopping up and for the enhancement of the specific, retained sections of footpath that would provide the necessary diversion. These measures have been agreed with both Local Authorities;
- Considering the arguments put forward by the Applicant and NE regarding the replacement of the ECP route, I find NE's argument more compelling for its suggested alternative route which directly follows the coast as detailed in Appendix E3 [REP5-015] (alternative route is shown in Figure 1 of [REP2-047]). There are no land rights issues with the suggested alternative route. Consequently, I have recommended changes to Schedule 4 streets subject to alteration of layout, and Schedule 6 permanent stopping up of streets and PRow of the dDCO.

Conclusions

5.11.21. I conclude that:

- the ES includes an appropriate transport assessment which identifies the impacts of transport implications;

- that the applicant has sought to mitigate these impacts; and
- material deliveries (feedstock) and removal of aggregate are planned to be transported by water.
- With regard to the replacement of the ECP route; I recommend the suggested alternative route which directly follows the coast proposed by NE.
- Taking all these matters into consideration I conclude that traffic and transport matters do not weigh against the Order being made.

5.12. WASTE MANAGEMENT

Introduction

- 5.12.1. This section considers the effects of the Proposed Development in relation to waste management.

Policy Background

- 5.12.2. NPS EN-1 Section 5.14 provides the policy background relating to waste management.
- 5.12.3. Paragraphs 5.14.2 and 5.14.3 of NPS EN-1 require the Proposed Development should ensure:

"Sustainable waste management is implemented through the "waste hierarchy", which sets out the priorities that must be applied when managing waste; ...

Disposal of waste should only be considered where other waste management options are not available or where it is the best overall environmental outcome."

Applicant's Approach

- 5.12.4. ES Chapter 23 Waste provides an assessment of waste generation during the construction, operation and decommissioning phases, considers the proposed options for recycling, recovery or disposal of waste in accordance with the Waste Hierarchy, and the capability of the existing local or regional waste management facilities to manage the waste [APP-061]. This document is supported by the following:
- Fuel Availability and Waste Hierarchy Assessment [APP-037]; and
 - Addendum to Fuel Availability and Waste Hierarchy Assessment [REP1-018].
- 5.12.5. The 'Fuel Availability and Waste Hierarchy Assessment' has been prepared to comply with the requirements of paragraphs 5.14.2 and 5.14.3 of NPS EN-1.

Issues Arising During the Examination

- 5.12.6. Following representations from UKWIN [RR-001] and LCC (the waste authority) [RR-014] I asked the Applicant to:

- detail the need for the proposed additional incineration capacity in light of Government policies such as the December 2018 Resources and Waste Strategy, and local plans such as: the 2016 Minerals and Waste Local Plan; and the latest Lincolnshire Waste Needs Assessment (June 2021) in Q12.0.1 of ExQ1 [PD-008]; and
- explain how the proposed additional incineration capacity supported the achievement of government recycling targets in light of its competition for feedstock with recycling, composting and anaerobic digestion in Q12.0.2 of ExQ1 [PD-008].

5.12.7. The Applicant responded to Q12.0.1 [REP2-008] as follows:

"The Applicant is providing the incineration capacity to meet a UK need, and will provide recovery capacity for residual waste in line with the 2018 Waste Strategy for England. The Applicant has confirmed the need for the proposed Facility to divert residual waste from landfill, as detailed in the Fuel Availability and Waste Hierarchy Assessment (Document reference 5.8, APP-037) and the Addendum to Fuel Availability and Waste Hierarchy Assessment (Document reference 9.5, REP1-018).

The Applicant notes that there is currently limited need for the proposed Facility for municipal waste arising in Lincolnshire as identified in the recently published Lincolnshire Waste Needs Assessment. However, the proposed Facility is meeting a UK need and is providing a solution based on marine transport of RDF from a network of ports throughout the UK, as detailed in Section 5.6 of Chapter 5, Project Description of the ES (document reference 6.2.5, APP-043)."

5.12.8. The Applicant responded to Q12.0.1 [REP2-008] as follows:

5.12.9. *"The proposed Facility will only target sourcing feedstocks from residual wastes that have already had the recyclables removed and are destined for landfill disposal or export overseas, as detailed in Fuel Availability and Waste Hierarchy Assessment [APP-037] and the Addendum to Fuel Availability and Waste Hierarchy Assessment [REP1-018]. The Applicant will not be competing for feedstocks suitable for composting or anaerobic digestion as the proposed Facility will be fuelled with RDF. This is secured by Requirement 18 in Schedule 2 to the draft DCO [REP10-004] which requires the undertaker to submit to "the relevant planning authority for approval a scheme, which sets out arrangements for maintenance of the waste hierarchy in priority order and which aims to minimise recyclable and reusable waste received at the authorised development during the commissioning and operational period of the authorised development."*

5.12.10. Following a representation from BBC [RR-019] I asked the Applicant what consideration was being given to the use of localised residual waste as part of the feedstock in Q12.0.5 of ExQ1 [PD-008].

5.12.11. The Applicant responded *"The Applicant recognises the proximity of potential, locally available feedstock for the Facility. As stated in the draft Statement of Common Ground (SoCG) with Boston Borough Council (REP1-040) in Table 3-1 (item 5.1 Household Waste) the Applicant, "is happy to discuss the potential for future use of local waste as part of the*

Facility's feedstock if it meets the required specification and the requirements of the DCO subject to contracts and timing." This matter is being considered with Boston Borough Council and Lincolnshire County Council as part of the s.106 discussions." [REP2-008].

- 5.12.12. I note that all points on waste were agreed within the final SoCG with BBC [REP10-028].
- 5.12.13. I note that all points on waste and project need were agreed within the final SoCG with LCC [REP9-049].
- 5.12.14. Throughout the Examination UKWIN:
- questioned the methodology of using the 2-hour drive time to define a waste catchment area around the indicative ports from which the Refuse Derived Fuel (RDF) would be transferred to the Proposed Development;
 - the approach and outcomes to the consideration of waste plans within the Fuel Sourcing and Waste Hierarchy Report;
 - indicated that there is additional EfW capacity in the UK; and
 - questioned why the Applicant has not used more recent waste data.
- 5.12.15. The Applicant's position in response to the four questions above was summarised in Table 1-1 [REP5-009] as follows:
- i. *"The Applicant has used a 2-hour travel time to represent a practicable limit over which bulk waste transport becomes economically unattractive. This methodology has been used to demonstrate a large quantity of residual waste is available in the catchments around the proposed ports detailed in the Environmental Statement (ES). The movement of waste by vessel is common, demonstrated by the large quantities that have been exported overseas in the past and continue to be."*
 - ii. *"The Applicant in response has highlighted that the approach adopted accords with NPS EN3 paragraphs 2.5, consistent with previous comparable Development Consent Order (DCO) determinations for Energy from Waste facilities. The Applicant highlights the proposed development is a merchant facility, which will be powered by refuse derived fuel transported to it by sea going vessel, optimising the opportunity for the most economic and best environmental solution, therefore an appropriate facility according with the proximity principle.
With respect to waste plans, the Applicant draws the attention to Lincolnshire County Council's support for the proposed development and its acceptance that there is a national need for such facilities and that the proposal does not compromise the policies of the Lincolnshire Minerals and Waste Local Plan with respect to need and location.
With reference to the effect of the proposed development upon waste plans generally from where refuse derived fuel may be sourced, the Applicant highlights no contractual arrangements are in place with suppliers of this material, however the proposed facility will rely upon such fuel presently exported to the continent or wastes presently*

landfilled. The addendum to the Fuel Availability and Waste Hierarchy Assessment (document reference 9.5, REP1-018) demonstrates that taking account of high recycling rates there will be some 3.9 million tonnes available annually by 2035 and, that the proposed development accords with the waste hierarchy."

- iii. The Applicant has used the most up to date information on Energy from Waste (EfW) facilities that have reached financial close when the Tolvik report was published in 2021.*
- iv. The Applicant has used the most up to date data from the most reliable sources (e.g. Defra, Environment Agency and SEPA) although there is often a lag time for the data to be published in the public domain. The Applicant has used the available data to include modelling of higher recycling rates that have been committed to by Governments to factor in reductions of residual waste in the long-term."*

5.12.16. UKWIN's position is summarised [REP7-036], the key differences stated include the following statements:

- v. "...disputes the notion that applying a 2-hour drive time to all of the Applicant's 12 ports results in a meaningful assessment of feedstock availability.*
- vi. "Fundamentally there is a difference in opinion regarding whether a need for the proposed capacity (and a need for this to capacity to be located at the Port of Boston) has been demonstrated and the policy implications of this need not being demonstrated.
... that EN-3, Draft EN-3 (2021), the Wheelabrator Kemsley North (WKN) decision, and a number of Government statements all support the idea that incineration can divert waste from recycling and therefore prejudice the management of waste in accordance with Government policy on the waste hierarchy, that incineration overcapacity should be avoided, and that robust evidence is needed to justify the need for the proposed capacity.
... that the proposed capacity would likely divert material and composting, and potentially from incinerators in closer proximity to where the waste arises."*
- vii. ... does not accept as realistic the Applicant's assumptions as to which ports it will receive waste from and in what quantities.*
- viii. The Applicant has not directly disputed UKWIN's evidence that the Applicant's assessments failed to consider the increases in headline capacity which occurred in 2019 and 2020 but which were not fully reflected in the amount diverted from landfill in 2019 due to the facilities not being fully online throughout that period.*
- ix. ... this oversight means the Applicant underestimated incineration capacity by around 1.5 million tonnes based on a 90% utilisation rate. ...*
- x. ... was questioning the fact that the Applicant's methodology to get from the base year to the present situation was flawed and missed out on hundreds of thousands of tonnes of capacity."*

Conclusions

5.12.17. I conclude that:

- ES Chapter 23 Waste, and the Fuel Availability and Waste Hierarchy Assessment appropriately consider the proposed options for recycling, recovery or disposal of waste in accordance with the Waste Hierarchy;
- that the Applicant has provided satisfactory answers to the questions relating to:
 - the methodology to define a waste catchment area around the indicative ports from which the waste would be transferred;
 - approach and outcomes to the consideration of waste plans within the Fuel Sourcing and Waste Hierarchy Report;
 - additional EfW capacity in the UK; and
 - not using more recent waste data.
- that all points on waste were agreed within the final SoCGs with BBC and LCC.
- Taking all these matters into consideration I conclude that waste management matters do not weigh against the Order being made.

5.13. WATER QUALITY AND FLOOD RISK

Introduction

- 5.13.1. This section considers the effects of the Proposed Development in relation to water quality and flood risk.

Policy Background

- 5.13.2. The Applicant details legislation, policy and guidance applicable to the Proposed Development at section 13.2 of Chapter 13 - Surface Water, Flood Risk and Drainage Strategy of the ES [APP-051].
- 5.13.3. Table 13-1 'NPS EN-1 and EN-3 Assessment Requirements with Relevance to Water Resources and Flood Risk' of Chapter 13 [APP-051] summarises the specific assessment requirements for surface water, flood risk and drainage, as detailed in the NPSs, together with an indication of the section of the ES chapter where each is addressed.
- 5.13.4. I have reviewed Table 13-1 and confirm that the ES has complies with the specific assessment requirements for surface water, flood risk and drainage, as detailed in the NPSs.

Applicant's Approach

- 5.13.5. The Applicant's approach to water quality and flood protection is contained in Chapter 13 - Surface Water, Flood Risk and Drainage Strategy of the ES [APP-051].
- 5.13.6. The Applicant's assessment methodology is contained in Chapter 13 [APP-051] at section 13.4. This section sets out the overall approach to the assessment and highlights the main potential effects on surface water, flood risk and drainage receptors. Separate, more detailed, methodologies for the Water Framework Directive (WFD) compliance assessment and FRA can be found in Appendix 13.1 [APP-105] and Appendix 13.2 [APP-106], respectively.

- 5.13.7. Within the ES, the following key potential impacts were identified for the construction stage:
- Direct impacts on drainage systems;
 - Increased sediment supply;
 - Accidental release of contaminants; and
 - Changes to surface water runoff and flood risk.
- 5.13.8. The Applicant proposes to develop a Code of Construction Practice (CoCP) post-consent to mitigate the construction activities; it is proposed that this would be substantially in accordance with the Outline CoCP [APP-120].
- 5.13.9. The following impacts are described for the operation stage:
- Changes to surface water runoff and flood risk; and
 - Supply of fine sediment and other contaminants.
- 5.13.10. It is proposed that these would be managed by the conditions of the EP that would be required to operate the Proposed Development.
- 5.13.11. The Applicant has considered mitigation measures to manage sediment, pollution and drainage, these potential effects have been determined as not significant during construction and operation.
- 5.13.12. Appendix 13.1 [APP-105] demonstrates compliance with the WFD requirements; and indicates there would not be an increased flood risk on or off the Principal Application Site.
- 5.13.13. I consider that each assessment requirement of the NPS as detailed in Table 13-1 of Chapter 13 [APP-051] has been appropriately addressed.

Issues Arising During the Examination

- 5.13.14. An outline Surface and Foul Water Drainage Strategy was submitted and following comments from the EA and Black Sluice Drainage Board this document was finalised at D10 [REP10-017]. It is proposed that a final drainage strategy would be produced post-consent based on the outline.
- 5.13.15. In its RR [RR-013] the EA raised an objection with regards to flood risk, and in response to its requests for further information the Applicant provided the following:
- Wharf Construction Outline Methodology [REP1-030];
 - Response to EA queries on Critical Infrastructure and Levels across the Application Site [REP3-016];
 - Worst Case Assessment for Land Raising [AS-008];
 - Erosion monitoring added to the OLEMS submitted at D7 [REP7-037]; and
 - Agreed Protective Provisions in the dDCO [REP10-004].

At the close of the Examination the Applicant was working towards an agreement with the EA to enable the disapplication of the requirement to obtain an EP for a flood risk activity.

- 5.13.16. I asked the following questions with regard to the existing flood defences and the PPs sought to ensure that harm to flood management infrastructure does not arise as a result of the Proposed Development: Q15.0.1; and Q15.0.3 [PD-008]; Q2.15.0.1 [PD-010]; and Q3.15.0.3 [PD-013].
- 5.13.17. The SoCG with the EA submitted at D10 [REP10-032] confirms that the EA are in agreement with the evidence presented in the Worst Case Assessment for Land Raising [AS-008] and other information provided with regards to flood risk. However, there are ongoing discussions to finalise the flood risk legal agreement which needs to be agreed before the EA can fully agree the flood risk assessment. I consider finalisation of this agreement is likely.
- 5.13.18. With regard to the MMO's RR [RR-008] I requested details of how mitigation discussed in the ES is secured through conditions in the DML, as well as details of proposals for dredging and maintaining the berthing pocket that forms part of the Proposed Development Q15.0.4 and Q15.0.2 [PD-008]. By the close of the Examination the Applicant and the MMO had substantially reached agreement on these matters [REP10-035] except for some minor wording issues regarding the DML which I deal with in Chapter 9.
- 5.13.19. In the final SoCG with the EA [REP10-032], Table 3-1 item EA 7.1, with regards to Compliance with Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ("WFD Regulations"), the EA raised there should be further assessment of potential marine ecology impacts to the Witham transitional water body.
- 5.13.20. The EA also noted [REP10-032], Table 3-1 item EA 7.1, an outstanding concern with regards to the direct loss of habitat at the Application Site. The Applicant's Overall Summary of Case [REP10-019], para 4.7.10, stated that the direct loss of habitat at the Application Site is mitigated by the Habitat Mitigation Area which is detailed within Chapter 17 Marine and Coastal Ecology [REP9-011] and the OLEMS [REP7-037]. The EA stated that this would need to be agreed with NE [REP10-032].

Conclusions

- 5.13.21. I conclude that:
- The ES has complied with the specific assessment requirements for surface water, flood risk and drainage, as detailed in the NPSs; and
 - Taking all these matters into consideration I conclude that water quality and flood risk matters do not weigh against the Order being made.

6. FINDINGS AND CONCLUSIONS IN RELATION TO HABITATS REGULATIONS ASSESSMENT

6.1. INTRODUCTION

- 6.1.1. This Chapter is a summary of my analysis and conclusions relevant to the Habitats Regulations Assessment (HRA). Appendix C contains my detailed analysis. This will assist the Secretary of State for Business, Energy and Industrial Strategy (SoS), as the Competent Authority, in performing their duties under the Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations').
- 6.1.2. In accordance with the precautionary principle embedded in the Habitats Regulations, consent for the Proposed Development may be granted only after having ascertained that it will not adversely affect the integrity of European site(s) and no reasonable scientific doubt remains.
- 6.1.3. I have been mindful throughout the Examination of the need to ensure that the SoS BEIS has such information as may reasonably be required to carry out their duties as the Competent Authority. I have sought evidence from the Applicant and the relevant Interested Parties (IPs), including Natural England (NE) as the Appropriate Nature Conservation Body (ANCB), through written questions and issue-specific hearings (ISHs).
- 6.1.4. I produced a Report on the Implications for European Sites (RIES) [PD-014]. My recommendation is that the Secretary of State (SoS) may wish to rely on the RIES, and consultation on it, as a sufficient body of information to enable the SoS to fulfil their duties of consultation under Regulation 63(3) of the Habitats Regulations.

6.2. PROJECT LOCATION

- 6.2.1. The Proposed Development is described in Chapter 2 of this Report.
- 6.2.2. The spatial relationship between the Order limits of the Proposed Development and the European sites is shown in Environmental Statement (ES) Chapter 17 Figure 17.1 [APP-091].
- 6.2.3. The Proposed Development is not directly connected with, or necessary to, the management of a European site. Therefore, the SoS BEIS must make an 'appropriate assessment' (AA) of the implications of the Proposed Development on potentially affected European sites in light of their Conservation Objectives.

6.3. HRA IMPLICATIONS OF THE PROJECT

- 6.3.1. The Applicant's assessment of effects is presented in the following key document(s):

- Boston Alternative Energy Facility – Environmental Statement - Appendix 17.1: Habitats Regulations Assessment (V1.0) [AS-006] (which superseded [APP-111 and REP9-013]), (hereafter referred to as the Applicant’s HRA Report (HRAR));
- Updated Habitats Regulations Assessment Screening and Integrity Matrices (V0.0) [REP3-018] (a tracked changes version of which was submitted at D5 [REP5-003]);
- ES Chapter 17 Marine and Coastal Ecology and Appendix 17.1 Habitats Regulations Assessment Update [REP5-006];
- ES Chapter 17: Marine and Coastal Ecology and Appendix 17.1: Habitats Regulations Assessment - Ornithology Addendum ([REP1-026] (hereafter referred to as the Ornithology Addendum); and
- Addendum to ES Chapter 17 and Appendix 17.1: Marine Mammals (V1.0) [REP9-020] (which superseded REP1-027) (hereafter referred to as the Marine Mammals Addendum).

6.3.2. Appendix A17.1.3 of the HRAR contains information on consultation on the HRA with relevant stakeholders, including NE, the Royal Society for the Protection of Birds (RSPB) and Lincolnshire Wildlife Trust (LWT).

6.3.3. In response to my questions and representations made by IPs during the Examination the Applicant submitted documents containing a ‘without prejudice’ derogation case at Deadline (D) 2, comprising:

- Without Prejudice Habitats Regulations Assessment Derogation Case: Assessment of Alternative Solutions [REP2-011];
- Without Prejudice Habitats Regulations Assessment Derogation Case: Imperative Reasons of Overriding Public Interest (IROPI) Case [REP2-012]; and
- Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (V2.0) [REP8-006] (hereafter referred to as the Compensation Measures Document (CMD). This superseded [REP2-013 and REP6-025]. It was supported by an Outline Ornithology Compensation Implementation and Monitoring Plan (oOCIMP V0.0) submitted at D7 [REP7-013], which was superseded by a final version at D8 (V1.1)[REP8-013].
- Sections 6.6 to 6.10 of this Chapter address the derogation and compensation proposals in relation to the draft Development Consent Order (dDCO).

6.3.4. The Applicant has not identified any likely significant effects (LSE) on European sites in European Economic Area (EEA) States in its HRAR [AS-006] or within its ES [REP9-011]. Only European sites which form part of the UK National Site Network (NSN) are addressed in this Report. No such effects were raised for discussion by any IPs during the Examination.

Summary of HRA Matters Considered During the Examination

6.3.5. The Applicant screened the following European sites into the HRA:

- The Wash Special Protection Area (SPA);

- The Wash and North Norfolk Coast Special Area of Conservation (SAC); and
- The Wash Ramsar site.

The location of these is shown on ES Figure 17.1 [APP-091].

6.3.6. IPs did not identify any other UK European sites that may be affected by the Proposed Development. NE confirmed at D9 that the Applicant had identified all of the relevant designated sites and features [REP9-063].

6.3.7. At the time of the application submission there was a high level of disagreement between the Applicant and IPs, such as NE, the RSPB and LWT, in relation to the HRA. This included concerns about the scope of and approach to the assessment, the robustness and extent of the survey data, the Applicant's conclusions, the adequacy of the proposed mitigation, and the need for compensation.

6.3.8. The main HRA matters raised by me, NE and other IPs and discussed during the Examination include:

- the scope of the assessment;
- confidence in the Applicant's data and whether it was comprehensive;
- the approach to the in combination assessment;
- the Applicant's conclusions in relation to impacts arising from disturbance and loss of habitat on bird species which are features of the SPA and Ramsar site;
- the Applicant's conclusions in relation to impacts arising from collision risk, entanglement within the anchorage area, and disturbance of harbour seal which are a feature of the SAC;
- whether the application site and land along The Haven between the application site and the SPA and Ramsar site are functionally linked to the European sites;
- the adequacy of the proposed mitigation;
- the Applicant's conclusion of no adverse effect on integrity (AEoI) of the European sites considered in the assessment; and
- the level of detail on and sufficiency of the proposed in principle compensation measures.

6.3.9. These matters are set out in the RIES [PD-014] in detail and discussed in the sections below, as appropriate.

6.4. ASSESSMENT OF LIKELY SIGNIFICANT EFFECTS

6.4.1. Under Regulation 63 of the Habitats Regulations the competent authority must consider whether a development will have LSE on a European site, either alone or in combination with other plans or projects. The purpose of the LSE test is to identify the need for an AA and the activities, sites or plans and projects to be included for further consideration in the AA.

6.4.2. The European sites and qualifying features that were considered in the Applicant's assessment of LSE are presented in Section A17.3 and Tables A17-1 to A17-4 of the HRAR [AS-006]. The Applicant's HRAR sets out the methodology applied to determining what would constitute a 'significant effect'.

- 6.4.3. The Applicant's screening exercise and conclusions on likely significant effects are set out in HRAR Section A17.4 [AS-006]. Potential construction and operational effects on the three European sites are identified in Section 17.4 and Appendix A17.1.1, Table A17-1-1-1.
- 6.4.4. I issued written questions which included HRA matters on 14 October [PD-008], 11 January 2022 [PD-010] and 15 February [PD-013], and a Rule 17 request on 30 March 2022 [PD-015]. The HRA was discussed at the Issue Specific Hearing on environmental matters held on 24 November 2021.

LSE from the Proposed Development Alone

- 6.4.5. The Applicant identified potential impacts of the Proposed Development considered to have the potential to result in LSE alone in Section A17.4 of the HRAR [AS-006]. The Applicant concluded that there could be LSE alone on features of each of the three European sites. These are identified in Table 1 (Appendix C) (all of the bird species of which are non-breeding).
- 6.4.6. The Applicant's conclusion of potential likely significant effects on the three European sites and their qualifying features identified were not disputed by any IPs during the Examination. However, IPs considered that some additional features of the SPA and Ramsar site should be included and taken forward for further assessment (see Appendix C section 2 for details).

LSE from the Proposed Development in Combination

- 6.4.7. The Applicant addressed potential in combination effects (ICE) arising from the Proposed Development within HRAR Section A17.5 [AS-006], which sets out the methodology applied. Details of the other plans and projects included in the in combination assessment are provided in HRAR Table A17-5.
- 6.4.8. Of the 11 plans and projects identified it was concluded that there was potential for ICE with one project, the Viking Link Interconnector, on SAC harbour seal, resulting from underwater noise (from piling and dredging) and an increased risk of vessel collision, and this was taken forward for further assessment.
- 6.4.9. The scope of the in combination assessment was disputed by NE. They raised a number of concerns in Appendix C of their combined Relevant Representation (RR)/ Written Representation (WR) [RR-021] (see Appendix C section 2 for details).
- 6.4.10. No in combination LSEs were identified for the sites and qualifying features where LSE were excluded from the Proposed Development alone.

LSE assessment outcomes

- 6.4.11. The sites and features identified in Table 1 'Likely significant effects concluded by Applicant' (Appendix C) were assessed by the Applicant to

determine if they could be subject to AEOI as a result of the Proposed Development alone or in combination with other plans and projects, in view of their conservation objectives.

- 6.4.12. I am satisfied, on the basis of the information provided, that the correct impact-effect pathways for each site have been assessed and am satisfied with the approach to the assessment of alone and in combination likely significant effects.
- 6.4.13. Taking into account the reasoning set out above, I consider that the Proposed Development is likely to have a significant effect resulting from the impacts identified in Table 1, and additionally from habitat loss, on the qualifying features of the European sites identified above when considered alone, and on harbour seal in combination with other plans or projects. This was not disputed by IPs/ NE during the Examination.
- 6.4.14. I do not agree with the RSPB that there would be a LSE on common tern.

6.5. CONSERVATION OBJECTIVES

- 6.5.1. The conservation objectives for the European sites taken forward for consideration of effects on their integrity, are set out in HRAR Section 17.3 [AS-006]. In the absence of conservation objectives for Ramsar sites, the same objectives were assumed in the HRAR for The Wash Ramsar site. No IPs made any comments on this approach.

6.6. FINDINGS IN RELATION TO ADVERSE EFFECTS ON INTEGRITY

- 6.6.1. The European sites and qualifying features identified in Table 1 (Appendix C) were further assessed by the Applicant to determine if they could be subject to AEOI from the Proposed Development, either alone or in combination. The assessment of AEOI was made in light of the conservation objectives for the European sites.
- 6.6.2. The following matters were considered in the HRAR in relation to potential effects on site integrity:

SPA/ Ramsar site - bird species

- habitat loss;
- disturbance from construction noise;
- vessel disturbance (visual, presence and noise) during both construction and operation; and
- disturbance from construction and operational lighting at the application site and on vessels in transit through The Wash and The Haven.

SAC

- underwater noise from piling and dredging during construction - harbour seal;

- increased underwater noise and disturbance from changes in vessel traffic and movements during construction and operation – harbour seal;
- increased collision risk - harbour seal; and
- changes to air quality during operation - potential emission/deposition of NO_x, SO₂, nitrogen, acid and ammonia on the qualifying Annex I habitats.

6.6.3. Details of the examination of these matters is contained in Appendix C. A summary of the outcomes of the AEoI assessment is presented below.

Proposed Development alone

6.6.4. The Applicant's HRAR concluded that an AEoI can be excluded for the European sites considered above from the Proposed Development alone. These conclusions were not agreed with the ANCB.

6.6.5. The conclusions in the Applicant's HRA Report were subject to Examination through my Written Questions, an ISH and a Rule 17 request. NE, the RSPB and LWT disputed a number of the Applicant's conclusions.

6.6.6. I have found that an AEoI from the Proposed Development alone cannot be excluded beyond reasonable scientific doubt for:

- The Wash SPA – redshank, dark-bellied brent goose (DBBG), black-tailed godwit, oystercatcher, turnstone, the waterbird assemblage;
- The Wash Ramsar site - redshank, DBBG, oystercatcher, turnstone, the waterbird assemblage; and
- The Wash and North Norfolk Coast SAC – harbour seal

6.6.7. Table 2 (Appendix C) presents my conclusions in relation to AEoI alone at the end of the Examination.

Proposed Development in combination

6.6.8. The Applicant considered in the HRAR whether there could be an in combination effect arising from the Viking Link Interconnector project together with the Proposed Development on the SAC harbour seal population. It concluded that an AEoI could be excluded for the SAC from the Proposed Development in combination with other plans and projects. No IPs disputed this conclusion.

6.6.9. Based on the findings of the Examination, I am satisfied that an AEoI on all the qualifying features of the European sites can be excluded from the Proposed Development in combination with other plans or projects.

Engaging with the HRA Derogations

6.6.10. If the competent authority cannot conclude the absence of an AEoI, such that no reasonable scientific doubt remains, then under the Habitats Regulations the Proposed Development can proceed only if there are no alternative solutions and there are IROPI why the Proposed Development

must be carried out. Suitable compensatory measures must also be secured to ensure the overall coherence of the UK NSN.

6.6.11. At D2 the Applicant reasserted its conclusion set out in the HRAR of no AEOI alone or in combination of any of the European sites. Notwithstanding, in response to representations made by NE, the RSPB and LWT, the Applicant submitted a derogation case comprised:

- Without Prejudice Habitats Regulations Assessment Derogation Case: Assessment of Alternative Solutions; [REP2-011];
- Without Prejudice In-Principle Alternative Locations Case submitted at D8 [REP8-015];
- Without Prejudice Habitats Regulations Assessment Derogation Case: Imperative Reasons of Overriding Public Interest (IROPI) Case [REP2-012]; and
- Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (V2.0) [REP8-006, which superseded REP2-013 and REP6-025].

The consideration of these matters during the Examination are discussed in the following sections.

6.7. CONSIDERATION OF ALTERNATIVE SOLUTIONS

6.7.1. I have considered the alternative solutions test in line with the requirements of the Habitats Regulations with reference to guidance detailed at section 1.5 in Appendix C and the Examination submissions.

6.7.2. The Applicant's assessment of alternatives, including the 'do-nothing scenario', and of alternative solutions to deliver the objectives of the Proposed Development is presented in [REP2-011 and REP8-015]. Nine objectives are detailed in Section 5.4, Table 5-1 of [REP2-011].

6.7.3. Consideration of matters relating to alternative solutions were discussed during the Examination and are detailed at section 1.5 in Appendix C.

6.7.4. I am satisfied that no alternative locations or sites exist for the Proposed Development that would present a feasible alternative solution.

6.7.5. I have concluded that a need for the Proposed Development has been established and that the 'do nothing' option is not a feasible alternative. In HRA terms the 'do nothing' option would fail to meet the objectives of the Proposed Development and is not considered an alternative solution.

6.7.6. I am satisfied that no alternative design parameters are known to be implementable that would present a feasible alternative solution.

6.7.7. I am satisfied that no alternative options were considered that would have a lesser effect on the European sites than the Proposed Development.

6.7.8. Alternatives must be financially, legally, and technically feasible to constitute an alternative solution. I consider that the alternatives

assessed would not constitute an alternative solution that would meet the objectives of the Proposed Development. I am satisfied that no alternative solutions exist which would deliver appreciable benefits in terms of adverse effects on the European sites.

6.8. IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST

- 6.8.1. This section addresses the examination of the IROPI test under the requirements of the Habitats Regulations.
- 6.8.2. The Applicant's without prejudice case for IROPI under the HRA process is presented in [REP2-012]. Sections 3 - 7 set out the Applicant's reasoning that there is an imperative need for the Proposed Development, with reference to the need for:
- electrical energy;
 - the need to diversify and decarbonise electricity generation (including by waste combustion);
 - to continue to have secure and reliable supplies of electricity in the transition to a low carbon economy;
 - to divert waste materials from landfill in line with the aims of the UK's Circular Economy Package (CEP);
 - to reduce UK exports and increase domestic use of RDF and promote the proximity principle;
 - to process rather than dispose of residues;
 - lower carbon transportation;
 - development in a location which aligns with local planning policy; and
 - the socio-economic need for economic growth and jobs.
- 6.8.3. Paragraph 8.1.2 sets out the case that the reasons are overriding and in the public interest.
- 6.8.4. The Proposed Development would not affect any priority habitats or species (under the Habitats Regulations) and therefore the IROPI case can include consideration of social and economic reasons in addition to human health, public safety, or beneficial consequences of primary importance to the environment. The Applicant confirmed in Section 2 of [REP2-012] that as it had concluded that the Proposed Development would not have an adverse effect on a priority habitat or species the competent authority could consider IROPI in relation to human health, public safety, important environmental benefits, and social or economic benefits.
- 6.8.5. It considered that IROPI was justified in relation to the Proposed Development based on:
- an urgent need for electrical energy;
 - an urgent need for waste management;
 - the need for lower carbon transportation, key for maintaining public safety and human health;
 - the need for development in a location which aligns with local planning policy; and

- socio-economic benefits related to job creation during construction and operation.

- 6.8.6. Sections 3 – 8 of the document considered the above matters in detail. Reference was made to Government policy set out in NPS EN-1 and NPS EN-3 that was considered to support the Applicant’s position. In addition, cross-reference was made to supporting information contained in ES Chapter 21 (Climate Change).
- 6.8.7. In relation to the need for lower carbon transportation, Section 5 highlighted information contained in its ‘Comparative Analysis of Greenhouse Gas Emissions from Road and Marine Vessel Transport Options to the Site’ [REP1-020]. It was concluded therein that marine vessels would reduce greenhouse gas emissions by approximately 30% when compared to heavy goods vehicles, and that in addition to a beneficial reduction in carbon emissions it would have human health benefits in relation to air quality.
- 6.8.8. The Applicant considered that the Proposed Development would support good human health and public safety through diversifying energy supply, improving energy security, providing additional electricity generation to meet rising demand, diverting waste from landfill, and providing key social and economic benefits both UK-wide and locally. It concluded that this established that the Proposed Development would have long term benefits which were imperative and overriding, and that there was a public interest in it proceeding which outweighed the views of NE and other IPs on its potential effects on the conservation objectives of the European sites.
- 6.8.9. NE stated in [REP3-028] that it would not be commenting on the IROPI case. Neither the RSPB nor LWT mentioned it in any their submissions.
- 6.8.10. Given the evidence available, with regards to the case for IROPI I have not been able to conclude that IROPI for the Proposed Development could be established on the basis of the evidence submitted.

6.9. COMPENSATION MEASURES

- 6.9.1. The Applicant submitted a without prejudice package of proposed compensatory measures (the CMD) in [REP2-013], which was subsequently updated at D6 [REP6-025] and again at D8 [REP8-006], in response to ExQ3.3.1.29 [PD-013].
- 6.9.2. Section 3.5 of the CMD provided information on potential compensation sites that could provide additional or enhanced habitat for birds should this be required. It was explained that no compensation was identified in relation to harbour seals as following the assessment of the additional data obtained it was concluded that the proposed mitigation measures, as set out in the ES/ HRA Marine Mammals Addendum [REP9-020], would reduce any potential effects to not significant.
- 6.9.3. The compensation would be secured by a without prejudice DCO Schedule 11: ‘Ornithology Compensation Schedule’, a draft of which is

contained in the updated dDCO submitted at D6 [REP6-003] and subsequent versions. It requires the establishment of an Ornithology Engagement Group (OEG) and the SoS's approval of an Ornithology Compensation Implementation and Monitoring Plan (OCIMP) of measures designed to compensate for the predicted disturbance to waterbirds.

- 6.9.4. The subject of compensation in particular was given substantial consideration throughout the Examination. Details of my questions, documents submitted, and compensations sites proposed are provided at section 1.7 in Appendix C.

Conclusions on compensation measures

- 6.9.5. I consider that the information that has been provided during the Examination does not provide sufficient confidence that the measures proposed by the Applicant would effectively compensate for the AEOI on The Wash SPA and Ramsar site or that they can be secured.
- 6.9.6. Of the two sites proposed in the final version of the CMD [REP8-006], a letter of comfort was provided at D10 [REP10-022] only for the smaller site (plot 1), and the content does not provide the required certainty that the land can be used by the Applicant. As discussions with the landowner are ongoing and no letter of comfort can be provided in relation to the larger site (plot 2) (as explained in [REP10-022]) there is even less certainty that this land will be made available to the Applicant. In addition, as discussions are less advanced, insufficient information has been provided on the location of this site. Limited information has been provided on the additional area of land proposed in [REP10-022] (plot 1a) and the introduction of this site at the final Examination deadline has precluded any subsequent discussion or the opportunity for any questions to be asked about it. In the event that all three proposed sites could be secured, it is indicated that 33.3ha of compensatory habitat could potentially be provided, however currently only 19.3ha appears to have a prospect of being secured.
- 6.9.7. Insufficient information has been provided on the nature of the proposed sites, their carrying capacity, suitability, survey data, and whether any additional consents or licences would be required before they could be utilised as compensatory habitat. The compensatory sites would be required to be fully functioning prior to any impacts occurring, however the timeline for implementing this is unknown.
- 6.9.8. Taking all of the above considerations into account, I consider that there is insufficient information for the SoS to establish that appropriate compensatory measures have been secured at this time that would allow them to fulfil their duty under the requirements of Regulation 68 of the Habitat Regulations. I conclude that it cannot be ascertained at this stage that the overall package of proposed compensation measures would ultimately ensure the overall coherence of the UK NSN.

6.10. HRA CONCLUSIONS

6.10.1. The Proposed Development is not directly connected with, or necessary to, the management of a European site, and therefore the implications of the Proposed Development with respect to adverse effects on potentially affected sites must be assessed by the SoS.

LSE

6.10.2. Three European Sites and their qualifying features were considered in the Applicant's assessment of LSE: The Wash SPA, The Wash Ramsar site and The Wash and North Norfolk Coast SAC. LSE were identified for all of these sites from the Proposed Development alone, as identified in Table 1 (Appendix C). An in combination LSE with other plans or projects was identified for The Wash and North Norfolk Coast SAC.

6.10.3. The methodology and outcomes of the Applicant's screening for LSE on European sites was subject to some discussion and scrutiny, however, the sites and features for which LSE were identified were not disputed by any IP. I am satisfied that the correct European sites and qualifying features have been identified for the purposes of the assessment, and that all potential impacts which could give rise to significant effects have been identified.

AEoI

6.10.4. My findings are that, subject to the mitigation measures to be secured in the dDCO, an AEoI resulting from the assessed impact-effect pathways from the Proposed Development can be excluded in combination with other plans or projects for each of the European sites.

6.10.5. However, my findings are that an AEoI cannot be excluded on the European sites and their qualifying features as a result of the assessed impact-effect pathways from the Proposed Development alone in respect of the following:

- disturbance to birds from construction activities at the application site;
- disturbance to birds from vessel movements during construction and operation at the application site, the mouth of The Haven and the central section of The Haven; and
- collision risk impacts on harbour seal during operation.

6.10.6. If the SoS is minded to agree with this conclusion, then they are required to consider information to inform a derogation case.

Alternative solutions, IROPI and compensation measures

6.10.7. The Applicant has submitted a without prejudice assessment of alternative solutions, the case for IROPI, and proposed compensation measures. The subject of compensation in particular was given substantial consideration during the Examination. I am satisfied that no feasible alternative solution exists that would represent a lesser adverse effect than the Proposed Development. Given the evidence available,

with regards to the case for IROPI I have not been able to conclude that IROPI for the Proposed Development could be established on the basis of the evidence submitted.

- 6.10.8. The findings of the Examination are that the compensation package as currently proposed is insufficiently certain and not adequately secured in the dDCO/ DML.
- 6.10.9. I consider that there is sufficient information before the SoS BEIS to enable them to undertake an appropriate assessment and to apply the derogation tests of the Habitats Regulations of alternative solutions, IROPI in order to fulfil their duty under the requirements of the Habitats Regulations.
- 6.10.10. Whilst the SoS is the competent authority under the Habitats Regulations and will make the definitive assessment, my finding is that the proposal would be likely to have an adverse effect on the integrity of European sites, for which compensation is required. Due to the late submission of material by the Applicant covering proposed compensation sites their deliverability remains uncertain. I therefore have no option but to conclude that the requirements of Regulation 68 of the Habitats Regulations have not been satisfied at this time in respect of compensation measures.
- 6.10.11. The SoS may be in a position to draw a different conclusion based on the information presented or in the event that further detail and certainty regarding the efficacy and securing mechanism of the compensation measures becomes available. I have provided in Appendix D the matters I recommend the SoS may wish to consider in order to resolve the outstanding uncertainties.

7. CONCLUSION ON THE CASE FOR DEVELOPMENT CONSENT

7.1. INTRODUCTION

- 7.1.1. The statutory framework for deciding Nationally Significant Infrastructure Project applications where there is a relevant designated National Policy Statement (NPS) is set out in s104 of PA2008. Subject only to specific exceptions provided for in s104, the Secretary of State (SoS) must decide the application in accordance with relevant designated NPS(s), which in the case of this application are NPS EN-1 and NPS EN-3.
- 7.1.2. Accordingly, this Chapter summarises my findings on each of the matters in Chapters 4, 5 and 6 in order to reach a conclusion on the case for granting development consent for this application. This is based on an assessment of those matters which I consider are both important and relevant to the decision as well as the Local Impact Reports submitted to the Examination, as required by s104 of PA2008.
- 7.1.3. In the light of my conclusion on the case for development consent in this Chapter, Chapter 8 then turns to the Applicant's proposals for compulsory acquisition and related matters, followed by discussion of the draft Development Consent Order in Chapter 9 before reaching an overall recommendation about whether development consent should be granted for the application in Chapter 10.

7.2. FINDINGS AND CONCLUSIONS

- 7.2.1. This section summarises the conclusions reached in Chapter 4 (The Planning Issues), Chapter 5 (Findings and Conclusions in Relation to the Planning Issues), and Chapter 6 (Findings and Conclusions in Relation to Habitats Regulations Assessment). I have not included references in this summary, since the full references are in the corresponding sections of Chapters 4, 5 and 6.

Air quality and emissions

- 7.2.2. The Environmental Statement (ES) has adequately described any significant air emissions, their mitigation and any residual effects generated by the Proposed Development in accordance with paragraph 5.2.7 of NPS EN-1. I conclude that the project is unlikely to lead to a breach of the air quality legislation referred to in NPS EN-1 and NPS EN-3, or a deterioration in air quality.
- 7.2.3. I consider that mitigation measures for operational and construction emissions have been adequately identified.
- 7.2.4. Therefore, the Proposed Development meets the policy tests for air quality and emissions given in NPS EN-1 Section 5.2.
- 7.2.5. I conclude that air quality and emissions matters do not weigh against the Order being made.

Climate change adaptation

- 7.2.6. The Applicant has taken into account the potential impacts of climate change using the latest UK Climate Projections available at the time the ES was prepared, covering the estimated lifetime of the Proposed Development. All points on climate change were agreed within the final Statements of Common Ground (SoCG) with Boston Borough Council (BBC) and Lincolnshire County Council (LCC).
- 7.2.7. Therefore, the Proposed Development meets the policy tests for climate change adaptation given in NPS EN-1 Section 4.8.
- 7.2.8. I conclude that climate change adaptation matters do not weigh against the Order being made.

Good design

- 7.2.9. The Applicant has taken into account functionality and aesthetics as far as possible and demonstrated good design in terms of siting the Proposed Development.
- 7.2.10. The application documents demonstrate how the design process was conducted and how the design process evolved.
- 7.2.11. Therefore, the Proposed Development meets the policy tests for good design given in NPS EN-1 Section 4.5.
- 7.2.12. I conclude that good design matters do not weigh against the Order being made.

Habitats, ecology and nature conservation

- 7.2.13. The Applicant has sought to avoid significant harm to biodiversity conservation interests, including through mitigation.
- 7.2.14. I conclude that habitats, ecology and nature conservation matters do not weigh against the Order being made. My findings with regard to the Habitats Regulations is contained within 7.3 The Planning Balance below.

Historic environment

- 7.2.15. The Applicant has adequately assessed the nature and significance of the historic environment assets and the value they hold, and has reached agreement with Historic England on all points.
- 7.2.16. Therefore, the Proposed Development meets the policy tests for historic environment given in NPS EN-1 Section 5.8.
- 7.2.17. I conclude that historic environment matters do not weigh against the Order being made.

Landscape and visual

- 7.2.18. An acceptable Landscape and Visual Impact Assessment has been undertaken as part of the ES.
- 7.2.19. In submitting an Outline Landscape and Ecological Mitigation Strategy (secured in the DCO) I conclude that the Applicant has demonstrated good design principles and set out mitigation and landscape proposals to mitigate adverse landscape/visual effects.
- 7.2.20. Therefore, the Proposed Development meets the policy tests for landscape and visual given in NPS EN-1 Section 5.9 and NPS EN-3 2.5.46-52.
- 7.2.21. I conclude that landscape and visual matters do not weigh against the Order being made.

Navigation

- 7.2.22. The Applicant has identified appropriate navigational policies and applied them appropriately to the Proposed Development. Impacts on navigation of all users affected were appropriately assessed.
- 7.2.23. Residual impacts to the fishing fleet were identified and mitigation through the implementation of a Navigation Management Plan (NMP) was identified and committed to. There is a satisfactory mechanism for resolving the fishermen's issues post consent via the NMP template, a DCO certified document.
- 7.2.24. The Applicant worked closely with the Port of Boston as Statutory Harbour Authority on the ability to safely and efficiently manage the additional traffic.
- 7.2.25. Therefore, the Proposed Development accords with:
- The Marine Policy Statement;
 - The East Marine Plan; and
 - Local Planning Policy
- 7.2.26. I conclude that navigation matters do not weigh against the Order being made.

Noise and vibration

- 7.2.27. I accept the Applicant's proposals for mitigation of noise impacts which would avoid significant adverse impacts and mitigate and minimise other adverse impacts on health and quality of life from noise.
- 7.2.28. Therefore, the Proposed Development meets the policy tests for noise and vibration given in NPS EN-1 Section 5.11.
- 7.2.29. I conclude that noise and vibration matters do not weigh against the Order being made.

Socio-economic

- 7.2.30. The Applicant has undertaken an adequate assessment of all relevant socio-economic impacts at local or regional levels as part of the ES, supported by evidence.
- 7.2.31. Therefore, the Proposed Development meets the policy tests for socio-economic given in NPS EN-1 Section 5.12.
- 7.2.32. I conclude that socio-economic matters weigh positively for the Order being made in terms of job creation, opportunities for local businesses and uplift in demand for visitor accommodation and tourism attractions from construction workers.

Traffic and transport

- 7.2.33. The ES includes an appropriate transport assessment which identifies the impacts of transport implications, and the Applicant has sought to mitigate these impacts. Material deliveries and removals are planned to be transported by water.
- 7.2.34. With regard to the replacement of the England Coast Path route I recommend the suggested alternative route which directly follows the coast, as proposed by Natural England (NE).
- 7.2.35. Therefore, the Proposed Development meets the policy tests for traffic and transport given in NPS EN-1 paragraph 5.13.6 and NPS EN-3 paragraph 2.5.25.
- 7.2.36. I conclude that traffic and transport matters do not weigh against the Order being made.

Waste management

- 7.2.37. ES Chapter 23 Waste, and the Fuel Availability and Waste Hierarchy Assessment appropriately consider the proposed options for recycling, recovery or disposal of waste in accordance with the Waste Hierarchy.
- 7.2.38. All points on waste were agreed within the final SoCGs with BBC and LCC.
- 7.2.39. Therefore, the Proposed Development meets the policy tests for waste management given in NPS EN-1 Section 5.14.
- 7.2.40. I conclude that waste management matters do not against the Order being made.

Water quality and flood risk

- 7.2.41. The ES has complied with the specific assessment requirements for surface water, flood risk and drainage.

- 7.2.42. Therefore, the Proposed Development meets the policy tests for water quality and flood risk given in NPS EN-1 and NPS EN-3.
- 7.2.43. I conclude that water quality and flood risk matters do not weigh against the Order being made.

7.3. THE PLANNING BALANCE

7.3.1. In this Chapter, I have summarised the conclusions reached in relation to each of the sections in Chapters 4, 5 and 6. The purpose of this section is to draw the threads together in reaching a recommendation as to whether the case is made out for granting development consent for the Boston Alternative Energy Facility application.

7.3.2. The Proposed Development would meet the need established in section 3.4 of NPS EN-1 and NPS EN-3 to which substantial weight is accorded, and of the assessment topics socio-economic matters weigh positively. These matters therefore weigh in favour of the draft Order, strongly so in relation to the policy justification.

7.3.3. For all other matters considered in Chapter 5:

- Air quality and emissions;
- Climate change adaptation;
- Good design;
- Historic environment;
- Landscape and visual;
- Navigation;
- Noise and vibration;
- Socio-economic;
- Traffic and transport;
- Waste management; and
- Water quality and flood risk.

There are no issues which would weigh against the Order being made, these are neutral in the planning balance. In terms of the assessment of impacts the case for development consent is made.

7.3.4. As is set out in paragraphs 3.1 and 7.1.1 of this report, the starting point for reaching a decision is that s104(3) of PA2008 requires the SoS to decide the application in accordance with any relevant national policy statement, except to the extent that one or more of the exceptions in subsections (4) to (8) applies, creating a presumption in favour of NPS compliant development.

7.3.5. Whilst the SoS is the competent authority under the Habitats Regulations and will make the definitive assessment, my finding is that the proposal would be likely to have an adverse effect on the integrity of European sites, for which compensation is required. Due to the late submission of material by the Applicant covering proposed compensation sites their deliverability remains uncertain. I therefore have no option but to conclude that the requirements of Regulation 68 of the Habitats

Regulations have not been satisfied at this time in respect of compensation measures.

- 7.3.6. The SoS may be in a position to draw a different conclusion based on the information presented or in the event that further detail and certainty regarding the efficacy and securing mechanism of the compensation measures becomes available. I have provided in Appendix D the matters I recommend the SoS may wish to consider in order to resolve the outstanding uncertainties. If the Habitats Regulations matters are satisfied the planning balance would then weigh for the case for development consent being made.

8. COMPULSORY ACQUISITION AND RELATED MATTERS

8.1. INTRODUCTION

8.1.1. The draft Development Consent Order (dDCO) contains powers of compulsory acquisition (CA) and also for temporary possession (TP) of land and rights. The Applicant is seeking these powers to:

- acquire land permanently within the Order limits;
- temporarily possess land within the Order limits;
- acquire rights over some of the land within the Order limits;
- extinguish existing rights over some of the land within the Order limits; and
- temporarily suspend rights over some of the land within the Order limits,

in order to construct, operate and maintain the Proposed Development [REP10-004].

8.2. THE REQUEST FOR CA AND TP POWERS

8.2.1. The application includes a request for CA and TP powers; the source of those powers is contained in the Applicant's preferred dDCO [REP10-004]. All further references to the dDCO in this Chapter relate to this version.

8.2.2. The application was accompanied by:

- a Book of Reference (BoR);
- Land Plan and Crown Land Plan, and Works Plans;
- A Statement of Reasons (SoR); and
- A Funding Statement (FS).

8.2.3. Taken together, these documents set out the land and rights sought by the Applicant together with the reasons for their requirement and the basis under which compensation would be funded. Where the Examination and due diligence processes led to changes to this documentation, the changes are recorded. By the close of the Examination, the most up-to date versions were as follows:

- BoR [REP9-007];
- Land Plan and Crown Land Plan, and Works Plans [APP-012; and REP10-006];
- SoR [APP-008]; and
- FS [APP-009].

8.2.4. These documents taken together form the basis of the analysis in this Chapter. References to the BoR and the Land Plan and Crown Land Plan, and Works Plans in this Chapter from this point should be read as references to the latest revisions cited above.

- 8.2.5. Land over which CA and TP powers are sought is referred to in this Chapter as the Order land.

8.3. THE PURPOSES FOR WHICH LAND IS REQUIRED

Land for CA and TP

- 8.3.1. The Applicant is seeking limited CA powers (permanent acquisition) over four plots, being plots 19, 19b, 21 and 23. Plots 19 and 19b are required for the wharf and amount to approximately 2,700m²; plots 21 and 23 for the Habitat Mitigation Area amounting to approximately 12,400m². It would not be sufficient to only acquire rights over this land as there is no owner to enforce these rights against, and only full title acquisition will grant the Applicant sufficient control over the land in order to implement the Authorised Development. The Applicant is also seeking TP over one plot, plot 3 (a drain). Despite the reasonable efforts taken by the Applicant, such as the erection of site notices, the owners of these plots remain unknown. The steps taken by the Applicant have however identified one new potential interest holder in plot 3 whom the Applicant has included in its latest BoR [REP9-007]. However, as the land is unregistered, this new party has only been able to establish a potential riparian interest.
- 8.3.2. The Applicant has concluded a voluntary s106 agreement with Alchemy Farms Limited who own the land required for the Facility [REP10-018]. This is for all the land within the redline boundary except the Crown Land and the four CA plots.

Crown Land

- 8.3.3. The Applicant's Overall Summary of Case [REP10-019] states:
- "The Applicant has held discussions with The Crown Estate and negotiations have been ongoing for the dredging and habitat mitigation area land since pre-application. Current discussions centre around agreeing commercial terms. Following recent correspondence from The Crown Estate's solicitors (30 March 2022), the Applicant has agreed to insert the Crown rights article in the latest version of the DCO (document reference 2.1(6))."*
- 8.3.4. The Applicant's Overall Summary of Case [REP10-019] stated at paragraph 5.3.2:
- "The Crown Estate have provided consent pursuant to s135(2) of PA2008 by email to the Planning Inspectorate on 6 April 2022."*
- This was not received by the Planning Inspectorate; the SoS may wish to request this.

Statutory undertakers

- 8.3.5. No statutory undertakers (SUs) object to the scheme.

- 8.3.6. The dDCO seeks to incorporate the provisions of the Compulsory Purchase (General Vesting Declarations) Act 1981 and the provisions set out in s158 of the Act relating to the statutory authority and protection given to override easements and other rights.

8.4. LEGISLATIVE REQUIREMENTS

- 8.4.1. CA powers can only be granted if the conditions set out in s122 and s123 of PA2008, together with relevant guidance in "Guidance Related to Procedures for the Compulsory Acquisition of Land", DCLG, September 2013 (the Former Department for Communities and Local Government (DCLG) CA Guidance) are met.
- 8.4.2. s122(2) of PA2008 requires that the land subject to CA must be required for the development to which the development consent relates or must be required to facilitate or be incidental to the development. In respect of land required for the development, the land to be taken must be no more than is reasonably required and be proportionate⁶.
- 8.4.3. s122(3) of PA2008 requires that there must be a compelling case in the public interest to acquire the land, which means that the public benefit derived from the CA must outweigh the private loss that would be suffered by those whose land is affected. In balancing public interest against private loss, CA must be justified in its own right.
- 8.4.4. s123 of PA2008 requires that one of three procedural conditions in subsections (2) to (4) must be met by the application proposal, namely:
- 2) The condition is that the application for the order included a request for compulsory acquisition of the land to be authorised.
 - 3) The condition is that all persons with an interest in the land consent to the inclusion of the provision.
 - 4) The condition is that the prescribed procedure has been followed in relation to the land.
- 8.4.5. A number of general considerations also have to be addressed, either as a result of following the applicable guidance or in accordance with legal duties on decision-makers:
- all reasonable alternatives to CA must have been explored;
 - the Applicant must have a clear idea of how it intends to use the land subject to CA powers;
 - the Applicant must be able to demonstrate that funds are available to meet the compensation liabilities that might flow from the exercise of CA powers; and
 - the decision-maker must be satisfied that the purposes stated for the CA are legitimate and sufficiently justify the inevitable interference with the human rights of those affected.

⁶ DCLG CA Guidance

8.4.6. Further to Part 1 of Schedule 5 to PA2008 at paragraph 2, TP powers are capable of being within the scope of a DCO. PA2008 and the associated DCLG Guidance do not contain the same level of specification and tests to be met in relation to the granting of TP powers, as by definition such powers do not seek to permanently deprive or amend a person's interests in land.

8.5. EXAMINATION OF THE CA AND TP CASE

The Examination Process

8.5.1. Particular measures relating to examination of the CA and TP case included the following:

- a voluntary agreement in respect of each of the plots for CA is not possible given that the owners are unknown and there is no legal entity capable of giving the Applicant good title or licence. The Applicant is not aware of any objections to CA elements of the scheme; and
- the Applicant has concluded a voluntary agreement with Alchemy Farms Limited for all the land within the redline boundary except the Crown Land and the four CA plots.

8.5.2. I undertook the following site inspection to land subject to CA and TP proposals:

- USI on 6 July 2021 [EV1-001]; and
- USI on 10 January 2022 [EV1-002].

8.5.3. One CAH was scheduled for 26 November 2021 where individuals subject to CA and TP proposals could be heard. There were no requests to attend and therefore this hearing was cancelled.

General Consideration

8.5.4. The Applicant's general case for CA and TP is set out in Chapter 5 of the SoR [APP-008] under the following headings:

- Justification for Powers of Compulsory Acquisition;
- Alternatives to CA;
- The proposed interest in the land is for a legitimate purpose and is necessary and proportionate;
- Clear idea of intentions of how land proposed to be acquired will be used;
- Availability of funds for compensation;
- Justification for interfering with the human rights of those with an interest in the land affected;
- Compelling case in the public interest; and
- Purpose for which powers are sought.

8.5.5. The Applicant concludes that:

- the conditions in s122 of PA2008 are met and that the tests in the CA Guidance are satisfied;

- all of the land subject to CA and TP powers is necessary to construct, operate, maintain and mitigate the Proposed Development are necessary to achieve the objectives of the Proposed Development.
- the extent of the land sought is reasonable and proportionate; and
- there is a compelling case in the public interest to include the CA powers sought by the Applicant in the dDCO. The exercise of the CA powers that are sought is necessary and proportionate to the extent that interference with private land and rights is required. In the absence of compulsory powers, the Applicant considers that it would not be possible to proceed with the Proposed Development, therefore the public benefits of the Proposed Development would not be realised.

8.5.6. I agree with the Applicant’s conclusions on the generality of the case, but the overarching conclusion on CA and TP cannot be reached until individual objections and all other relevant and important considerations have been addressed.

Consideration of Individual Objections and Issues

8.5.7. No objections to CA and TP were received.

8.6. OTHER PARTICULAR CONSIDERATIONS

Special Land and Rights Provisions

8.6.1. The Applicant was asked throughout the Examination whether the Proposed Development bore on any of the special land and rights provisions that arise under PA2008. Issues arising are reported under individual headings below.

Statutory Undertaker land, rights or apparatus

8.6.2. The Applicant confirmed that no SU retains an interest in the plots subject to CA [REP9-022].

8.6.3. The Applicant confirmed that no SU possesses a relevant right or relevant apparatus on the land subject to CA [REP9-022].

8.6.4. With regard to s127 of PA2008 I conclude:

- no SU raised any issues with regard to CA

8.6.5. With regard to s138(4) I conclude:

- no SU possesses a relevant right or relevant apparatus on the land subject to CA.

Crown Land

8.6.6. The BoR identifies Crown Land.

8.6.7. The interests owned by or on behalf of the Crown are excluded from the scope of CA. This is done by excluding them from the description of the land in the BoR and listing the interests separately in Part 4 [REP9-007].

8.6.8. Article 53 of the dDCO protects the Crown interest [REP10-004].

Human Rights Act 1988 Considerations

8.6.9. The Human Rights Act 1988 places the European Convention on Human Rights (ECHR) into UK statute. The ECHR is subscribed to by member states of the Council of Europe. ECHR rights are enforceable in the domestic courts but with final recourse to the European Court of Human Rights. The ECHR, the Council of Europe and the European Court of Human Rights are not European Union institutions and are unaffected by the decision to leave the European Union.

8.6.10. Relevant provisions of the ECHR that are normally engaged by CA and / or TP proposals include:

- Article 6 – the right to due process in civil proceedings, including a public hearing before an independent and impartial tribunal;
- Article 8 – the right to respect for private and family life and the home is relevant where property that is a home is affected;
- Protocol 1, Article 1 – the right to the peaceful enjoyment of property and not to be deprived of this other than in the public interest.

8.6.11. Chapter 8 of the SoR deals with Human Rights [APP-008]. There are no occurrences on the Proposed Development of acquiring residential property.

8.6.12. I conclude that the CA sought is compatible with the Human Rights Act and the ECHR.

8.7. CONCLUSIONS

Conclusion relating to individual objections and issues

8.7.1. No objections to CA and TP were received.

Conclusion relating to SU land, rights or apparatus

8.7.2. No SU raised any issues with regard to CA.

8.7.3. No SU possesses a relevant right or relevant apparatus on the land subject to CA.

Crown land

8.7.4. I conclude that the relevant consent has been provided.

Human rights

8.7.5. I conclude that the CA sought is compatible with the Human Rights Act and the ECHR.

Final Conclusion

8.7.6. I conclude that the SoS can be satisfied that conditions 123(2) and 123(3) PA2008 are met.

8.7.7. I conclude that the SoS can be satisfied that the tests in s122(2) and s122(3) PA2008 are met and recommend acceptance of the CA and TP powers proposed in the DCO as a whole.

CA applies to plots: 19, 19b, 21 and 23; and

TP applies to plot 3.

9. DRAFT DEVELOPMENT CONSENT ORDER AND RELATED MATTERS

9.1. INTRODUCTION

9.1.1. This Chapter outlines the structure and evolution of the draft Development Consent Order (dDCO) from the version submitted with the application to the recommended DCO included with this Report at Appendix E.

9.2. THE DCO AS APPLIED FOR

9.2.1. The dDCO as initially applied for was included with the application [APP-005], and the final version Revision 6 [REP10-004] was submitted on 7 April 2022.

9.2.2. The dDCO consists of seven parts:

- Part 1: Preliminary (Articles 1-2);
- Part 2: Principal Powers (Articles 3-9);
- Part 3: Streets (Articles 10-18);
- Part 4: Supplementary Powers (Articles 19-24);
- Part 5: Powers of acquisition and possession of land (Articles 25-39);
- Part 6: Miscellaneous and general (Articles 40-54);
- Schedules 1-11.

9.2.3. Schedule 1 specifies the proposed works. Works Nos. 1 to 7 would comprise the Nationally Significant Infrastructure Project and the associated development.

9.2.4. Schedule 2 details the 25 Requirements that would need to be met by the Proposed Development, and the procedure for the discharge of the Requirements. Schedules 3, 4, 5, and 6 deal with streets subject to: street works; alteration; temporary closure etc; and permanent stopping up, respectively. Schedule 7 addresses temporary possession. Schedule 8 contains the Protective Provisions in favour of 6 parties. Schedule 9 contains the Deemed Marine Licence (DML). Schedule 10 contains a list of the documents to be certified. Finally, Schedule 11 contains the without prejudice ornithology compensation measures.

9.2.5. The Applicant's explanation for the various components of the dDCO is in the Explanatory Memorandum [APP-006].

9.3. CHANGES DURING EXAMINATION

9.3.1. This section of the Report addresses the matters in respect of which there was discussion between the Applicant, the Examining Authority (ExA), Interested Parties (IP) and Affected Persons (AP) at the hearings and through correspondence about potential changes to the dDCO.

9.3.2.

Discussions occurred throughout the course of the Examination, and the Applicant worked to produce a dDCO that met the requirements of the various parties. In doing so, the Applicant submitted a number of revisions to the dDCO with accompanying explanatory documents which were as follows:

- The Applicant's dDCO Revision 1 [REP1-003] at Deadline (D)1, 19 October 2021, contains minor updates.
- In Revision 2 [REP3-003] at D3, 6 December 2021, many of the changes made were agreed and included in the Applicant's response to Written Representations, Local Impact Reports, and the Applicant's comments on Examining Authority's First Written Questions (ExQ1) [REP2-008].
- At D6 on 8 February 2022 in Revision 3 [REP6-002], most of the changes arose from and were agreed in the Applicant's response to ExQ2 [REP5-004]; and the Applicant's Responses to Representations received at Deadlines 2-4 [REP5-008].
 - The Applicant submitted a without prejudice package of proposed compensatory measures [REP2-013], which was subsequently updated at D6 [REP6-025] and again at D8 [REP8-006]. The compensation would be secured by a without prejudice DCO Schedule 11: Ornithology Compensation Measures, a draft of which is contained in the updated dDCO submitted at D6 [REP6-002] and subsequent versions). Schedule 11 of the dDCO ensures funding would be in place for the delivery of the compensation measures and includes provisions for decommissioning.
- At D8 on 15 March 2022 in Revision 4 [REP8-004], changes were made in response to ExQ3 [REP7-007] and to reflect changes agreed with IPs.
- At D9 on 24 March 2022 in Revision 5 [REP9-004], changes were made to reflect changes agreed with IPs, and other points which the Applicant identified as requiring amendment since Revision 4 of the dDCO
- In the final revision, Revision 6 [REP10-004] at D10, 7 April 2022, changes were made to include a Crown Rights Article at the request of the Crown Estate, and to address matters raised in the ExA's Rule 17 letter [PD-015] and to make some minor corrections. These changes are detailed in The Applicant's Final Schedule of Changes to the draft Development Consent Order [REP10-021]. I draw the SoS's attention to the following changes:
 - Point 4. Schedule 9 – DML – Part 3 – Conditions – Paragraph 27 – Decommissioning. *"If the Secretary of State determines that the habitat lost as a result of the construction of Work No. 4 does not result in an adverse effect on integrity then this text should be included in the DCO and the text in paragraph 11 of Schedule 11 should be deleted."*
 - Point 9: Schedule 11 - Ornithology Compensation Measures – Paragraph 11. Text to be deleted as stated in point 4.

- I have made note of these matters in Appendix D: considerations for the SoS.

9.3.3. The seven parts of the DCO are detailed under paragraph 9.2 above. Regarding the Proposed Development the following features are of note:

- Requirement 18 waste hierarchy scheme, which sets out arrangements for maintenance of the waste hierarchy which aims to minimise recyclable and reusable waste received.
- Schedule 9 DML, which sets out the terms on which the licence would be granted. The wording of this licence reflects that found in other made DCOs. Contained within the DML at item 14 is:
 - the navigation management plan (NMP). This provides that the wharf construction may not commence until the NMP has been submitted to and approved by the Marine Management Organisation, following consultation with the Port of Boston.
- Schedule 11 contains the without prejudice ornithology compensation measures. This references the ornithology compensation implementation and monitoring plan (OCIMP), a certified document listed in Schedule 10. Should the SoS decide that an Adverse Effect on Integrity cannot be ruled out, Schedule 11 requires inclusion in the DCO.

9.3.4. The dDCO provisions in respect of which I recommend changes to the final submitted dDCO [REP10-004] in the recommended DCO (Appendix E) are summarised in Table 1 below.

9.3.5. By way of context, various parties had different views on the following matters relating to the dDCO during the Examination:

- *Article 9: Consent to transfer benefit of the Order.* Presentational change.
- *Schedule 2 – Requirements.* Minor wording changes.
- *Schedule 6 - permanent stopping up of streets and public rights of way.* The replacement of the ECP route.
- *Schedule 9 - Deemed Marine Licence.* Presentational and minor wording changes. Wording relating to the Habitats Regulations Assessment (HRA) issue and compensatory measures.

Table 1: DCO issues outstanding at end of Examination, including recommended changes to the dDCO and included in the recommended DCO at Appendix E

Provision	Examination Issue and ExA’s Recommendation
Schedule 2 - Requirements 6(3) and 9(2)	Deadline 10 Submission - Update on Environment Agency Position [REP10-034] included at page 3:

Provision	Examination Issue and ExA's Recommendation
	<p>"2.11. For clarity and to ensure the protection of controlled waters, we request that the wording in Requirement 6(3) and Requirement 9(2) of document ref REP9-004 (Draft Development Consent Order), is amended from 'substantially in accordance with' to 'in accordance with'."</p> <p>The wording proposed by the Environment Agency (EA) would tie the Applicant to the wording of the draft Landscape Mitigation Strategy and Drainage Strategies, which were submitted in draft because they needed the detail to be fine-tuned later. The wording proposed by the Applicant is widely used for when a draft Strategy/ Plan has been submitted but a degree of flex is required at the implementation stage and has been used in other DCOs.</p> <p>I therefore do not recommend that the changes requested by the EA are made to the dDCO.</p>
	<p>Statement of Common Ground (SoCG) with the Marine Management Organisation (MMO) [REP9-053] Table 3-1 included:</p>
<p>Schedule 9 DML – paragraph 4(1)(k)</p>	<p>SoCG ref.: MMO1.2 "materially new or materially different". The MMO does not consider the use of 'materially' as appropriate.</p> <p>The Applicant has identified the particular wording as desirable, and the MMO has not contended that it's unlawful on the facts, or going to cause significant risks. The Applicant has identified precedent wording, which makes it harder to find that the approach taken in the draft wording is novel or contentious. I therefore consider that the Applicant's wording should be upheld.</p> <p>I therefore do not recommend that the changes requested by the MMO are made to the dDCO.</p>
<p>Schedule 9 DML – paragraph 4(1)(k) (iii)</p>	<p>SoCG ref.: MMO1.3 - "necessary or convenient". The MMO does not consider this phrase is appropriate.</p> <p>The Applicant has identified the particular wording as desirable, and the MMO has not contended that it's unlawful on the facts, or going to cause significant risks. The Applicant has identified precedent wording, which makes it harder to find that the approach taken in the draft wording is novel or contentious. I therefore consider that the Applicant's wording should be upheld.</p> <p>I therefore do not recommend that the changes requested by the MMO are made to the dDCO.</p>

Provision	Examination Issue and ExA's Recommendation
Schedule 9 DML – paragraph 30(2)	<p>SoCG ref.: MMO1.4 - “within 30 business days”. The MMO does not agree with being held to set timescales within the DML.</p> <p>The Applicant has identified the particular wording as desirable, and the MMO has not contended that it’s unlawful on the facts, or going to cause significant risks. The Applicant has identified precedent wording, which makes it harder to find that the approach taken in the draft wording is novel or contentious. I therefore consider that the Applicant’s wording should be upheld.</p> <p>I therefore do not recommend that the changes requested by the MMO are made to the dDCO.</p>
Schedule 9 DML – paragraph 31	<p>SoCG ref.: MMO1.5 - Paragraph 31 “<i>Determination of returns</i>”. The MMO are of the opinion that this condition is not necessary.</p> <p>The Applicant has identified the particular wording as desirable, and the MMO has not contended that it’s unlawful on the facts, or going to cause significant risks. The Applicant has identified precedent wording, which makes it harder to find that the approach taken in the draft wording is novel or contentious. I therefore consider that the Applicant’s wording should be upheld.</p> <p>I therefore do not recommend that the changes requested by the MMO are made to the dDCO.</p>
Schedule 9 DML – paragraph 32(1), (2) and (3) and 33(3) and (4)	<p>SoCG ref.: MMO1.6 - Determination within 13 weeks. The MMO do not consider it acceptable to place determination periods/timeframes.</p> <p>The Applicant has identified the particular wording as desirable, and the MMO has not contended that it’s unlawful on the facts, or going to cause significant risks. The Applicant has identified precedent wording, which makes it harder to find that the approach taken in the draft wording is novel or contentious. I therefore consider that the Applicant’s wording should be upheld.</p> <p>I therefore do not recommend that the changes requested by the MMO are made to the dDCO.</p>
	<p>Considering the arguments put forward by the Applicant and NE regarding the replacement of the ECP route, I find NE’s argument more compelling for its suggested alternative route which directly follows the coast as detailed in Appendix E3 [REP5-015] (alternative route is shown in Figure 1 of [REP2-047]).</p>

Provision	Examination Issue and ExA's Recommendation	
	I therefore recommend that the following changes requested by NE are made to the dDCO, as detailed below.	
Schedule 4 – streets subject to alteration of layout Part 1 – permanent alteration of layout	(1) Street subject to alteration of layout	(2) Description of alteration
	New section of public footpath from Boston Public Footpath 14/4 to Boston Public Footpath 14/11.	A new section of footpath (110m approximately) from a point approximately 200 m from the point marked ST1 (OSGR TF3374542872) on the access and rights of way plan which would join BOST/14/11.
Schedule 6 - permanent stopping up of streets and public rights of way	(1) Street to be stopped up	(2) Extent of stopping up
	Boston Public Footpath 14/4	Footpath to be stopped up between a point approximately 200 m from the points marked ST1 (OSGR TF3374542872) to ST3 (OSGR TF3411942384) on the access and rights of way plan.
	MMO D10 Submission - Final comments on the Development Consent Order (DCO) [REP10-035]. The points are mainly presentational and not particularly contentious. I therefore recommend that the following changes requested by the MMO are made to the dDCO, as detailed below.	
Article 9(5): Consent to transfer benefit of the Order	The Secretary of State must consult the MMO before giving consent under paragraph (1) to the transfer or grant to another person of the benefit of the provisions of the deemed marine licence.	
Schedule 9 DML		
PART 1		
1(1) "Marine Noise Registry"	"Marine Noise Registry" means the database developed and maintained by the Joint Nature Conservation Committee on behalf of Defra the Department for Environment, Food and	

Provision	Examination Issue and ExA's Recommendation
	Rural Affairs to record the spatial and temporal distribution of impulsive noise generating activities in UK seas;
PART 3	
13(2) Piling	Unless otherwise agreed by the MMO, the piling method statement must include the following—
13(2)(c) Piling	provision that piling activities must only be undertaken between 1 June and 30 September (inclusive) and details on the timing of piling activities throughout those months;
18 - title	Landscape and eEcological mMitigation sStrategy
18(4)(d)	the site or sites on which the compensation off-setting required pursuant to sub-paragraph (c) ...
18(4)(e)	certified copies of the completed legal agreements securing the site or sites identified in sub-paragraph (d) ...
25 - title	Sediment sSampling
25(1)	The undertaker must submit a sample plan request in writing to the MMO for written approval of a sample plan in
25(2)	The sample plan request must be made—
25(2)(a)	for capital dredging, at least 6six months prior ...
25(3)	The sample plan request must include details of—
25(4)	Unless otherwise agreed by the MMO in writing , the ...
28	The undertaker must inform the local MMO local office ...

9.4. CONCLUSIONS

- 9.4.1. The Applicant's dDCO was subject to six revisions through the course of the Examination, as a result of the hearings, the ExA's Written Questions and submissions by the IPs and APs.
- 9.4.2. Table 1 above summarises the matters that were not fully resolved by the end of the Examination, and on which I have concluded and made recommendations to the SoS. These proposed changes to the dDCO submitted at the end of the Examination are therefore contained in the recommended DCO in Appendix E.

10. SUMMARY OF FINDINGS AND CONCLUSIONS

10.1. INTRODUCTION

10.1.1. This Chapter summarises my conclusions arising from this Report as a whole and sets out my recommendation to the Secretary of State (SoS). It relies for its position on the planning balance on the conclusions recorded in Chapter 7. However, in addition to those conclusions it also draws in the conclusions arising from Chapters 8 (Compulsory Acquisition (CA) and Temporary Possession (TP)) and 9 (the Development Consent Order (DCO)).

10.2. CONSIDERATION OF FINDINGS AND CONCLUSIONS

10.2.1. In relation to s104 of PA2008 I conclude in summary that:

- making the recommended DCO would be in accordance with both National Policy Statements (NPS) EN-1 and EN-3, any relevant development plans and other relevant policy, all of which have been taken into account in this Report, reference Chapter 3 of this Report;
- matters arising from the Local Impact Reports from two Councils have been taken into account, reference paragraph 1.4.27 of this Report;
- in regard to all other matters and representations received, there are no important and relevant matters that would individually or collectively lead to a different recommendation to that below, reference paragraph 7.3.3 of this Report; and
- there is no reason to indicate that the application should be decided other than in accordance with the relevant NPSs.
- In terms of the assessment of impacts the case for development consent is made.

10.2.2. I have considered the case for any CA and TP of land and rights required in order to implement the Proposed Development in Chapter 8 of this Report. No objections to CA and TP were received. I have recommended acceptance of the CA (4 plots) and TP (1 plot) powers proposed in the DCO as a whole.

10.2.3. I confirm that I have had regard to the provisions of the Human Rights Act 1998. I conclude that the CA sought is compatible with the Human Rights Act and the European Convention on Human Rights, reference paragraph 8.6.22 of this Report.

10.2.4. With the changes to the Applicant's preferred dDCO proposed in Appendix E to this Report, the Proposed Development meets the tests in s104 of PA2008.

10.2.5. Whilst the SoS is the competent authority under the Habitats Regulations and will make the definitive assessment, my finding is that the proposal would be likely to have an adverse effect on the integrity of European sites, for which compensation is required. Due to the late submission of material by the Applicant covering proposed compensation sites their

deliverability remains uncertain. I therefore have no option but to conclude that the requirements of Regulation 68 of the Habitats Regulations have not been satisfied at this time in respect of compensation measures.

- 10.2.6. The SoS may be in a position to draw a different conclusion based on the information presented or in the event that further detail and certainty regarding the efficacy and securing mechanism of the compensation measures becomes available. I have provided in Appendix D the matters I recommend the SoS may wish to consider in order to resolve the outstanding uncertainties.

10.3. RECOMMENDATION

- 10.3.1. For all the above reasons and in the light of my findings and conclusions on important and relevant matters set out in this Recommendation Report, I recommend that the SoS should not make an Order granting development consent for the Boston Alternative Energy Facility.
- 10.3.2. However, if the HRA matters detailed in this report can be resolved I recommend that the SoS makes the Order subject to the modifications summarised in Chapter 9 of this Recommendation Report and set out in Appendix E.
- 10.3.3. I also draw the SoS's attention to the areas of outstanding concern and matters which I have advised the SoS may wish to pursue; these are contained in Appendix D.

APPENDICES

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APPENDIX A: EXAMINATION LIBRARY

APPENDIX A: EXAMINATION LIBRARY

Application Documents	
APP-001	Alternative Use Boston Projects Limited 1.1 Application Cover Letter
APP-002	Alternative Use Boston Projects Limited 1.2 Application Guide
APP-003	Alternative Use Boston Projects Limited 1.3 Application Form
APP-004	Alternative Use Boston Projects Limited 1.4 Section 55 Checklist
APP-005	Alternative Use Boston Projects Limited 2.1 Draft Development Consent Order
APP-006	Alternative Use Boston Projects Limited 2.2 Explanatory Memorandum
APP-007	Alternative Use Boston Projects Limited 2.3 Validation Report
APP-008	Alternative Use Boston Projects Limited 3.1 Statement of Reasons
APP-009	Alternative Use Boston Projects Limited 3.2 Funding Statement
APP-010	Alternative Use Boston Projects Limited 3.3 Book of Reference
APP-011	Alternative Use Boston Projects Limited 4.1. Location Plan
APP-012	Alternative Use Boston Projects Limited 4.2. Land Plan and Crown Land Plan
APP-013	Alternative Use Boston Projects Limited 4.3. Works Plans
APP-014	Alternative Use Boston Projects Limited 4.4. Illustrative Landscape Plans
APP-015	Alternative Use Boston Projects Limited 4.5. Access and Rights of Way Plan
APP-016	Alternative Use Boston Projects Limited 4.6. Statutory and Non-Statutory Sites or Features of Nature Conservation and Habitats Plan
APP-017	Alternative Use Boston Projects Limited 4.7. Water Bodies in a River Basin Management Plan
APP-018	Alternative Use Boston Projects Limited 4.8. Heritage Assets
APP-019	Alternative Use Boston Projects Limited 4.9. Indicative Generating Station Plans
APP-020	Alternative Use Boston Projects Limited 4.10. Indicative Electrical and Water Connection Plans
APP-021	Alternative Use Boston Projects Limited 4.11. Indicative Wharf Plans
APP-022	Alternative Use Boston Projects Limited 5.1 Consultation Report
APP-023	Alternative Use Boston Projects Limited

	5.1 Consultation Report - Appendix 1 - Consultation Compliance Checklist
APP-024	Alternative Use Boston Projects Limited 5.1 Consultation Report - Appendix 2 - Statements of Community Consultation (SoCC)
APP-025	Alternative Use Boston Projects Limited 5.1 Consultation Report - Appendix 3 - Phase One Consultation - Part 1
APP-026	Alternative Use Boston Projects Limited 5.1 Consultation Report - Appendix 3 - Phase One Consultation - Part 2
APP-027	Alternative Use Boston Projects Limited 5.1 Consultation Report - Appendix 4 - Phase Two Consultation
APP-028	Alternative Use Boston Projects Limited 5.1 Consultation Report - Appendix 5 - Phase Three Consultation - Part 1
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APP-030	Alternative Use Boston Projects Limited 5.1 Consultation Report - Appendix 6 - Phase Four Consultation
APP-031	Alternative Use Boston Projects Limited 5.2 Planning Statement
APP-032	Alternative Use Boston Projects Limited 5.3 Design and Access Statement
APP-033	Alternative Use Boston Projects Limited 5.4 Other Consents and Licences
APP-034	Alternative Use Boston Projects Limited 5.5 Statutory Nuisance Statement
APP-035	Alternative Use Boston Projects Limited 5.6 Electricity Grid Connection Statement
APP-036	Alternative Use Boston Projects Limited 5.7 Combined Heat and Power Assessment
APP-037	Alternative Use Boston Projects Limited 5.8 Fuel Availability and Waste Hierarchy Assessment
APP-038	Alternative Use Boston Projects Limited 6.1 Environmental Statement Non-Technical Summary
APP-039	Alternative Use Boston Projects Limited 6.2.1. Environmental Statement - Chapter 1 - Introduction
APP-040	Alternative Use Boston Projects Limited 6.2.2 Environmental Statement - Chapter 2 - Project Need
APP-041	Alternative Use Boston Projects Limited 6.2.3 Environmental Statement - Chapter 3 - Policy and Legislation
APP-042	Alternative Use Boston Projects Limited 6.2.4 Environmental Statement - Chapter 4 - Site Selection and Alternatives
APP-043	Alternative Use Boston Projects Limited 6.2.5 Environmental Statement - Chapter 5 - Project Description
APP-044	Alternative Use Boston Projects Limited

	6.2.6 Environmental Statement - Chapter 6 - Approach to Environmental Impact Assessment
APP-045	Alternative Use Boston Projects Limited 6.2.7 Environmental Statement - Chapter 7 - Consultation
APP-046	Alternative Use Boston Projects Limited 6.2.8 Environmental Statement - Chapter 8 - Cultural Heritage
APP-047	Alternative Use Boston Projects Limited 6.2.9 Environmental Statement - Chapter 9 - Landscape and Visual Impact Assessment
APP-048	Alternative Use Boston Projects Limited 6.2.10 Environmental Statement - Chapter 10 - Noise and Vibration
APP-049	Alternative Use Boston Projects Limited 6.2.11 Environmental Statement - Chapter 11 - Contaminated Land, Land Use and Hydrogeology
APP-050	Alternative Use Boston Projects Limited 6.2.12 Environmental Statement - Chapter 12 - Terrestrial Ecology
APP-051	Alternative Use Boston Projects Limited 6.2.13 Environmental Statement - Chapter 13 - Surface Water, Flood Risk and Drainage Strategy
APP-052	Alternative Use Boston Projects Limited 6.2.14 Environmental Statement - Chapter 14 - Air Quality
APP-053	Alternative Use Boston Projects Limited 6.2.15 Environmental Statement - Chapter 15 - Marine Water and Sediment Quality
APP-054	Alternative Use Boston Projects Limited 6.2.16 Environmental Statement - Chapter 16 - Estuarine Processes
APP-055	Alternative Use Boston Projects Limited 6.2.17 Environmental Statement - Chapter 17 - Marine and Coastal Ecology
APP-056	Alternative Use Boston Projects Limited 6.2.18 Environmental Statement - Chapter 18 - Navigational Issues
APP-057	Alternative Use Boston Projects Limited 6.2.19 Environmental Statement - Chapter 19 - Traffic and Transport
APP-058	Alternative Use Boston Projects Limited 6.2.20 Environmental Statement - Chapter 20 - Socio-Economics
APP-059	Alternative Use Boston Projects Limited 6.2.21 Environmental Statement - Chapter 21 - Climate Change
APP-060	Alternative Use Boston Projects Limited 6.2.22 Environmental Statement - Chapter 22 - Health
APP-061	Alternative Use Boston Projects Limited 6.2.23 Environmental Statement - Chapter 23 - Waste
APP-062	Alternative Use Boston Projects Limited 6.2.24 Environmental Statement - Chapter 24 - Major Accidents and Risk Management
APP-063	Alternative Use Boston Projects Limited 6.2.25 Environmental Statement - Chapter 25 - Transboundary Impacts
APP-064	Alternative Use Boston Projects Limited 6.2.26 - Environmental Statement - Chapter 26 - Summary

APP-065	Alternative Use Boston Projects Limited 6.2.27 Environmental Statement - Glossary
APP-066	Alternative Use Boston Projects Limited 6.2.28 Environmental Statement - Scoping Opinion
APP-067	Alternative Use Boston Projects Limited 6.3.1 Environmental Statement - Chapter 1 - Figure 1.1
APP-068	Alternative Use Boston Projects Limited 6.3.2 Environmental Statement - Chapter 5 - Figures 5.1 - 5.3
APP-069	Alternative Use Boston Projects Limited 6.3.3 Environmental Statement - Chapter 8 - Figure 8.1
APP-070	Alternative Use Boston Projects Limited 6.3.4 Environmental Statement - Appendix 8.1 - Figures A8.1 - A8.2
APP-071	Alternative Use Boston Projects Limited 6.3.5 Environmental Statement - Chapter 9 - Figures 9.1 - 9.5
APP-072	Alternative Use Boston Projects Limited 6.3.6 Environmental Statement - Chapter 9 - Figures 9.6 - 9.14
APP-073	Alternative Use Boston Projects Limited 6.3.7 Environmental Statement - Chapter 9 - Figure 9.15
APP-074	Alternative Use Boston Projects Limited 6.3.8 Environmental Statement - Chapter 9 - Figure 9.16
APP-075	Alternative Use Boston Projects Limited 6.3.9 Environmental Statement - Chapter 9 - Figure 9.17
APP-076	Alternative Use Boston Projects Limited 6.3.10 Environmental Statement - Chapter 9 - Figure 9.18
APP-077	Alternative Use Boston Projects Limited 6.3.11 Environmental Statement - Chapter 9 - Figure 9.19
APP-078	Alternative Use Boston Projects Limited 6.3.12 Environmental Statement - Chapter 9 - Figure 9.20
APP-079	Alternative Use Boston Projects Limited 6.3.13 Environmental Statement - Chapter 9 - Figure 9.21
APP-080	Alternative Use Boston Projects Limited 6.3.14 Environmental Statement - Chapter 10 - Figures 10.1 - 10.2
APP-081	Alternative Use Boston Projects Limited 6.3.15 Environmental Statement - Chapter 11 - Figures 11.1 - 11.7
APP-082	Alternative Use Boston Projects Limited 6.3.16 Environmental Statement - Chapter 12 - Figures 12.1 - 12.3
APP-083	Alternative Use Boston Projects Limited 6.3.17 Environmental Statement - Appendix 12 - Figures A12.1 - A12.2
APP-084	Alternative Use Boston Projects Limited 6.3.18 Environmental Statement - Chapter 13 - Figures 13.1 - 13.2
APP-085	Alternative Use Boston Projects Limited 6.3.19 Environmental Statement - Appendix 13 - Figures A13.1 - A13.2
APP-086	Alternative Use Boston Projects Limited 6.3.20 Environmental Statement - Appendix 13.2 - Figures A13.2.1 - A13.2.3
APP-087	Alternative Use Boston Projects Limited 6.3.21 Environmental Statement - Chapter 14 - Figures 14.1 - 14.5
APP-088	Alternative Use Boston Projects Limited

	6.3.22 Environmental Statement - Chapter 14 - Figures 14.6 - 14.15
APP-089	Alternative Use Boston Projects Limited 6.3.23 Environmental Statement - Chapter 15 - Figures 15.1 - 15.3
APP-090	Alternative Use Boston Projects Limited 6.3.24 Environmental Statement - Chapter 16 - Figures 16.1 - 16.8
APP-091	Alternative Use Boston Projects Limited 6.3.25 Environmental Statement - Chapter 17 - Figures 17.1 - 17.10
APP-092	Alternative Use Boston Projects Limited 6.3.27 Environmental Statement - Chapter 18 - Figures 18.1 - 18.3
APP-093	Alternative Use Boston Projects Limited 6.3.28 Environmental Statement - Chapter 19 - Figures 19.1 - 19.7
APP-094	Alternative Use Boston Projects Limited 6.4.1 Environmental Statement - Appendix 1.1 - Statement of Competency
APP-095	Alternative Use Boston Projects Limited 6.4.2 Environmental Statement - Appendix 6.1 - List of Cumulative Schemes
APP-096	Alternative Use Boston Projects Limited 6.4.3 Environmental Statement - Appendix 8.1 - Cultural Heritage Desk Based Assessment
APP-097	Alternative Use Boston Projects Limited 6.4.4 Environmental Statement - Appendix 8.2 - Geophysical Survey Report
APP-098	Alternative Use Boston Projects Limited 6.4.5 Environmental Statement - Appendix 9.1 - Landscape and Visual Impact Assessment Methodology
APP-099	Alternative Use Boston Projects Limited 6.4.6 Environmental Statement - Appendix 9.2 - Representative Viewpoint Analysis Tables
APP-100	Alternative Use Boston Projects Limited 6.4.7 Environmental Statement - Appendix 10.1 - Baseline Noise Survey
APP-101	Alternative Use Boston Projects Limited 6.4.8 Environmental Statement - Appendix 11.1 - Land Quality Phase 1 Preliminary Risk Assessment
APP-102	Alternative Use Boston Projects Limited 6.4.9 Environmental Statement - Appendix 11.2 - Lincs Laboratory, Ground Investigation Report for Boston Waste Transfer Station
APP-103	Alternative Use Boston Projects Limited 6.4.10 Environmental Statement - Appendix 11.3 - T.L.P. Ground Investigation Report Proposed Power Generation Plant
APP-104	Alternative Use Boston Projects Limited 6.4.11 Environmental Statement - Appendix 12.1 - Extended Phase 1 Habitat Report
APP-105	Alternative Use Boston Projects Limited 6.4.12 Environmental Statement - Appendix 13.1 - Water Framework Directive Compliance Assessment
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	6.4.13 Environmental Statement - Appendix 13.2 - Flood Risk Assessment
APP-107	Alternative Use Boston Projects Limited 6.4.14 Environmental Statement - Appendix 14.1 - Construction Phase Dust and Particulate Matter Assessment Methodology
APP-108	Alternative Use Boston Projects Limited 6.4.15 Environmental Statement - Appendix 14.2 Dispersion Modelling Methodology
APP-109	Alternative Use Boston Projects Limited 6.4.16 Environmental Statement - Appendix 14.3 - Tabulated Assessment Results
APP-110	Alternative Use Boston Projects Limited 6.4.17 Environmental Statement - Appendix 16.1 - Supplementary Information to Estuarine Processes
APP-111	Alternative Use Boston Projects Limited 6.4.18 Environmental Statement - Appendix 17.1 - Habitats Regulations Assessment
APP-112	Alternative Use Boston Projects Limited 6.4.19 Environmental Statement - Appendix 17.2 - Breeding Bird Survey Report
APP-113	Alternative Use Boston Projects Limited 6.4.20 Environmental Statement - Appendix 19.1 - Boston Waste Transfer Station Summary
APP-114	Alternative Use Boston Projects Limited 6.4.21 Environmental Statement - Appendix 19.2 - Personal Injury Collision Location Plan
APP-115	Alternative Use Boston Projects Limited 6.4.22 Environmental Statement - Appendix 19.3 - Transport Assignment on Indicative Construction Programme
APP-116	Alternative Use Boston Projects Limited 6.4.23 Environmental Statement - Appendix 19.4 - 2021 and 2025 Background Forecast Traffic Flows
APP-117	Alternative Use Boston Projects Limited 6.4.24 Environmental Statement - Appendix 19.5 - Junction Modelling Matrices
APP-118	Alternative Use Boston Projects Limited 6.4.25 Environmental Statement - Appendix 19.6 - Junction Modelling Outputs
APP-119	Alternative Use Boston Projects Limited 6.4.26 Environmental Statement - Appendix 22.1 - Health Baseline Statistics
APP-120	Alternative Use Boston Projects Limited 7.1 Outline Code of Construction Practice
APP-121	Alternative Use Boston Projects Limited 7.2 Outline Construction Traffic Management Plan
APP-122	Alternative Use Boston Projects Limited 7.3 Outline Written Scheme of Investigation
APP-123	Alternative Use Boston Projects Limited 7.4 Outline Landscape and Ecological Mitigation Strategy
APP-124	Alternative Use Boston Projects Limited 7.5 Outline Lighting Strategy

APP-125	Alternative Use Boston Projects Limited 7.6 Register of Environmental Actions and Commitments
Adequacy of Consultation Responses	
AoC-001	Boston Borough Council Adequacy of Consultation Representation
AoC-002	Cambridgeshire County Council Adequacy of Consultation Representation
AoC-003	Lincolnshire County Council Adequacy of Consultation Representation
AoC-004	Norfolk County Council Adequacy of Consultation Representation
AoC-005	Northamptonshire County Council Adequacy of Consultation Representation
AoC-006	Nottinghamshire County Council Adequacy of Consultation Representation
AoC-007	Peterborough City Council Adequacy of Consultation Representation
AoC-008	Rutland County Council Adequacy of Consultation Representation
AoC-009	South Holland District Council Adequacy of Consultation Representation
Relevant Representations	
RR-001	United Kingdom Without Incineration Network
RR-002	Osborne Clarke LLP on behalf of Western Power Distribution Submission withdrawn via letter dated 4 April 2022 [REP10-050]
RR-003	Kevin Blanchard
RR-004	Black Sluice Internal Drainage Board
RR-005	Kimberleigh Page
RR-006	Nicola Richardson
RR-007	Alice Tanner
RR-008	Marine Management Organisation
RR-009	Vic Firth
RR-010	Roythornes Solicitors on behalf of The Boston and Fosdyke Fishing Society Limited
RR-011	Lincolnshire Wildlife Trust
RR-012	Jenny Mason
RR-013	Environment Agency
RR-014	Lincolnshire County Council
RR-015	Maritime and Coastguard Agency
RR-016	Neil Harris Consulting on behalf of Port of Boston
RR-017	Port of Boston Ltd
RR-018	Anglian Water
RR-019	Boston Borough Council
RR-020	Inland Waterways Association
RR-021	Natural England
RR-022	Peter Wilson
RR-023	Public Health England

RR-024	RSPB
RR-025	Royal Yachting Association
RR-026	Veronica Patey
RR-027	Historic England
Procedural Decisions and Notifications from the Examining Authority	
PD-001	Notification of Decision to Accept Application
PD-002	Section 55 Checklist
PD-003	Section 51 advice to the Applicant
PD-004	Rule 4 Letter - Notification of the appointment of the Examining Authority
PD-005	Rule 4 and Rule 6 - Appointment of the Examining Authority and invitation to the Preliminary Meeting
PD-006	Rule 13 and Rule 16 - Notification of hearings and Accompanied Site Inspection (ASI)
PD-007	Rule 8 – notification of timetable for the examination
PD-008	Examining Authority’s first round of written questions (ExQ1)
PD-009	Rule 17 - Request for Further Information
PD-010	Examining Authority’s second round of written questions (ExQ2)
PD-011	Examining Authority’s Commentary on the draft Development Consent Order (dDCO)
PD-012	Rule 8(3) - Change to the timetable
PD-013	Examining Authority’s (ExA’s) third round of written questions (ExQ3)
PD-014	Report on the Implications for European Sites (RIES) Issued by the Examining Authority - 24 February 2022
PD-015	Rule 17 - Request for further information
PD-016	Notification of completion of the Examining Authority’s Examination
Additional Submissions	
AS-001	Natural England Additional submission accepted at the discretion of the Examining Authority. Natural England’s response to Issue Specific Hearing 2 (ISH2) agenda questions
AS-002	Natural England Additional submission accepted at the discretion of the Examining Authority. Summary of Natural England’s advice on the Wash Special Protection Area (SPA) passage and overwintering birds.
AS-003	Alternative Use Boston Projects Limited Additional submission accepted at the discretion of the Examining Authority. Applicant’s comments on the Deadline 7 submissions from The Boston and Fosdyke Fishing Society Limited (BFFS) - Marico Report
AS-004	The Boston and Fosdyke Fishing Society

	Additional submission, accepted at the discretion of the Examining Authority. Cover letter and Report: Independent Review of the Boston Alternative Energy Facility Navigation Risk Assessment
AS-005	Alternative Use Boston Projects Limited Additional submission, accepted at the discretion of the Examining Authority. 6.4.18(1) Appendix 17.1 Habitats Regulations Assessment (Tracked) To replace REP9-012
AS-006	Alternative Use Boston Projects Limited Additional submission, accepted at the discretion of the Examining Authority. 6.4.18(1) Appendix 17.1 Habitats Regulations Assessment (Clean) To replace REP9-013
AS-007	Alternative Use Boston Projects Limited Additional submission, accepted at the discretion of the Examining Authority. 9.77(1) Worst Case Assessment for Land Raising (Tracked). To replace REP9-025
AS-008	Alternative Use Boston Projects Limited Additional submission, accepted at the discretion of the Examining Authority. 9.77(1) Worst Case Assessment for Land Raising (Clean). To replace REP9-026
Events and Hearings	
Unaccompanied Site Inspections	
EV1-001	Note of Unaccompanied Site Inspection of 6 July 2021
EV1-002	Note of Unaccompanied Site Inspection of 10 January 2022
Preliminary Meeting Part 1	
EV2-001	Recording of Preliminary Meeting Part 1 - 28 September 2021
EV2-002	Preliminary Meeting Part 1 - Transcript - 28 September 2021 This document is intended to assist Interested Parties, it is not verbatim. The content is produced using artificial intelligence voice to text and is unedited. The video recording remains as the primary record of the event.
Preliminary Meeting Part 2	
EV3-001	Updated agenda for the Preliminary Meeting Part 2
EV3-002	Recording of Preliminary Meeting - Part 2 - Session 1 - 7 October 2021
EV3-003	Preliminary Meeting Part 2 - Session 1 - Transcript - 7 October 2021 This document is intended to assist Interested Parties, it is not verbatim. The content is produced using artificial intelligence voice to text and is unedited. The video recording remains as the primary record of the event.
EV3-004	Recording of Preliminary Meeting - Part 2 - Session 2 - 7 October 2021
EV3-005	Preliminary Meeting Part 2 - Session 2 - Transcript - 7 October 2021

	This document is intended to assist Interested Parties, it is not verbatim. The content is produced using artificial intelligence voice to text and is unedited. The video recording remains as the primary record of the event.
EV3-006	Preliminary Meeting Note Preliminary Meeting Note parts 1 and 2
Accompanied Site Visits and Hearings	
EV4-001	Agenda for Issue Specific Hearing 1 - Draft Development Consent Order (dDCO) - 23 November 2021
EV4-002	Agenda for Issue Specific Hearing 2 - Environmental Matters - 24 November 2021
EV4-003	Recording of Issue Specific Hearing 1 (ISH1) into the draft Development Consent Order – 23 November 2021
EV4-004	Issue Specific Hearing 1 (ISH1) into the draft Development Consent Order - Transcript - 23 November 2021 This document is intended to assist Interested Parties, it is not verbatim. The content is produced using artificial intelligence voice to text and is unedited. The video recording remains as the primary record of the event.
EV4-005	Recording of Issue Specific Hearing 2 (ISH2) into Environmental Matters, Part 1 – Session 1 – 24 November 2021
EV4-006	Recording of Issue Specific Hearing 2 (ISH2) into Environmental Matters, Part 1 – Session 2 – 24 November 2021
EV4-007	Issue Specific Hearing 2 (ISH2) into Environmental Matters, Part 1 - Session 1 - Transcript - 24 November 2021 This document is intended to assist Interested Parties, it is not verbatim. The content is produced using artificial intelligence voice to text and is unedited. The video recording remains as the primary record of the event.
EV4-008	Issue Specific Hearing 2 (ISH2) into Environmental Matters, Part 1 - Session 2 - Transcript - 24 November 2021 This document is intended to assist Interested Parties, it is not verbatim. The content is produced using artificial intelligence voice to text and is unedited. The video recording remains as the primary record of the event.
Representations	
Procedural Deadline A – 14 September 2021	

<ul style="list-style-type: none"> • Written submissions on the Examination procedure including any submissions about the use of virtual procedures; and • Requests to be heard orally at the Preliminary Meeting Part 1 • Applicant’s draft Accompanied Site Inspection itinerary 	
PDA-001	Alternative Use Boston Projects Limited Procedural Deadline A Submission - Applicant’s draft Accompanied Site Inspection itinerary
PDA-002	Alternative Use Boston Projects Limited Procedural Deadline A Submission - Requests to be heard orally at the Preliminary Meeting Part 1
PDA-003	Environment Agency Procedural Deadline A Submission - Written submissions on the Examination procedure including any submissions about the use of virtual procedures
PDA-004	Royal Society for the Protection of Birds (RSPB) Procedural Deadline A Submission - Comments on procedure and the Preliminary Meeting
PDA-005	United Kingdom Without Incineration Network (UKWIN) Procedural Deadline A Submission
Late Submission	
PDA-006	Natural England Procedural Deadline A Submission - Late Submission - Accepted at the discretion of the Examining Authority
Procedural Deadline B – 4 October 2021	
<ul style="list-style-type: none"> • Written submissions on the Examination procedure including any submissions about the use of virtual procedures; and • Requests to be heard orally at the Preliminary Meeting Part 1 • Applicant’s draft Accompanied Site Inspection itinerary 	
PDB-001	Alternative Use Boston Projects Limited Procedural Deadline B Submission - Written submissions on Examination procedure including responses to matters raised orally at the Preliminary Meeting Part 1; and the Applicant’s request to be heard orally at Preliminary Meeting Part 2
PDB-002	Boston Borough Council Procedural Deadline B Submission
PDB-003	Environment Agency Procedural Deadline B Submission - Written submissions on Examination procedure including responses to matters raised orally at the Preliminary Meeting Part 1; comments on the Applicant’s draft Accompanied Site Inspection itinerary and a request to reserve the right to be heard orally at the Preliminary Meeting Part 2.
PDB-004	Kevin Blanchard Procedural Deadline B Submission - Comments on the Applicant’s draft Accompanied Site Inspection (ASI) itinerary

PDB-005	Lincolnshire County Council Procedural Deadline B Submission - Written submissions on Examination procedure including responses to matters raised orally at the Preliminary Meeting Part 1
PDB-006	Marine Management Organisation (MMO) Procedural Deadline B Submission - Written submissions on Examination procedure including responses to matters raised orally at the Preliminary Meeting Part 1
PDB-007	Royal Society for the Protection of Birds (RSPB) Procedural Deadline B Submission - Written submissions on the Examination procedure including responses to matters raised orally at the Preliminary Meeting Part 1; Requests to be heard orally at the Preliminary Meeting Part 2 and comments on the Applicant's draft Accompanied Site Inspection itinerary
<p>Deadline 1 – 19 October 2021</p> <p>For receipt by the ExA of:</p> <ul style="list-style-type: none"> - Comments on Relevant Representations (RRs) - Summaries of RR's exceeding 1500 words - Written Representations (WRs) - Summaries of all WRs exceeding 1500 words - Local Impact Report(s) (LIR) from any local authority - Initial Statements of Common Ground (SoCGs) - Statement of Commonality of SoCGs - Notification of wish to attend ASI - Comments on ExA's draft ASI itinerary - Notification of wish to speak at Open Floor Hearing(in-person) - Notification from any Affected Person of wish to speak at a Compulsory Acquisition Hearing (CAH) - Notification of wish make oral representations at an Issue Specific Hearing (ISH) - Notification by Statutory Parties of their wish to be considered as an Interested Party by the ExA - Any further information requested by the ExA under Rule 17 of the Examination Rules 	
REP1-001	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.1: Cover Letter
REP1-002	Alternative Use Boston Projects Limited Deadline 1 Submission - 2.1: Draft Development Consent Order (Tracked)
REP1-003	Alternative Use Boston Projects Limited Deadline 1 Submission - 2.1 - Draft Development Consent Order (clean)
REP1-004	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.2.9: Chapter 9 - Landscape and Visual Impact Assessment (Clean)
REP1-005	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.2.9: Chapter 9 - Landscape and Visual Impact Assessment (Tracked)

REP1-006	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.2.14: Chapter 14 - Air Quality (Clean)
REP1-007	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.2.14: Chapter 14: Air Quality (Tracked)
REP1-008	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.4.15: Appendix 14.2: Dispersion Modelling Methodology (Tracked)
REP1-009	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.4.15: Appendix 14.2: Dispersion Modelling Methodology (Clean)
REP1-010	Alternative Use Boston Projects Limited Deadline 1 Submission - 6.4.16: Appendix 14.3 Tabulated Assessment Results
REP1-011	Alternative Use Boston Projects Limited Deadline 1 Submission - 7.3: Outline Written Scheme of Investigation (Tracked)
REP1-012	Alternative Use Boston Projects Limited Deadline 1 Submission - 7.3: Outline Written Scheme of Investigation (Clean)
REP1-013	Not in use
REP1-014	Alternative Use Boston Projects Limited Deadline 1 Submission - 7.6: Register of Environmental Actions and Commitments (Clean)
REP1-015	Alternative Use Boston Projects Limited Deadline 1 Submission - 7.6: Register of Environmental Actions and Commitments (Tracked)
REP1-016	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.3: Statement of Commonality
REP1-017	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.4: Outline Surface Water Drainage Strategy
REP1-018	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.5: Addendum to Fuel Availability and Waste Hierarchy Assessment
REP1-019	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.6: Climate Change - Further Greenhouse Gas Emissions Analysis and Consideration of Waste Composition Scenarios
REP1-020	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.7: Climate Change - Comparative Analysis of Greenhouse Gas Emissions from Road and Marine Vessel Transport Options to the Site
REP1-021	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.8: Appendix 14.4 - Analysis of SO ₂ and O ₃ Concentrations to Justify Adoption of the Less Stringent Daily Mean NO _x Critical Level for Protection of Vegetation
REP1-022	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.9: Appendix 14.5 - Human Health Risk Assessment
REP1-023	Alternative Use Boston Projects Limited

	Deadline 1 Submission - 9.10: Appendix 14.6 - Abnormal Emissions Assessment
REP1-024	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.11: Response to Relevant Representation submitted by Public Health England in respect of electromagnetic fields
REP1-025	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.12: Outline Marine Mammal Mitigation Protocol
REP1-026	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.13: Chapter 17 Marine and Coastal Ecology and Appendix 17.1 - Habitats Regulations Assessment - Ornithology Addendum
REP1-027	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.14: Addendum to Environmental Statement Chapter 17 and Appendix 17.1 - Marine Mammals
REP1-028	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.15: Addendum to Chapter 17 and Appendix 17.1 - Benthic Ecology, Fish and Habitats
REP1-029	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.16: Boston Alternative Energy Facility Examination Technical Note: Updated Piling Noise Assessment
REP1-030	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.17: Wharf Construction Outline Methodology
REP1-031	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.18: Indicative Construction Programme
REP1-032	Alternative Use Boston Projects Limited Deadline 1 Submission - 9.19: East Marine Plan Policy Checklist
REP1-033	Alternative Use Boston Projects Limited Deadline 1 Submission- 9.20: Schedule of changes to the Draft Development Consent Order
REP1-034	Alternative Use Boston Projects Limited Deadline 1 Submission - Chapter 14 Updates Figures 14.6 - 14.15
REP1-035	Alternative Use Boston Projects Limited Deadline 1 Submission - Comments on Relevant Representations (RRs)
REP1-036	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Western Power Distribution (East Midlands) Plc
REP1-037	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston
REP1-038	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council

REP1-039	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Marine Management Organisation
REP1-040	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council
REP1-041	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water
REP1-042	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England
REP1-043	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Public Health England
REP1-044	Alternative Use Boston Projects Limited Deadline 1 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency
REP1-045	Boston Borough Council Deadline 1 Submission - Initial Statements of Common Ground (SoCGs)
REP1-046	Boston Borough Council Deadline 1 Submission - Notification of wish to speak at Open Floor Hearing (in-person)
REP1-047	Boston Borough Council Deadline 1 Submission - Local Impact Report (LIR)
REP1-048	Boston Borough Council Deadline 1 Submission - Notification of wish to attend Accompanied Site Inspection (ASI)
REP1-049	Boston Borough Council Deadline 1 Submission - Notification of wish make oral representations at an Issue Specific Hearing (ISH)
REP1-050	Boston Borough Council Deadline 1 Submission - Summaries of Relevant Representations (RR) exceeding 1500 words
REP1-051	Environment Agency Deadline 1 Submission - Written Representations (WRs)
REP1-052	Environment Agency Deadline 1 Submission - Summaries of all Written Representations (WR) exceeding 1500 words
REP1-053	Lincolnshire County Council Deadline 1 Submission - Local Impact Report (LIR)
REP1-054	Lincolnshire County Council Deadline 1 submission - notification of wish to attend Issue Specific Hearing
REP1-055	Lincolnshire Wildlife Trust Deadline 1 Submission - Written Representations (WRs)

REP1-056	Marine Management Organisation (MMO) Deadline 1 Submission
REP1-057	Natural England Deadline 1 submission - Cover Letter and Appendix H1 - Risk and Issues Log
REP1-058	Royal Society for the Protection of Birds (RSPB) Deadline 1 Submission - Summaries of all Written Representations (WR) exceeding 1500 words
REP1-059	Royal Society for the Protection of Birds (RSPB) Deadline 1 Submission - Notification of wish make oral representations at an Issue Specific Hearing (ISH)
REP1-060	Royal Society for the Protection of Birds (RSPB) Deadline 1 Submission - Written Representations (WRs)
REP1-061	Royal Society for the Protection of Birds (RSPB) Deadline 1 Submission - Notification of wish to attend Accompanied Site Inspection (ASI)
REP1-062	Royal Society for the Protection of Birds (RSPB) Deadline 1 Submission - Comments on Relevant Representations (RRs)
REP1-063	Boston and Fosdyke Fishing Society Deadline 1 Submission - Notification of wish make oral representations at an Issue Specific Hearing (ISH)
REP1-064	Jenny Mason Deadline 1 Submission – notification of wish to attend Accompanied Site Inspection
REP1-065	Kevin Blanchard Deadline 1 Submission - Written Representations (WRs) 1
REP1-066	Kevin Blanchard Deadline 1 Submission - Written Representations (WRs) 2
REP1-067	Kevin Blanchard Deadline 1 Submission - Written Representations (WRs) 3
REP1-068	Shlomo Downen on behalf of United Kingdom Without Incineration Network (UKWIN) Deadline 1 submission – Written representations (WR), summary of WR and good practice guide
Late Deadline 1 Submission	
REP1-069	Royal Society for the Protection of Birds (RSPB) Late submission accepted at the discretion of the Examining Authority – Summary of Relevant Representation
Deadline 2 – 11 November 2021	
For receipt by the ExA of:	
<ul style="list-style-type: none"> - Comments on Written Representations (WRs) - Comments on Local Impact Reports (LIRs) - Updated Application Guide - Responses to ExA’s Written Questions - Applicant’s Navigational Risk Assessment - Applicant’s draft in-principle Habitats Regulations derogation case 	

- Any further information requested by the ExA under Rule 17 of the Examination Rules	
REP2-001	Alternative Use Boston Projects Limited Deadline 2 submission - 9.21. Cover Letter
REP2-002	Alternative Use Boston Projects Limited Deadline 2 submission - 1.2.(1) Application Guide
REP2-003	Alternative Use Boston Projects Limited Deadline 2 Submission - 8.4.(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston (Clean)
REP2-004	Alternative Use Boston Projects Limited Deadline 2 Submission - 8.4 Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston (Tracked)
REP2-005	Alternative Use Boston Projects Limited Deadline 2 Submission - 8.9 Statement of Common Ground between Alternative Use Boston Projects Limited and Boston and Fosdyke Fishing Society
REP2-006	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.22 Applicant's Comments on Written Representations
REP2-007	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.23 The Applicant's Comments on Lincolnshire County Council's Local Impact Report (LIR)
REP2-008	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.24 Comments on Examining Authority's First Written Questions (ExQ1)
REP2-009	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.25 Appendix A: Response to ExA's Written Question Q12.0.7 (ExQ1)
REP2-010	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.27 Navigation Risk Assessment
REP2-011	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.28 Without Prejudice Habitats Regulations Assessment Derogation Case: Assessment of Alternative Solutions
REP2-012	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.29 Without Prejudice Habitats Regulations Assessment Derogation Case: Imperative Reasons of Overriding Public Interest (IROPI) Case
REP2-013	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.30 Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures
REP2-014	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.31 The Applicant's Comments on Boston Borough Council's Local Impact Report (LIR)
REP2-015	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.32 Outline Reptile Precautionary Method of Working (PMoW)

REP2-016	Alternative Use Boston Projects Limited Deadline 2 Submission - 9.33 Appendix B: Response to ExA's Written Question Q5.0.2
REP2-017	Alternative Use Boston Projects Limited Deadline 2 submission - 6.3.7.(1) Chapter 9 Figure 9.15 (high resolution)
REP2-018	Alternative Use Boston Projects Limited Deadline 2 submission - 6.3.7.(1) Chapter 9 Figure 9.15 (low resolution)
REP2-019	Alternative Use Boston Projects Limited Deadline 2 submission - 6.3.9.(1) Chapter 9 Figure 9.17 (high resolution)
REP2-020	Alternative Use Boston Projects Limited Deadline 2 submission - 6.3.9.(1) Chapter 9 Figure 9.17 (low resolution)
REP2-021	Alternative Use Boston Projects Limited Deadline 2 Submission - 4.6. Statutory and Non-Statutory Sites or Features of Nature Conservation and Habitats Plan (low resolution)
REP2-022	Alternative Use Boston Projects Limited Deadline 2 submission - 4.9.(1) Indicative Generating Station Plans (low resolution)
REP2-023	Alternative Use Boston Projects Limited Deadline 2 submission - 4.9.(1) Indicative Generating Station Plans (high resolution)
REP2-024	Alternative Use Boston Projects Limited Deadline 2 submission - 4.2. Land Plan (low resolution)
REP2-025	Alternative Use Boston Projects Limited Deadline 2 submission - 4.1. Location Plan (low resolution)
REP2-026	Alternative Use Boston Projects Limited Deadline 2 submission - 4.3.(1) Works Plans (high resolution)
REP2-027	Alternative Use Boston Projects Limited Deadline 2 submission - 4.3.(1) Works Plans (low resolution)
REP2-028	Alternative Use Boston Projects Limited Deadline 2 submission - 9.26. Navigational features and fishing wharves on The Haven
REP2-029	Alternative Use Boston Projects Limited Deadline 2 submission - 4.10. Indicative Electrical and Water Connection Plans (low resolution)
REP2-030	Alternative Use Boston Projects Limited Deadline 2 submission - 4.11. Indicative Wharf Plans (low resolution)
REP2-031	Alternative Use Boston Projects Limited Deadline 2 submission - 4.8. Heritage Assets (low resolution)
REP2-032	Alternative Use Boston Projects Limited Deadline 2 submission - 4.7. Water Bodies in a River Basin Management Plan (low resolution)
REP2-033	Alternative Use Boston Projects Limited Deadline 2 submission - 4.4. Illustrative Landscape Plans (low resolution)
REP2-034	Boston Borough Council Deadline 2 Submission - Comments on Local Impact Reports (LIRs)

REP2-035	Boston Borough Council Deadline 2 Submission - Other: Comments on the Construction Programme submitted by the Applicant
REP2-036	Boston Borough Council Deadline 2 Submission - Other: Comments on draft DCO and other submitted documents
REP2-037	Boston Borough Council Deadline 2 Submission - Comments on Written Representations (WRs)
REP2-038	Environment Agency Deadline 2 Submission - Comments on Written Representations (WRs)
REP2-039	Lincolnshire County Council Deadline 2 Submission - Responses to ExA's Written Questions (ExQ1)
REP2-040	Marine Management Organisation (MMO) Deadline 2 Submission
REP2-041	Natural England Deadline 2 Submission - Cover Letter
REP2-042	Natural England Deadline 2 Submission - Comments on the Applicant's Deadline 1 Submissions in Relation to Air Quality [REP1-007, REP1-021, REP1-028]
REP2-043	Natural England Deadline 2 Submission - Comments on the Applicant's Deadline 1 Submissions in Relation to Marine Mammals [REP1-025, REP1-027]
REP2-044	Natural England Deadline 2 Submission - Comments on the Draft DCO [REP1-002] and Schedule of Changes to Draft DCO [REP1-033]
REP2-045	Natural England Deadline 2 Submission - Comments on Habitats Regulations Assessment - Ornithology Addendum [REP1-026]
REP2-046	Natural England Deadline 2 Submission - Comments on 9.15: Addendum to Chapter 17 and Appendix 17.1 -Benthic, Ecology, Fish and Habitats [REP1-028]
REP2-047	Natural England Deadline 2 Submission - Further Natural England Advice in Relation to the Alignment of the England Coast Path (ECP)
REP2-048	Natural England Deadline 2 Submission - Risk and Issues Log
REP2-049	Royal Society for the Protection of Birds (RSPB) Deadline 2 Submission - additional information about Unaccompanied Site Inspection (USI) at Mouth of the Haven.
REP2-050	Royal Society for the Protection of Birds (RSPB) Deadline 2 Submission - RSPB attendance at November Issue Specific Hearings for the Royal Society for the Protection of Birds
REP2-051	Royal Society for the Protection of Birds (RSPB) Deadline 2 Submission - Other: Comments on responses to Relevant Representations

REP2-052	Royal Society for the Protection of Birds (RSPB) Deadline 2 Submission - Other: Note on Outline Surface Water Drainage Strategy
REP2-053	Royal Society for the Protection of Birds (RSPB) Deadline 2 Submission - Other: Note on Ornithology Addendum
REP2-054	Royal Society for the Protection of Birds (RSPB) Deadline 2 Submission - Other: Note on the Statement of Commonality
REP2-055	Cllr Richard Austin Deadline 2 Submission - A Borough Councillor's comments on Lincolnshire County Council's Local Impact Report - Accepted at the discretion of the Examining Authority
REP2-056	Kevin Blanchard Deadline 2 Submission - Comments on Written Representations (WRs)
REP2-057	Shlomo Downen on behalf of United Kingdom Without Incineration Network (UKWIN) Deadline 2 Submission - Other: Comments on Applicant's Deadline 1 Climate Change Document 9.6
REP2-058	Shlomo Downen on behalf of United Kingdom Without Incineration Network (UKWIN) Deadline 2 Submission - Other: Comment on Applicant's Deadline 1 Waste Submissions
Late Deadline 2 Submission	
REP2-059	Alternative Use Boston Projects Limited Deadline 2 Submission - Late submission - Accepted at the discretion of the Examining Authority. Applicant's proposed changes to ASI itinerary
Deadline 3 – 06 December 2021	
<p>For receipt by the ExA of:</p> <ul style="list-style-type: none"> - Post hearing submissions including written summaries of oral case - Comments on responses to ExA's Written Questions - Revised draft Development Consent Order (DCO) - Updated Book of Reference - Land negotiations tracker, including s127 Statutory Undertakers' Land and Rights Schedule and s138 Statutory Undertakers' Apparatus Schedule - Updated Application Guide - Any further information requested by the ExA under Rule 17 of the Examination Rules 	
REP3-001	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.34 Cover Letter
REP3-002	Alternative Use Boston Projects Limited Deadline 3 Submission - 1.2 Updated Application Guide
REP3-003	Alternative Use Boston Projects Limited Deadline 3 Submission - 2.1(2) Revised draft Development Consent Order (dDCO) (Clean)
REP3-004	Alternative Use Boston Projects Limited

	Deadline 3 Submission - 2.1(2) Revised draft Development Consent Order (dDCO) (Tracked)
REP3-005	Alternative Use Boston Projects Limited Deadline 3 Submission - 3.3(1) Updated Book of Reference (Clean)
REP3-006	Alternative Use Boston Projects Limited Deadline 3 Submission - 3.3(1) Updated Book of Reference (Tracked)
REP3-007	Alternative Use Boston Projects Limited Deadline 3 Submission - Other: 7.4(1) Outline Landscape and Ecological Mitigation Strategy (Clean)
REP3-008	Alternative Use Boston Projects Limited Deadline 3 Submission - Other: 7.4(1) Outline Landscape and Ecological Mitigation Strategy (Tracked)
REP3-009	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.4(1) Outline Surface and Foul Water Drainage Strategy (Clean)
REP3-010	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.4(1) Outline Surface and Foul Water Drainage Strategy (Tracked)
REP3-011	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.35 Written Summary of the Applicant's Oral Case at Issue Specific Hearing 1 (ISH1) on draft Development Consent Order (dDCO)
REP3-012	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.36 Comments on responses to ExA's Written Questions (ExQ1)
REP3-013	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.37 Book of Reference Schedule of Changes
REP3-014	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.38 Land negotiations tracker, including s127 Statutory Undertakers' Land and Rights Schedule and s138 Statutory Undertakers' Apparatus Schedule
REP3-015	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.39 Outline Air Quality and Dust Management Plan
REP3-016	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.40 Response to Environment Agency's queries on Critical Infrastructure and Levels across the Application Site
REP3-017	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.41 Outline Public Right of Way (PRoW) Design Guide and Stopping Up Plan
REP3-018	Alternative Use Boston Projects Limited Deadline 3 Submission - Other: 9.42 Habitats Regulations Assessment (HRA) Screening and Integrity Matrices
REP3-019	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.43 Autumn Surveys of Waterbirds at the Principal Application Site
REP3-020	Alternative Use Boston Projects Limited

	Deadline 3 Submission - 9.44 Deadline 3 Response to Environment Agency's queries on Estuarine Processes
REP3-021	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.45 The Applicant's note on the Examining Authority's Unaccompanied Site Inspection (USI)
REP3-022	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.46 Schedule of Changes to the draft Development Consent Order (dDCO)
REP3-023	Alternative Use Boston Projects Limited Deadline 3 Submission - 9.47 Written Summary of the Applicant's Oral Case at Issue Specific Hearing 2 (ISH2) on Environmental Matters (Part 1)
REP3-024	Boston Borough Council Deadline 3 Submission - Comments on Development Consent Order (DCO), Comments on responses to ExA's written questions (ExQ1) and other comments following hearing sessions
REP3-025	Environment Agency Deadline 3 Submission - Post hearing submissions including written summaries of oral case
REP3-026	Lincolnshire County Council Deadline 3 Submission - Post hearing submissions including written summaries of oral case – Issue Specific Hearing 1 (ISH1) into the draft Development Consent Order (dDCO) – 23 November 2021
REP3-027	Marine Management Organisation (MMO) Deadline 3 Submission
REP3-028	Natural England Deadline 3 Submission - Cover Letter
REP3-029	Natural England Deadline 3 Submission - Appendix H3 – Natural England's Risk and Issues Log Deadline 3
REP3-030	Natural England Deadline 3 Submission - Appendix I2 – Natural England's Written Summary of Oral Representations made at Issue Specific Hearing 2 (ISH2): Environmental Matters
REP3-031	Natural England Deadline 3 Submission - Appendix J1 – Natural England's Advice on BAEP Derogation Case - Alternatives and Compensation Measures
REP3-032	Royal Society for the Protection of Birds (RSPB) Deadline 3 Submission - Response to Examining Authorities queries on the Unaccompanied Site Inspection (USI) for the Royal Society for the Protection of Birds [PD-009]
REP3-033	Royal Society for the Protection of Birds (RSPB) Deadline 3 Submission - Comments on Responses to the Examining Authority's First Written Questions (ExQ1)
REP3-034	Royal Society for the Protection of Birds (RSPB) Deadline 3 Submission - Note on breeding redshanks on The Wash
REP3-035	Royal Society for the Protection of Birds (RSPB) Deadline 3 Submission - Summary of Comments on Issue Specific Hearing 2 (ISH2): Environmental Matters
REP3-036	United Kingdom Without Incineration Network (UKWIN)

	Deadline 3 Submission - Comments on Responses to the Examining Authority's First Written Questions (ExQ1)
REP3-037	United Kingdom Without Incineration Network (UKWIN) Deadline 3 Submission - Response to REP2-006
REP3-038	United Kingdom Without Incineration Network (UKWIN) Deadline 3 Submission - Response to REP2-011
REP3-039	United Kingdom Without Incineration Network (UKWIN) Deadline 3 Submission - Post hearing submissions including written summaries of oral case - Issue Specific Hearing 2 (ISH2) Item 6 - Comments on Environmental Matters
Late Deadline 3 Submission	
REP3-040	Alternative Use Boston Projects Limited Late Deadline 3 Submission - Accepted at the discretion of the Examining Authority. Additional information for Unaccompanied Site Inspection
Deadline 4 – 13 December 2021	
For receipt by the ExA of: <ul style="list-style-type: none"> - Comments on revised draft DCO - Updated Statement of Commonality of SoCGs - Updated Application Guide - Comments on draft in-principle Habitats Regulations derogation case - Any further information requested by the ExA under Rule 17 of the Examination Rules 	
REP4-001	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.48 Cover Letter
REP4-002	Alternative Use Boston Projects Limited Deadline 4 Submission - 1.2(3) Updated Application Guide
REP4-003	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.1(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council (Clean)
REP4-004	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.1(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council (Tracked)
REP4-005	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.2(1) Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency (Clean)
REP4-006	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.2(1) Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency (Tracked)
REP4-007	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.3(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England (Clean)

REP4-008	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.3(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England (Tracked)
REP4-009	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.5(1) Statement of Common Ground between Alternative Use Boston Projects Limited and UK Health Security Agency (UKHSA) (formerly Public Health England) (Clean)
REP4-010	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.5(1) Statement of Common Ground between Alternative Use Boston Projects Limited and UK Health Security Agency (UKHSA) (formerly Public Health England) (Tracked)
REP4-011	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.7(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Clean)
REP4-012	Alternative Use Boston Projects Limited Deadline 4 Submission - 8.7(1) Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Tracked)
REP4-013	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.3(1) Updated Statement of Commonality of Statements of Common Ground (SoCG)
REP4-014	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.49 Response to the Marine Management Organisation (MMO) and Natural England's queries regarding Marine Mammals and Fish
REP4-015	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.50 Noise Modelling and Mapping Relating to Bird Disturbance at the Principal Application Site
REP4-016	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.51 Air Quality Deposition Monitoring Plan
REP4-017	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.52 Geoarchaeological Borehole Survey
REP4-018	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.53 Lightweight Aggregate Technical Note
REP4-019	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.54 Technical Note on the Carbon Recovery System
REP4-020	Alternative Use Boston Projects Limited Deadline 4 Submission - 9.55 The Applicant's Response to United Kingdom Without Incineration Network's (UKWIN) Oral Submission at Issue Specific Hearing 2 (ISH2) on Environmental Matters (Part 1)
REP4-021	Lincolnshire Wildlife Trust Deadline 4 Submission - Comments on draft in-principle Habitats Regulations derogation case
REP4-022	Marine Management Organisation (MMO)

	Deadline 4 submission
REP4-023	Natural England Deadline 4 Submission
REP4-024	Royal Society for the Protection of Birds (RSPB) Deadline 4 Submission - Cover letter
REP4-025	Royal Society for the Protection of Birds (RSPB) Deadline 4 Submission - Response to the Applicant's Comments on our Written Representations submitted at Deadline 1
REP4-026	Royal Society for the Protection of Birds (RSPB) Deadline 4 Submission - Final comments on the Ornithology Addendum (Clean)
REP4-027	Royal Society for the Protection of Birds (RSPB) Deadline 4 Submission - Final comments on the Ornithology Addendum (Tracked)
REP4-028	Royal Society for the Protection of Birds (RSPB) Deadline 4 Submission - Comments on draft in-principle Habitats Regulations derogation case
Deadline 5 – 25 January 2022	
For receipt by the ExA of:	
<ul style="list-style-type: none"> - Responses to Second Written Questions - Responses to ExA's commentary on the draft DCO - Updated Application Guide - Any further information requested by the ExA under Rule 17 of the Examination Rules 	
REP5-001	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.56 Cover Letter
REP5-002	Alternative Use Boston Projects Limited Deadline 5 Submission - 1.2 Application Guide
REP5-003	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.42(1) Habitats Regulations Assessment Screening and Integrity Matrices
REP5-004	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.57 The Applicant's Responses to the Examining Authority's Second Written Questions (ExQ2)
REP5-005	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.58 The Applicant's Responses to the Examining Authority's Commentary on the Draft Development Consent Order (dDCO)
REP5-006	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.59 Chapter 17 Marine and Coastal Ecology and Appendix 17.1 Habitats Regulations Assessment Update
REP5-007	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.60 Note responding to Royal Society for the Protection of Birds (RSPB) concerns in relation to Geographical Scope of Habitats Regulations Assessment
REP5-008	Alternative Use Boston Projects Limited

	Deadline 5 Submission - 9.63 Report on Outstanding Deadline 2, 3 and 4 Submissions
REP5-009	Alternative Use Boston Projects Limited Deadline 5 Submission - 9.64 The Applicant's Response to United Kingdom Without Incineration Network's (UKWIN) Comments
REP5-010	Environment Agency Deadline 5 Submission - Responses to Second Written Questions (ExQ2)
REP5-011	Marine Management Organisation (MMO) Deadline 5 Submission
REP5-012	Natural England Deadline 5 submission - Cover Letter and Responses to Second Written Questions (ExQ2)
REP5-013	Natural England Deadline 5 Submission - Appendix B3 Natural England's Advice on Ornithology Documents Submitted at Deadline 3 and 4
REP5-014	Natural England Deadline 5 Submission - Appendix D3 Natural England's Advice on Outline Air Quality and Dust Management Plan [REP3-015] and Air Quality Deposition Monitoring Plan [REP4-016]
REP5-015	Natural England Deadline 5 Submission - Appendix E3 Natural England's Comments on Public Rights of Way
REP5-016	Natural England Deadline 5 Submission - Appendix F3 Natural England's Comments on draft Development Consent Order (dDCO) [REP3-004] and Schedule of Changes [REP3-022]
REP5-017	Natural England Deadline 5 Submission - Appendix J2 Natural England's Advice on Outline Landscape Ecological Mitigation Strategy (OLEMS) [REP3-008]
REP5-018	Royal Society for the Protection of Birds (RSPB) Deadline 5 Submission - Summary of the RSPB's position and key concerns regarding the Boston Alternative Energy Facility Development Consent Order (DCO) Application
REP5-019	Royal Society for the Protection of Birds (RSPB) Deadline 5 Submission - Responses to Second Written Questions (ExQ2)
REP5-020	United Kingdom Without Incineration Network (UKWIN) Deadline 5 Submission - UKWIN response to applicant's REP 9.55 (REP4-020)
Late Deadline 5 Submission	
REP5-021	Natural England Late Deadline 5 Submission, accepted at the discretion of the Examining Authority - Appendix H4 Natural England's Risk and Issues Log
Deadline 6 Submission – 8 February 2022	

For receipt by the ExA of:

- Document Index
- Responses to the ExA's further Written Questions (if required)
- Comments on Applicant's revised draft DCO (if any)
- Comments on any additional information/submissions received by D5
- Any further information requested by the ExA under Rule 17 of the Examination Rules

REP6-001	Alternative Use Boston Projects Limited Deadline 6 Submission - 1.2(5) Application Guide
REP6-002	Alternative Use Boston Projects Limited Deadline 6 Submission - 2.1(3) Draft Development Consent Order (Clean)
REP6-003	Alternative Use Boston Projects Limited Deadline 6 Submission - 2.1(3) Draft Development Consent Order (Tracked)
REP6-004	Alternative Use Boston Projects Limited Deadline 6 submission - 8.1 Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council (Clean)
REP6-005	Alternative Use Boston Projects Limited Deadline 6 submission - 8.1 Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council (Tracked)
REP6-006	Alternative Use Boston Projects Limited Deadline 6 submission - 8.10 Statement of Common Ground between Alternative Use Boston Projects Ltd and Marine Management Organisation (Clean)
REP6-007	Alternative Use Boston Projects Limited Deadline 6 submission - 8.10 Statement of Common Ground between Alternative Use Boston Projects Ltd and Marine Management Organisation (Tracked)
REP6-008	Alternative Use Boston Projects Limited Deadline 6 Submission - 8.2(2) Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency (Clean)
REP6-009	Alternative Use Boston Projects Limited Deadline 6 Submission - 8.2(2) Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency (Tracked)
REP6-010	Alternative Use Boston Projects Limited Deadline 6 submission - 8.3 Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England (Clean)
REP6-011	Alternative Use Boston Projects Limited Deadline 6 submission - 8.3 Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England (Tracked)
REP6-012	Alternative Use Boston Projects Limited

	Deadline 6 Submission - 8.4(2) Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston (Clean)
REP6-013	Alternative Use Boston Projects Limited Deadline 6 Submission - 8.4(2) Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston (Tracked)
REP6-014	Alternative Use Boston Projects Limited Deadline 6 submission - 8.5 Statement of Common Ground between Alternative Use Boston Projects Limited and UK Health Security Agency (UKHSA) (Clean)
REP6-015	Alternative Use Boston Projects Limited Deadline 6 submission - 8.5 Statement of Common Ground between Alternative Use Boston Projects Limited and UK Health Security Agency (UKHSA) (Tracked)
REP6-016	Alternative Use Boston Projects Limited Deadline 6 submission - 8.7 Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Clean)
REP6-017	Alternative Use Boston Projects Limited Deadline 6 submission - 8.7 Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Tracked)
REP6-018	Alternative Use Boston Projects Limited Deadline 6 submission - 8.8 Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water (Clean)
REP6-019	Alternative Use Boston Projects Limited Deadline 6 submission - 8.8 Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water (Tracked)
REP6-020	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.12(1) Outline Marine Mammal Mitigation Protocol (Clean)
REP6-021	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.12(1) Outline Marine Mammal Mitigation Protocol (Tracked)
REP6-022	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.27(1) Navigation Risk Assessment (Clean)
REP6-023	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.27(1) Navigation Risk Assessment (Tracked)
REP6-024	Alternative Use Boston Projects Limited Deadline 6 submission - 9.3 Statement of Commonality
REP6-025	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.30(1) Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (Clean)
REP6-026	Alternative Use Boston Projects Limited

	Deadline 6 Submission - 9.30(1) Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (Tracked)
REP6-027	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.51(1) Air Quality Deposition Monitoring Plan (Clean)
REP6-028	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.51(1) Air Quality Deposition Monitoring Plan (Tracked)
REP6-029	Alternative Use Boston Projects Limited Deadline 6 submission - 9.65 Cover Letter
REP6-030	Alternative Use Boston Projects Limited Deadline 6 submission - 9.66 Comments on Interested Parties Responses to the Examining Authority's Second Written Questions (ExQ2)
REP6-031	Alternative Use Boston Projects Limited Deadline 6 submission - 9.67 Schedule of Changes to the draft Development Consent Order (dDCO)
REP6-032	Alternative Use Boston Projects Limited Deadline 6 Submission - 9.68 Second report on outstanding submissions
REP6-033	Alternative Use Boston Projects Limited Deadline 6 submission - 9.70 Technical Note for Navigation Management and Ornithology
REP6-034	Alternative Use Boston Projects Limited Deadline 6 submission - 9.71 Change in Waterbird Behaviour Report
REP6-035	Alternative Use Boston Projects Limited Deadline 6 submission - 9.72 Comparison of Predicted Critical Load and Level Results Using Maximum Permissible Emissions Limits and Realistic Emission Scenarios
REP6-036	Alternative Use Boston Projects Limited Deadline 6 submission - 9.73 Port of Boston Pilotage Statement
REP6-037	Marine Management Organisation (MMO) Deadline 6 submission - Comments on responses to Second Written Questions (ExQ2), comments on information submitted by the Applicant or Interested Parties, comments on upcoming submission of Statement of Common Ground (SoCG)
REP6-038	Natural England Deadline 6 submission - Cover letter
REP6-039	Natural England Deadline 6 submission Appendix H5 - BAEF NE Risk and Issues Log
REP6-040	Royal Society for the Protection of Birds (RSPB) Deadline 6 submission - Cover letter
REP6-041	Royal Society for the Protection of Birds (RSPB) Deadline 6 submission - Comments on Responses to the Examining Authority's Second Written Questions (ExQ2)
REP6-042	United Kingdom Without Incineration Network (UKWIN) Deadline 6 Submission - Comments on responses to Second Written Questions (ExQ2)
Deadline 7 – 01 March 2022	

For receipt by the ExA of:

- Responses to Third Written Questions
- Comments on revised draft DCO
- Comments on submissions received at Deadlines 5 and 6
- Outstanding Statements of Common Ground not submitted at Deadline 6
- Updated Application Guide
- Any further information requested by the ExA under Rule 17 of the Examination Rules

REP7-001	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.74 Cover Letter
REP7-002	Alternative Use Boston Projects Limited Deadline 7 Submission - 1.2 (6) Updated Application Guide
REP7-003	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.12 (2) Outline Marine Mammal Mitigation Protocol (Clean)
REP7-004	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.12 (2) Outline Marine Mammal Mitigation Protocol (Tracked)
REP7-005	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.38 (1) Land Negotiations Tracker and Statutory Undertaker Schedules (Tracked)
REP7-006	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.38 (1) Land Negotiations Tracker and Statutory Undertaker Schedules (Clean)
REP7-007	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.75 The Applicant's Responses to the Examining Authority's Third Written Questions (ExQ3)
REP7-008	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.76 The Applicant's Response to Natural England's Risk Log
REP7-009	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.77 Worst Case Assessment for Land Raising
REP7-010	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.78 Third Report on Outstanding Submissions
REP7-011	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.79 The Applicant's Response to United Kingdom Without Incineration Network (UKWIN) Deadline 6 Submission
REP7-012	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.80 Navigation Management Plan Template
REP7-013	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.81 Outline Ornithology Compensation Implementation and Monitoring Plan
REP7-014	Alternative Use Boston Projects Limited

	Deadline 7 Submission - 9.82 Summary of Breeding Bird Survey Counts (April to June 2020-2021)
REP7-015	Alternative Use Boston Projects Limited Deadline 7 Submission - 9.83 Breeding Bird Survey Monitoring Report (April - June 2021)
REP7-016	Alternative Use Boston Projects Limited Deadline 7 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire Wildlife Trust
REP7-017	Alternative Use Boston Projects Limited Deadline 7 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Royal Society for the Protection of Birds (RSPB)
REP7-018	Alternative Use Boston Projects Limited Deadline 7 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Western Power Distribution (East Midlands) Plc (Tracked)
REP7-019	Alternative Use Boston Projects Limited Deadline 7 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Western Power Distribution (East Midlands) Plc (Clean)
REP7-020	Alternative Use Boston Projects Limited Deadline 7 Submission - Draft (not agreed) Statement of Common Ground between Alternative Use Boston Projects Limited and Natural England
REP7-021	Boston Borough Council Deadline 7 Submission - Comments on Draft Development Consent Order (DCO), S106, Statement of Common Ground (SOCG), Habitats Regulations Assessment (HRA) derogation case and Biodiversity Net Gain
REP7-022	Eastern Inshore Fisheries and Conservation Authority Deadline 7 Submission, accepted at the discretion of the Examining Authority - Responses to Third Written Questions (ExQ3)
REP7-023	Environment Agency Deadline 7 Submission - Responses to Third Written Questions (ExQ3)
REP7-024	Marine Management Organisation (MMO) Deadline 7 Submission - Responses to Third Written Questions (ExQ3), Comments on revised draft Development Consent Order (DCO), Comments to any information submitted by the Applicant or Interested Parties at Deadline 6
REP7-025	Maritime and Coastguard Agency Deadline 7 Submission - Comments on The Examining Authority's third Written Questions (ExQ3)
REP7-026	Natural England Deadline 7 Submission - Cover Letter
REP7-027	Natural England Deadline 7 Submission - Appendix B4 - Natural England's Comments on Habitats Regulations Assessment (HRA) Assessment Update [REP5-006]
REP7-028	Natural England

	Deadline 7 Submission - Appendix F4 – Natural England’s Comments on Schedule 11 of Draft Development Consent Order (DCO) [REP6-003]
REP7-029	Natural England Deadline 7 Submission - Appendix H6 – Natural England’s Risk and Issues Log (Ornithology section)
REP7-030	Port of Boston Ltd Deadline 7 Submission - Responses to Third Written Questions (ExQ3)
REP7-031	Royal Society for the Protection of Birds (RSPB) Deadline 7 Submission - Responses to Third Written Questions (ExQ3)
REP7-032	Royal Society for the Protection of Birds (RSPB) Deadline 7 Submission - The RSPB’s comments on the Applicant’s response to the Examining Authority’s commentary of the draft Development Consent Order (DCO) and Critique of draft DCO Schedule 11
REP7-033	The Boston and Fosdyke Fishing Society Limited Deadline 7 Submission - Responses to Third Written Questions (ExQ3)
REP7-034	The Boston and Fosdyke Fishing Society Limited Deadline 7 Submission
REP7-035	United Kingdom Without Incineration Network (UKWIN) Deadline 7 Submission - Comments on submissions received at Deadlines 5 and 6
REP7-036	United Kingdom Without Incineration Network (UKWIN) Deadline 7 Submission - Responses to Third Written Questions (ExQ3)
Late Deadline 7 Submission	
REP7-037	Alternative Use Boston Projects Limited Late Deadline 7 Submission - 7.4 (2) Outline Landscape and Ecological Mitigation Strategy (Clean) - Accepted at the discretion of the Examining Authority
REP7-038	Alternative Use Boston Projects Limited Late Deadline 7 Submission - 7.4 (2) Outline Landscape and Ecological Mitigation Strategy (Tracked) - Accepted at the discretion of the Examining Authority
REP7-039	ESP Connections Ltd Late Deadline 7 Submission - Accepted at the discretion of the Examining Authority
Deadline 8 – 15 March 2022	
For receipt by the ExA of: <ul style="list-style-type: none"> - Comments on responses to Third Written Questions - IPs' comments on Applicant's updated without prejudice derogation case - Updated Application Guide 	

- Any further information requested by the ExA under Rule 17 of the Examination Rules	
REP8-001	Alternative Use Boston Projects Limited Deadline 8 Submission - Cover Letter
REP8-002	Alternative Use Boston Projects Limited Deadline 8 Submission - 1.2 (7) Updated Application Guide
REP8-003	Alternative Use Boston Projects Limited Deadline 8 Submission - 2.1 (4) Draft Development Consent Order (Tracked)
REP8-004	Alternative Use Boston Projects Limited Deadline 8 Submission - 2.1 (4) Draft Development Consent Order (Clean)
REP8-005	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.30 (2) Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (Tracked)
REP8-006	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.30 (2) Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (Clean)
REP8-007	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.41(1) Public Rights of Way – Outline Design Guide and Stopping Up Plan
REP8-008	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.52 (1) Geoarchaeological Borehole Survey (Tracked)
REP8-009	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.52 (1) Geoarchaeological Borehole Survey (Clean)
REP8-010	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.80 (1) Navigation Management Plan Template (Tracked)
REP8-011	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.80 (1) Navigation Management Plan Template (Clean)
REP8-012	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.81(1) Outline Ornithology Compensation Implementation and Monitoring Plan (Tracked)
REP8-013	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.81(1) Outline Ornithology Compensation Implementation and Monitoring Plan (Clean)
REP8-014	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.85 Comments on Interested Parties Responses to the Examining Authority’s Third Written Questions (ExQ3)
REP8-015	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.86 Without Prejudice ‘In-Principle’ Alternative Locations Case
REP8-016	Alternative Use Boston Projects Limited

	Deadline 8 Submission - 9.87 Schedule of Changes to the draft Development Consent Order
REP8-017	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.90 Fourth Report on Outstanding Submissions
REP8-018	Alternative Use Boston Projects Limited Deadline 8 Submission - 9.91 Final Waterbird Survey Report Summary of Data
REP8-019	Environment Agency Deadline 8 Submission - Update on Environment Agency Position on outstanding issues
REP8-020	Marine Management Organisation (MMO) Deadline 8 Submission - Comments on responses to Third Written Questions (ExQ3), revised draft DCO and information submitted by the Applicant or Interested Parties at Deadline 6
REP8-021	Natural England Deadline 8 Submission - Cover Letter
REP8-022	Natural England Deadline 8 Submission - Appendix B4 - Comments on HRA Assessment Update [REP5-006] (updated)
REP8-023	Natural England Deadline 8 Submission - Appendix B5 - Comments on Without Prejudice Habitats Regulations Assessment Derogation Case – Compensation Measures [REP6-026]
REP8-024	Natural England Deadline 8 Submission - Appendix B6 - Comments on Change in Waterbird Behaviour Report [REP6-034] and Technical Note for Navigation Management and Ornithology [REP6-033]
REP8-025	Natural England Deadline 8 Submission - Appendix C4 - Comments on Outline Marine Mammal Mitigation Protocol [REP7-004]
REP8-026	Natural England Deadline 8 Submission - Appendix F5 - Comments on Development Consent Order and Schedule of Changes [REP6-003,REP6-031]
REP8-027	Natural England Deadline 8 Submission - Appendix H7 - Risk and Issues Log Deadline 8
REP8-028	Royal Society for the Protection of Birds (RSPB) Deadline 8 Submission - Cover Letter
REP8-029	Royal Society for the Protection of Birds (RSPB) Deadline 8 Submission - Comments on responses to Third Written Questions (ExQ3)
REP8-030	United Kingdom Without Incineration Network (UKWIN) Deadline 8 Submission - Comments on the Applicant's Deadline 7 response to United Kingdom Without Incineration Network (UKWIN) Deadline 6 submission
Deadline 9 – 24 March 2022	

For receipt by the ExA of:

- Comments on the RIES
- Final DCO to be submitted by the Applicant in the SI template with the SI template validation report
- Tracked version of the Applicant's final DCO
- Finalised schedule of changes to the dDCO
- Final updated Book of Reference
- Final SoCGs
- Final Statement of Commonality of SoCGs
- Final land negotiations tracker, including s127 Statutory Undertakers' Land and Rights Schedule and s138 Statutory Undertakers' Apparatus Schedule (clean and tracked)
- Updated Application Guide
- Any further information requested by the ExA under Rule 17 of the Examination Rules

REP9-001	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.92 Cover Letter
REP9-002	Alternative Use Boston Projects Limited Deadline 9 Submission - 1.2(8) Application Guide
REP9-003	Alternative Use Boston Projects Limited Deadline 9 Submission - 2.1(5) Final draft Development Consent Order (DCO) (Tracked)
REP9-004	Alternative Use Boston Projects Limited Deadline 9 Submission - 2.1(5) Final draft Development Consent Order (DCO) (Clean)
REP9-005	Alternative Use Boston Projects Limited Deadline 9 Submission - 2.3(1) Validation Report (Clean)
REP9-006	Alternative Use Boston Projects Limited Deadline 9 Submission - 3.3(2) Book of Reference (Tracked)
REP9-007	Alternative Use Boston Projects Limited Deadline 9 Submission - 3.3(2) Book of Reference (Clean)
REP9-008	Alternative Use Boston Projects Limited Deadline 9 Submission - 4.12 Roman Bank within the Order limits
REP9-009	Alternative Use Boston Projects Limited Deadline 9 Submission - 4.12 Roman Bank within the Order limits (lower resolution)
REP9-010	Alternative Use Boston Projects Limited Deadline 9 Submission - 6.2.17(1) Chapter 17 Marine and Coastal Ecology (Tracked)
REP9-011	Alternative Use Boston Projects Limited Deadline 9 Submission - 6.2.17(1) Chapter 17 Marine and Coastal Ecology (Clean)
REP9-012	Alternative Use Boston Projects Limited Deadline 9 Submission - 6.4.18(1) Appendix 17.1 Habitats Regulations Assessment (Tracked) Superseded by AS-005 due to omission with original submission.
REP9-013	Alternative Use Boston Projects Limited

	Deadline 9 Submission - 6.4.18(1) Appendix 17.1 Habitats Regulations Assessment (Clean) Superseded by AS-006 due to omission with original submission.
REP9-014	Alternative Use Boston Projects Limited Deadline 9 Submission - 7.3(2) Outline Written Scheme of Investigation (Tracked)
REP9-015	Alternative Use Boston Projects Limited Deadline 9 Submission - 7.3(2) Outline Written Scheme of Investigation (Clean)
REP9-016	Alternative Use Boston Projects Limited Deadline 9 Submission - 7.6(1) Register of Environmental Actions and Commitments (Tracked)
REP9-017	Alternative Use Boston Projects Limited Deadline 9 Submission - 7.6(1) Register of Environmental Actions and Commitments (Clean)
REP9-018	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.3(3) Statement of Commonality
REP9-019	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.14(1) Addendum to Environmental Statement Chapter 17 and Appendix 17.1 - Marine Mammals (Tracked)
REP9-020	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.14(1) Addendum to Environmental Statement Chapter 17 and Appendix 17.1 - Marine Mammals (Clean)
REP9-021	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.38(2) Final Land Negotiations Tracker and Statutory Undertaker Schedules (Tracked)
REP9-022	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.38(2) Final Land Negotiations Tracker and Statutory Undertaker Schedules (Clean)
REP9-023	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.44(1) Response to Environment Agency's queries on Estuarine Processes (Tracked)
REP9-024	Alternative Use Boston Projects Limited Late Deadline 9 submission - 9.44(1) Response to Environment Agency's queries on Estuarine Processes (Clean). Accepted at the discretion of the Examining Authority
REP9-025	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.77(1) Worst Case Assessment for Land Raising (Tracked) Superseded by AS-007 due to omission with original submission.
REP9-026	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.77(1) Worst Case Assessment for Land Raising (Clean) Superseded by AS-008 due to omission with original submission.
REP9-027	Alternative Use Boston Projects Limited

	Deadline 9 Submission - 9.93 The Applicant's Comments on the Report on the Implications for European Sites (RIES)
REP9-028	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.94 Final Schedule of Changes to the draft Development Consent Order (DCO) (Tracked)
REP9-029	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.95 Book of Reference Schedule of Changes
REP9-030	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.96 Schedule of Errata
REP9-031	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.97 Navigation Summary
REP9-032	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.98 Final Waterbird Survey Report
REP9-033	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.99 Fifth Report on Outstanding Submissions
REP9-034	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.100 Draft Section 106 Agreement
REP9-035	Alternative Use Boston Projects Limited Deadline 9 Submission - 9.101 The Applicant's response to the Marico Review of the Navigation Risk Assessment
REP9-036	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston (Tracked)
REP9-037	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Port of Boston (Clean)
REP9-038	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Royal Society for the Protection of Birds (RSPB) (Tracked)
REP9-039	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Royal Society for the Protection of Birds (RSPB) (Clean)
REP9-040	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Western Power Distribution (East Midlands) Plc (Tracked)
REP9-041	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Western Power Distribution (East Midlands) Plc (Clean)
REP9-042	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Tracked)
REP9-043	Alternative Use Boston Projects Limited

	Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Clean)
REP9-044	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England (Tracked)
REP9-045	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Historic England (Clean)
REP9-046	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and UK Health Security Agency (UKHSA) (formerly Public Health England) (Tracked)
REP9-047	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and UK Health Security Agency (UKHSA) (formerly Public Health England) (Clean)
REP9-048	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council (Tracked)
REP9-049	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire County Council (Clean)
REP9-050	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water (Tracked)
REP9-051	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water (Clean)
REP9-052	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Ltd and Marine Management Organisation (Tracked)
REP9-053	Alternative Use Boston Projects Limited Deadline 9 Submission - Statement of Common Ground between Alternative Use Boston Projects Ltd and Marine Management Organisation (Clean)
REP9-054	Eastern Inshore Fisheries and Conservation Authority Deadline 9 Submission - Accepted at the discretion of the Examining Authority - Comments on the Report on the Implications for European Sites (RIES)
REP9-055	Environment Agency Deadline 9 Submission - Update on Environment Agency Position
REP9-056	Marine Management Organisation (MMO)

	Deadline 9 Submission - Comments on the Report on the Implications for European Sites (RIES) and Comments to any information submitted at Deadline 8
REP9-057	Natural England Deadline 9 Submission - Cover Letter
REP9-058	Natural England Deadline 9 Submission - Appendix B7 – Comments on Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures [REP8-005]
REP9-059	Natural England Deadline 9 Submission - Appendix B8 – Comments on Outline Ornithology Compensation Implementation and Monitoring Plan [REP8-012] and Final Waterbird Survey Report Summary of Data [REP8-018]
REP9-060	Natural England Deadline 9 Submission - Appendix E4 – Comments on Public Rights of Way – Outline Design Guide and Stopping Up Plan [REP8-007]
REP9-061	Natural England Deadline 9 Submission - Appendix F6 – Comments on draft Development Consent Order (DCO) [REP8-003] and Schedule of Changes to draft DCO [REP8-016]
REP9-062	Natural England Deadline 9 Submission - Appendix H8 – Risk and Issues Log Deadline 9
REP9-063	Natural England Deadline 9 Submission - Appendix J4 – Comments on Report on the Implications of European Sites (RIES) [PD-014]
REP9-064	Port of Boston Ltd Deadline 9 Submission - Port of Boston Statement in Respect of the Applicants Proposed 22.3.2022 Navigation Management Plan Template and the Associated Navigation Risk Assessment
REP9-065	Royal Society for the Protection of Birds (RSPB) Deadline 9 Submission - Comments on the Report on Implications for European Sites (RIES)
REP9-066	Roythornes Limited on behalf of The Boston Fosdyke Fishing Society Deadline 9 Submission
REP9-067	United Kingdom Without Incineration Network (UKWIN) Deadline 9 Submission - United Kingdom Without Incineration Network (UKWIN) response to documents 9.86 and 9.90
<p>Deadline 10 – 07 April 2022</p> <p>For receipt by the ExA of:</p> <ul style="list-style-type: none"> - Any further information requested by the ExA under Rule 17 of the Examination Rules <p>The ExA is under a duty to complete the Examination of the application by the end of the period of six months</p>	

REP10-001	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.102 Cover Letter
REP10-002	Alternative Use Boston Projects Limited Deadline 10 Submission - 1.2(9) Application Guide
REP10-003	Alternative Use Boston Projects Limited Deadline 10 Submission - 2.1(6) Final Development Consent Order (DCO) (including requirements) (Tracked)
REP10-004	Alternative Use Boston Projects Limited Deadline 10 Submission - 2.1(6) Final Development Consent Order (DCO) (including requirements) (Clean)
REP10-005	Alternative Use Boston Projects Limited Deadline 10 Submission - 2.3(2) Validation Report
REP10-006	Alternative Use Boston Projects Limited Deadline 10 Submission - 4.3(2) Works Plans
REP10-007	Alternative Use Boston Projects Limited Deadline 10 Submission - 4.4(1) Illustrative Landscape Plans
REP10-008	Alternative Use Boston Projects Limited Deadline 10 Submission - 4.9(2) Indicative Generating Station Plan
REP10-009	Alternative Use Boston Projects Limited Deadline 10 Submission - 4.10(1) Indicative Electrical and Water Connection Plan
REP10-010	Alternative Use Boston Projects Limited Deadline 10 Submission - 6.3.2(1) Chapter 5 Figures 5.1 - 5.3
REP10-011	Alternative Use Boston Projects Limited Deadline 10 Submission - 6.3.13(1) Chapter 9 Figure 9.21
REP10-012	Alternative Use Boston Projects Limited Deadline 10 Submission - 6.3.24(1) Chapter 16 Figures 16.1 - 16.8
REP10-013	Alternative Use Boston Projects Limited Deadline 10 Submission - 7.4(3) Outline Landscape and Ecological Mitigation Strategy (Tracked)
REP10-014	Alternative Use Boston Projects Limited Deadline 10 Submission - 7.4(3) Outline Landscape and Ecological Mitigation Strategy (Clean)
REP10-015	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.3(4) Statement of Commonality
REP10-016	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.4(2) Outline Surface and Foul Water Drainage Strategy (Tracked)
REP10-017	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.4(2) Outline Surface and Foul Water Drainage Strategy (Clean)
REP10-018	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.100 Final Draft Section 106 Agreement (Clean)
REP10-019	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.103 The Applicant's Overall Summary of Case
REP10-020	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.104 Final Report on Outstanding Submissions

REP10-021	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.105 Final Schedule of Changes to the draft Development Consent Order (DCO)
REP10-022	Alternative Use Boston Projects Limited Deadline 10 Submission - 9.106 Applicant's Response to the Rule 17 Letter
REP10-023	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire Wildlife Trust (Tracked) (Unsigned)
REP10-024	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Lincolnshire Wildlife Trust (Clean) (Signed)
REP10-025	Alternative Use Boston Projects Limited Deadline 10 Submission - Final (Not Agreed) Statement of Common Ground between Alternative Use Boston Projects Limited and Boston and Fosdyke Fishing Society (Tracked)
REP10-026	Alternative Use Boston Projects Limited Deadline 10 Submission - Final (Not Agreed) Statement of Common Ground between Alternative Use Boston Projects Limited and Boston and Fosdyke Fishing Society (Clean)
REP10-027	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Tracked) (Unsigned)
REP10-028	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Boston Borough Council (Clean) (Signed)
REP10-029	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water (Tracked) (Unsigned)
REP10-030	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Anglian Water (Clean) (Signed)
REP10-031	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency (Tracked)
REP10-032	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and the Environment Agency (Clean) (Signed)
REP10-033	Alternative Use Boston Projects Limited Deadline 10 Submission - Statement of Common Ground between Alternative Use Boston Projects Limited and Natural England (Clean) (Signed)

REP10-034	Environment Agency Deadline 10 Submission - Update on Environment Agency Position
REP10-035	Marine Management Organisation (MMO) Deadline 10 Submission - Final comments on the Development Consent Order (DCO), Comments on any information submitted by the Applicant or Interested Parties at Deadline 9 and closing position.
REP10-036	Natural England Deadline 10 Submission - Cover Letter
REP10-037	Natural England Deadline 10 Submission - Appendix B9 - Comments on Final Waterbird Survey Report [REP9-032]
REP10-038	Natural England Deadline 10 Submission - Appendix C5 - Comments on Vessel Limits
REP10-039	Natural England Deadline 10 Submission - Appendix F7 - Comments on draft Development Consent Order (dDCO) [REP9-003] and Schedule of Changes to dDCO [REP9-028]
REP10-040	Natural England Deadline 10 Submission - Appendix H9 - Risk and Issues Log
REP10-041	Port of Boston Ltd Deadline 10 Submission - Comments on relevant submissions from Interested Parties
REP10-042	Royal Society for the Protection of Birds (RSPB) Deadline 10 Submission - Response to the Final Development Consent Order (DCO)
REP10-043	Royal Society for the Protection of Birds (RSPB) Deadline 10 Submission - Comments on the Applicant's Without Prejudice Derogation Case: Compensation Measures [REP8-005]
REP10-044	Royal Society for the Protection of Birds (RSPB) Deadline 10 Submission - Comments on the Final Waterbird Survey Report [REP9-032]
REP10-045	Royal Society for the Protection of Birds (RSPB) Deadline 10 Submission - Response to comments on the Fifth Report on Outstanding Submissions [REP9-033]
REP10-046	Royal Society for the Protection of Birds (RSPB) Deadline 10 Submission - Response to the Examining Authority's Rule 17 Questions
REP10-047	The Boston and Fosdyke Fishing Society Deadline 10 Submission - Cover Letter
REP10-048	The Boston and Fosdyke Fishing Society Deadline 10 Submission - Email correspondence
REP10-049	United Kingdom Without Incineration Network (UKWIN) Deadline 10 Submission - Response to Applicant's Document 9.99 [REP9-033]
REP10-050	Western Power Distribution (East Midlands) PLC Deadline 10 Submission - Withdrawal of Relevant Representation [RR-002]
Other Documents	

OD-001	Alternative Use Boston Projects Limited Applicant's S56 notice of accepted application
OD-002	Alternative Use Boston Projects Limited Certificates of Compliance with Section 56 Certificate and Regulation 16 of the Planning Act 2008
OD-003	Alternative Use Boston Projects Limited Certificate of Compliance with Section 59 of the Planning Act 2008
OD-004	Alternative Use Boston Projects Limited Notice of November 2021 Hearings

APPENDIX B: LIST OF ABBREVIATIONS

APPENDIX B: LIST OF ABBREVIATIONS

Abbreviation or usage	Reference
AA	Appropriate Assessment
AEoI	Adverse Effect on Integrity
AN (number)	Planning Inspectorate's Advice Notes
ANCB	Appropriate Nature Conservation Body
AOD	Above Ordnance Datum
AP	Affected Person
AQMA	Air Quality Management Areas
ARI	Access Required Inspection
ASI	Accompanied Site Inspection
BAEF	Boston Alternative Energy Facility
BAP	Biodiversity Action Plan
BAT-AELs	Best Available Techniques-Associated Emission Levels
BBC	Boston Borough Council
BEIS	Department for Business, Energy and Industrial Strategy
BFFS	The Boston and Fosdyke Fishing Society
BNG	Biodiversity Net Gain
BoR	Book of Reference
CA	Compulsory Acquisition
CAH	Compulsory Acquisition Hearing
CA Regulations	Infrastructure Planning (Compulsory Acquisition) Regulations 2010
CCP	Carbon Capture Plant
CEA	Cumulative Effects Assessment
CEMP	Construction Environmental Management Plan
CEP	Circular Economy Package
CHP	Combined Heat and Power
CIB	Changes in Behaviour
CiWB	Changes in Waterbird Behaviour
CJEU	Court of Justice of the European Union (CJEU)
CL	Critical Loads/ Levels
CMD	Compensation Measures Document
CoCP	Code of Construction Practice
COLREGS	Convention on the International Regulations for Preventing Collisions at Sea, 1972
cSACs	Candidate Special Areas of Conservation
CTMP	Construction Traffic Management Plan
D(number)	Deadline, with a number referring to a specific deadline identified in the Examination Timetable
DAS	Design and Access Statement

Abbreviation or usage	Reference
DBBG	Dark-bellied brent goose
DCLG/MHCLG	Former Department for Communities and Local Government, re-organised to form Ministry of Housing, Communities and Local Government (MHCLG) in January 2018 and currently the Department for Levelling Up, Housing and Communities. References to documents (eg Examination Guidance) or decisions taken by the former department are referred to using the abbreviation DCLG
DCO	Development Consent Order
dDCO	draft Development Consent Order
DECC	Former Department for Energy and Climate Change, reorganised to form BEIS
DEFRA	Department for Environment, Food and Rural Affairs
DML	Deemed Marine Licence
DMPO	Town and Country Planning (Development Management Procedure) (England) Order 2015
DP	Dynamic Positioning
EA	Environment Agency
EC	European Commission
ECHR	European Convention on Human Rights
EcIA	Ecological Impact Assessment
ECP	England Coast Path
EEA	European Economic Area
EFT	Emissions Factor Toolkit
EfW	Energy from Waste
EIA	Environmental Impact Assessment
EIA Regulations	The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017
EIFCA	Eastern Inshore Fisheries and Conservation Authority
EM	Explanatory Memorandum
EP	Environmental Permit
EPR	Infrastructure Planning (Examination Procedure) Rules 2010
ES	Environmental Statement
ExA	Examining Authority
ExQ (number)	Written examination questions issued by the ExA
FRA	Flood Risk Assessment
FS	Funding Statement
FWQ(s)	First Written Question(s)
GHG	Greenhouse Gas
GI	Ground Investigation
HGV	Heavy Goods Vehicle

APPENDIX B: List of abbreviations

REPORT TO THE SECRETARY OF STATE: Boston Alternative Energy Facility - EN010095

Abbreviation or usage	Reference
Ha	Hectare
Habitats Regulations	The Conservation of Habitats and Species Regulations 2017
HE	Historic England
HMA	Habitats Mitigation Area
HRA	Habitats Regulations Assessment
HRAR	Habitats Regulations Assessment Report
HWRC	Household Waste Recycling Centre
IAPI	Initial Assessment of Principal Issues
ICE	In Combination Effects
IDB	Internal Drainage Board
IECS	Institute of Estuarine and Coastal Studies
IP	Interested Party
IPC	The Infrastructure Planning Commission (now the Planning Inspectorate)
IROPI	Imperative Reasons of Overriding Public Interest
ISH (number)	Issue Specific Hearing and where followed by a number, the number is a reference to a specific ISH on a date in the examination timetable
IWA	Inland Waterways Association
JNCC	Joint Nature Conservation Committee
kV	Kilovolt
LA	Local Authority
LCA	Landscape Character Area
LCC	Lincolnshire County Council
LEMS	Landscape and Ecological Mitigation Strategy
LIR	Local Impact Report
LNR	Local Nature Reserve
LSE	Likely Significant Effects
LVIA	Landscape and Visual Impact Assessment
LWA	Lightweight aggregate
LWT	Lincolnshire Wildlife Trust
LV	Limit Value
M	metre
made Order	A statutory Order providing development consent made by the relevant SoS under PA2008, use of this term signifies a reference to a DCO that has been decided
MCA	Maritime and Coastguard Agency
MCAA2009	Marine and Coastal Access Act 2009
MHWS	Mean High Water Springs
MMMP	Marine Mammal Mitigation Protocol
MMO	Marine Management Organisation
MMOb	Marine Mammal Observer
MOTH	Mouth of the Haven
MPS	Marine Policy Statement
N	Nitrogen
NE	Natural England

APPENDIX B: List of abbreviations

REPORT TO THE SECRETARY OF STATE: Boston Alternative Energy Facility - EN010095

Abbreviation or usage	Reference
NERCA2006	The Natural Environment and Rural Communities Act 2006
NH ₃	Ammonia
NO ₂	Nitrogen Dioxide
NO _x	Nitrogen oxides
NMP	Navigation Management Plan
NPPF	National Planning Policy Framework
NPS	National Policy Statement
NPS EN-1	Overarching National Policy Statement for Energy
NPS EN-2	National Policy Statement for Fossil Fuel and Electricity Generating Infrastructure
NPS EN-3	National Policy Statement for Renewable Energy Infrastructure
NPS EN-4	National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines
NPS EN-5	National Policy Statement for Electricity Networks Infrastructure
NRA	Navigation Risk Assessment
NSIP	Nationally Significant Infrastructure Project
NSN	National Site Network
O&M	Operations and Maintenance
OCIMP	Ornithology Compensation Implementation and Monitoring Plan
OCoCP	Outline Code of Construction Practice
oCTMP	Outline Construction Traffic Management Plan
OEG	Ornithology Engagement Group
OFH	Open Floor Hearing
OLEMS	Outline Landscape and Ecological Mitigation Strategy
OMMMP	Outline Marine Mammal Mitigation Protocol'
oOCIMP	Outline Ornithology Compensation Implementation and Monitoring Plan
PAM	Passive Acoustic Modelling
PEC	Predicted Environmental Concentrations
PEIR	Preliminary Environmental Impact Report
PC	Process Contributions
PID	Public Information Day
PoB	Port of Boston
PPG	Planning Practice Guidance
PPs	Protective Provisions
PA2008	Planning Act 2008 (as amended)
PM	Preliminary Meeting
pSACs	Possible Special Areas of Conservation
PRoW	Public Right of Way
PSED	Public Sector Equality Duty
pSPAs	Potential Special Protection Areas
PTS	Permanent Threshold Shift
RDF	Refuse Derived Fuel
REAC	Register of Environmental Actions and Commitments

APPENDIX B: List of abbreviations

REPORT TO THE SECRETARY OF STATE: Boston Alternative Energy Facility - EN010095

(B:4)

Abbreviation or usage	Reference
RIES	Report on the Implications for European Sites
RR	Relevant Representation
RSPB	Royal Society for the Protection of Birds
s (number)	Section of a statute and when followed by a number, a particular section number from a named statute
SAC	Special Area of Conservation
SCIs	Sites of Community Importance
SCOS	Special Committee on Seals
SHA	Statutory Harbour Authority
SI	Statutory Instrument
SHDC	South Holland District Council
SNCB	Statutory Nature Conservation Body
SO ₂	Sulphur Dioxide
SoCC	Statement of Community Consultation
SoCG	Statement of Common Ground
SoR	Statement of Reasons
SoS	Secretary of State
SoS BEIS	Secretary of State for Business, Energy and Industrial Strategy
SPA/s	Special Protection Area
SSSI	Site of Special Scientific Interest
SU(s)	Statutory Undertaker(s)
SWQ(s)	Second Written Question(s)
TCPA1990	Town and Country Planning Act 1990
TWQs	Third Written Question(s)
TP	Temporary Possession
UK	United Kingdom
UKCP	UK Climate Projections
UKHSA	UK Health Security Agency (formally known as Public Health England)
UKWIN	United Kingdom Without Incineration Network
UNEP	United Nations Environment Programme
USI	Unaccompanied Site Inspection
WACA1981	The Wildlife and Countryside Act 1981
WCS	Worst Case Scenario
WeBS	Wetland Bird Survey
WFD	Water Framework Directive
WID	Waste Incineration Directive
WKN	Wheelebrator Kemsley North
WR	Written Representation
WSI	Written Scheme of Investigation
WTS	Waste Transfer Station

APPENDIX C: DETAILED FINDINGS AND CONCLUSIONS IN RELATION TO HABITATS REGULATIONS ASSESSMENT

APPENDIX C: DETAILED FINDINGS AND CONCLUSIONS IN RELATION TO HABITATS REGULATIONS ASSESSMENT

1.1. INTRODUCTION

- 1.1.1. This Appendix sets out my analysis and conclusions relevant to the Habitats Regulations Assessment (HRA). This will assist the Secretary of State for Business, Energy and Industrial Strategy (SoS), as the Competent Authority, in performing their duties under the Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations').
- 1.1.2. This Appendix is structured as follows:
- Section 1.2: Findings in relation to Likely Significant Effects (LSE) on the UK National Site Network (NSN) and European sites;
 - Section 1.3: Conservation Objectives for sites and features;
 - Section 1.4: Findings in relation to Adverse Effects on Integrity (AEoI);
 - Section 1.5: Alternative solutions considered;
 - Section 1.6 Imperative Reasons of Overriding Public Interest (IROPI);
 - Section 1.7: Compensation measures; and
 - Section 1.8: HRA conclusions.
- 1.1.3. In accordance with the precautionary principle embedded in the Habitats Regulations, consent for the Proposed Development may be granted only after having ascertained that it will not adversely affect the integrity of European site(s)¹ and no reasonable scientific doubt remains².
- 1.1.4. Policy considerations and the legal obligations under the Habitats Regulations are described in Chapter 3 of the Recommendation Report.
- 1.1.5. I have been mindful throughout the Examination of the need to ensure that the SoS has such information as may reasonably be required to carry out their duties as the Competent Authority. I have sought evidence from the Applicant and the relevant Interested Parties (IPs), including Natural England (NE) as the Appropriate Nature Conservation

¹ For the purposes of this Appendix, in line with the Habitats Regulations and relevant Government policy, the term 'European sites' includes Special Areas of Conservation (SACs), candidate SACs (cSACs), possible SACs (pSACs), Special Protection Areas (SPAs), potential SPAs (pSPAs), Sites of Community Importance (SCIs), listed and proposed Ramsar sites and sites identified or required as compensatory measures for adverse effects on any of these sites. For ease of reading, this Appendix also collectively uses the term 'European site' for 'European sites' defined in the Conservation of Habitats and Species Regulations 2017 and 'European Marine Sites' defined in the Conservation of Offshore Marine Habitats and Species Regulations 2017, unless otherwise stated.

² CJEU Case C-127/02 Waddenzee 7 September 2004, Reference for a preliminary ruling from the Raad van State (Netherlands) in the proceedings: Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij

Body (ANCB), through written questions and issue-specific hearings (ISHs).

RIES and Consultation

- 1.1.6. I produced a Report on the Implications for European Sites (RIES) [PD-014] which compiled, documented, and signposted HRA-relevant information provided in the Development Consent Order (DCO) application and Examination representations up to Deadline 6 (D6) (8 February 2022). The RIES was issued to set out my understanding on HRA-relevant information and the position of the IPs in relation to the effects of the Proposed Development on European sites at that point in time. Consultation on the RIES took place between 24 February and 24 March 2022. Comments were received from the Applicant [REP9-027], the Eastern Inshore Fisheries and Conservation Authority (EIFCA) [REP9-054], NE [REP9-063], and the Royal Society for the Protection of Birds (RSPB) [REP9-065] at D9 (24 March 2022). A response to these comments on the RIES was submitted by the Applicant [REP10-020] at D10 (7 April 2022). These comments have been taken into account in the drafting of this Appendix.
- 1.1.7. My recommendation is that the Secretary of State (SoS) may wish to rely on the RIES, and consultation on it, as a sufficient body of information to enable the SoS to fulfil their duties of consultation under Regulation 63(3) of the Habitats Regulations.

Proposed Development Description and HRA Implications

- 1.1.8. The Proposed Development is described in Chapter 2 of the Recommendation Report.
- 1.1.9. The spatial relationship between the Order limits of the Proposed Development and the European sites is shown in Environmental Statement (ES) Chapter 17 Figure 17.1 [APP-091].
- 1.1.10. The Proposed Development is not directly connected with, or necessary to, the management of a European site. Therefore, the SoS must make an 'appropriate assessment' (AA) of the implications of the Proposed Development on potentially affected European sites in light of their Conservation Objectives.
- 1.1.11. The Applicant's assessment of effects is presented in the following key document(s):
- Boston Alternative Energy Facility – Environmental Statement - Appendix 17.1: Habitats Regulations Assessment (V1.0) [AS-006] (which superseded [APP-111 and REP9-013]), (hereafter referred to as the Applicant's HRA Report (HRAR));

- Updated Habitats Regulations Assessment Screening and Integrity Matrices (V0.0) [REP3-018] (a tracked changes version of which was submitted at D5 [REP5-003]);
- ES Chapter 17 Marine and Coastal Ecology and Appendix 17.1 Habitats Regulations Assessment Update [REP5-006];
- ES Chapter 17: Marine and Coastal Ecology and Appendix 17.1: Habitats Regulations Assessment - Ornithology Addendum ([REP1-026] (hereafter referred to as the Ornithology Addendum); and
- Addendum to ES Chapter 17 and Appendix 17.1: Marine Mammals (V1.0) [REP9-020] (which superseded REP1-027) (hereafter referred to as the Marine Mammals Addendum).

1.1.12. Appendix A17.1.3 of the HRAR contains information on consultation on the HRA with relevant stakeholders, including NE, the RSPB and Lincolnshire Wildlife Trust (LWT).

1.1.13. In response to my questions and representations made by IPs during the Examination the Applicant submitted documents containing a 'without prejudice' derogation case at D2, comprising:

- Without Prejudice Habitats Regulations Assessment Derogation Case: Assessment of Alternative Solutions [REP2-011];
- Without Prejudice Habitats Regulations Assessment Derogation Case: Imperative Reasons of Overriding Public Interest (IROPI) Case [REP2-012]; and
- Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (V2.0) [REP8-006] (hereafter referred to as the Compensation Measures Document (CMD). This superseded [REP2-013 and REP6-025]. It was supported by an Outline Ornithology Compensation Implementation and Monitoring Plan (oOCIMP V0.0) submitted at D7 [REP7-013], which was superseded by a final version at D8 (V1.1)[REP8-013].
- Sections 1.5 to 1.7 of this Appendix address the derogation and compensation proposals in relation to the draft Development Consent Order (dDCO).

1.1.14. The Applicant has not identified any LSE on European sites in European Economic Area (EEA) States in its HRAR [AS-006] or within its ES [REP9-011]. Only European sites which form part of the UK NSN are addressed in this report. No such effects were raised for discussion by any IPs during the Examination.

Summary of HRA Matters Considered During the Examination

1.1.15. The Applicant screened the following European sites into the HRA:

- The Wash SPA;
- The Wash and North Norfolk Coast SAC; and
- The Wash Ramsar site.

The location of these is shown on ES Figure 17.1 [APP-091].

1.1.16. IPs did not identify any other UK European sites that may be affected by the Proposed Development. NE confirmed at D9 that the Applicant had identified all of the relevant designated sites and features [REP9-063].

1.1.17. At the time of the application submission there was a high level of disagreement between the Applicant and IPs, such as NE, the RSPB and LWT, in relation to the HRA. This included concerns about the scope of and approach to the assessment, the robustness and extent of the survey data, the Applicant's conclusions, the adequacy of the proposed mitigation, and the need for compensation.

1.1.18. The main HRA matters raised by me, NE and other IPs and discussed during the Examination include:

- the scope of the assessment;
- confidence in the Applicant's data and whether it was comprehensive;
- the approach to the in combination assessment;
- the Applicant's conclusions in relation to impacts arising from disturbance and loss of habitat on bird species which are features of the SPA and Ramsar site;
- the Applicant's conclusions in relation to impacts arising from collision risk, entanglement within the anchorage area, and disturbance of harbour seal which are a feature of the SAC;
- whether the application site and land along The Haven between the application site and the SPA and Ramsar site are functionally linked to the European sites;
- the adequacy of the proposed mitigation;
- the Applicant's conclusion of no AEOI of the European sites considered in the assessment; and
- the level of detail on and sufficiency of the proposed in principle compensation measures.

1.1.19. These matters are set out in the RIES [PD-014] in detail and discussed in the sections below, as appropriate.

1.2. FINDINGS IN RELATION TO LIKELY SIGNIFICANT EFFECTS

1.2.1. Under Regulation 63 of the Habitats Regulations the competent authority must consider whether a development will have LSE on a European site, either alone or in combination with other plans or projects. The purpose

of the LSE test is to identify the need for an AA and the activities, sites or plans and projects to be included for further consideration in the AA.

- 1.2.2. The European sites and qualifying features that were considered in the Applicant's assessment of LSE are presented in Section A17.3 and Tables A17-1 to A17-4 of the HRAR [AS-006]. The Applicant's HRAR sets out the methodology applied to determining what would constitute a 'significant effect'.
- 1.2.3. The Applicant's screening exercise and conclusions on likely significant effects are set out in HRAR Section A17.4 [AS-006]. Potential construction and operational effects on the three European sites are identified in Section 17.4 and Appendix A17.1.1, Table A17-1-1-1.
- 1.2.4. It was considered in the HRAR that the pathway for an effect on European sites (or functionally linked land) during the construction phase could be the delivery of materials to the application site using vessels via The Wash and The Haven. The following potential effects were identified for the construction phase for bird populations that are a feature of The Wash SPA and Ramsar site:
 - noise effects from piling and dredging activities impacting on designated species using the land adjacent to the Proposed Development;
 - effects arising from a loss of habitat (mudflat and saltmarsh habitat, which are functionally linked to the SPA and Ramsar site) in the area of the Proposed Development site; and
 - disturbance effects from an increase in vessel numbers.
- 1.2.5. The following potential effects were identified for the construction phase for harbour seal populations that are a feature of The Wash and North Norfolk Coast SAC:
 - underwater noise effects from piling and dredging activities impacting on seals using the section of The Haven adjacent to the Proposed Development;
 - disturbance effects from an increase in vessel numbers;
 - disturbance effects at seal haul-out sites from an increase in vessel numbers; and
 - increased risk of collision from an increase in vessel numbers.
- 1.2.6. For the operational phase, the following were considered as having the potential to have an effect on the qualifying features (and/or the supporting habitats of qualifying species) of all three of the European sites:
 - changes in vessel traffic and movements leading to increased collision risk and above ground and underwater noise and visual disturbance to birds, seals and otter; and
 - nitrogen oxides (NO_x), sulphur dioxide (SO₂), nitrogen, acid and ammonia deposition within the boundaries of the European sites as a result of the emissions from the Proposed Development.

- 1.2.7. Screening matrices are provided in HRAR Appendix A17.1.1 for each of the three European sites considered in the HRA. Each matrix includes footnotes that set out evidence to support the Applicant’s conclusions in relation to LSEs. An updated version (V1.0) [REP3-018] was provided at D3 in response to my third written questions (ExQ3) ExQs3.1.18, 3.1.19 and 3.1.20, and comments made by NE [REP2-048] at D2 in respect of the England Coast Path (ECP).
- 1.2.8. I issued written questions which included HRA matters on 14 October [PD-008], 11 January 2022 [PD-010] and 15 February [PD-013], and a Rule 17 request on 30 March 2022 [PD-015]. The HRA was discussed at the Issue Specific Hearing on environmental matters held on 24 November 2021.

LSE from the Proposed Development Alone

- 1.2.9. The Applicant identified potential impacts of the Proposed Development considered to have the potential to result in LSE alone in Section A17.4 of the HRAR [AS-006]. The Applicant concluded that there could be LSE alone on features of each of the three European sites. These are identified in Table C1 below (all of the bird species of which are non-breeding).

Table C1: Likely significant effects concluded by Applicant

European site	Qualifying feature	LSE identified
The Wash SPA	Bar-tailed godwit Black-tailed godwit Common scoter Curlew Dark-bellied brent goose Dunlin Gadwall Goldeneye Grey plover Knot Oystercatcher Pintail Redshank Sanderling	Disturbance (construction and operation)

	Shelduck Turnstone Waterbird assemblage Wigeon	
	Bar-tailed godwit Black-tailed godwit Common scoter Curlew Dark-bellied brent goose Dunlin Gadwall Goldeneye Grey plover Knot Oystercatcher Pintail Redshank Sanderling Shelduck Turnstone Waterbird assemblage Wigeon	Changes to noise levels (construction and operation)
The Wash and North Norfolk Coast SAC	Harbour (common) seal	Increased collision risk (construction and operation)
		Disturbance (construction and operation)
		Changes to noise levels (construction and operation)

		In combination effects (construction)
	<p>Atlantic salt meadows</p> <p>Coastal lagoons</p> <p>Large shallow inlets and bays</p> <p>Mediterranean and thermo-Atlantic halophilious scrubs</p> <p>Mudflats and sandflats not covered by seawater at low tide</p> <p>Reefs</p> <p>Salicornia and other annuals colonising mud and sand</p> <p>Sandbanks which are slightly covered by sea water all the time</p>	Changes to air quality (operation)
The Wash Ramsar site	<p>Bar-tailed godwit</p> <p>Black-headed gull</p> <p>Black-tailed godwit*</p> <p>Common eider</p> <p>Curlew</p> <p>Dark-bellied brent goose</p> <p>Dunlin</p> <p>Golden plover*</p> <p>Grey plover</p> <p>Lapwing*</p> <p>Knot</p> <p>Oystercatcher</p>	Disturbance (construction and operation)

	Redshank Ringed plover* Sanderling Shelduck	
	Bar-tailed godwit Black-headed gull Black-tailed godwit* Common eider Curlew Dark-bellied brent goose Dunlin Golden plover* Grey plover Knot Lapwing* Oystercatcher Redshank Ringed plover* Sanderling Shelduck	Changes to noise levels (construction and operation)

* Species/populations identified in the Ramsar Information Sheet as subsequent to designation for possible future consideration under Ramsar criterion 6.

1.2.10. HRAR Section 17.4 [AS-006] explained that impacts from the decommissioning phase were not considered in the HRA as the wharf would remain in place after the Proposed Development was decommissioned and the vessel movements arising from the operational phase would cease.

1.2.11. The Applicant's conclusion of potential likely significant effects on the three European sites and their qualifying features identified above were not disputed by any IPs during the Examination. However, IPs considered that some additional features of the SPA and Ramsar site should be included and taken forward for further assessment, as follows:

- At D9 the Applicant explained [REP9-027] that breeding common tern had been identified by the RSPB during the Examination as being

present near the application site. The potential for LSE on this feature was assessed and it was concluded that it was not at risk of disturbance from vessels using The Haven [REP5-006].

- NE [REP9-063] noted that habitat loss (mudflat and saltmarsh) from construction of the wharf had not specifically been identified by the Applicant as a potential LSE on SPA and Ramsar site features at the application site. However, it was considered by the Applicant at the appropriate assessment stage.
- The Ornithology Addendum [REP1-026] contained an updated screening exercise, based on additional survey data collected during the Examination for both the application site and the mouth of The Haven (MOTH). It had regard to NE's 'Supplementary Advice on Conservation Objectives' for the SPA. As a result, a number of additional features were screened in for assessment. At the application site non-breeding waterbirds that are an individual feature or part of the (non-breeding) waterbird assemblage of the SPA/Ramsar site were considered to potentially experience a LSE if they were present in numbers exceeding 1% of their population within the SPA/Ramsar site. On this basis redshank and the waterbird assemblage at the application site were screened in. At the MOTH non-breeding waterbirds that are an individual feature or part of the waterbird assemblage of the SPA/Ramsar site were considered to potentially experience a LSE according to the importance of 'The Haven local area' and the MOTH 'site' for the species according to the Wetland Bird Survey (WeBS) counts, and recorded mean and peak counts of the species disturbed during project-specific surveys at the MOTH. It was confirmed that dark-bellied brent goose (DBBG), black-tailed godwit, oystercatcher, redshank, turnstone and the waterbird assemblage were screened in.

- 1.2.12. The RSPB [REP4-026] commented that golden plover had not been identified as a SPA feature in its own right. The Applicant disagreed and stated at D10 [REP10-020] that in relation to disturbance sensitivity it had been identified as one of the two key species that was repeatedly disturbed and returned to the site. Accordingly, an assessment of energy usage had been undertaken for golden plover in its own right and was reported in Section 7.2 of ES Chapter 17 (V1.0) [REP9-011] and the HRA Update [REP5-006]. NE provided a response at D10 [REP10-036] to Question 4 in the Rule 17 letter issued 30 March 2022 [PD-015] clarifying whether golden plover is a feature of the SPA in its own right (as well as a waterbird assemblage feature). NE stated that it agreed with the RSPB that the numbers of golden plover within The Wash SPA justified their protection and that was currently being considered as part of a review of the SPA designation. NE suggested that until the review was complete measures should be taken to avoid/mitigate impacts on golden plover.

LSE from the Proposed Development in Combination

- 1.2.13. The Applicant addressed potential in combination effects arising from the Proposed Development within HRAR Section A17.5 [AS-006], which sets out the methodology applied. Details of the other plans and projects

included in the in combination assessment are provided in HRAR Table A17-5.

- 1.2.14. The HRAR explained that, due to the wide-ranging nature of the harbour seal, which may forage at considerable distance from their principal haul-out site, there was the potential for in combination effects (ICE) from projects at a larger distance from the application site. Therefore, projects that are within the same reference population (the south-east England Management Unit; Special Committee on Seals (SCOS), 2018) and that had the potential to overlap temporally were screened in for further assessment.
- 1.2.15. Of the 11 plans and projects identified it was concluded that there was potential for ICE with one project, the Viking Link Interconnector, on SAC harbour seal, resulting from underwater noise (from piling and dredging) and an increased risk of vessel collision, and this was taken forward for further assessment.
- 1.2.16. The scope of the in combination assessment was disputed by NE. They raised a number of concerns in Appendix C of their combined Relevant Representation (RR)/ Written Representation (WR) [RR-021]. They considered that it was:
- incomplete, particularly in relation to baseline disturbance (such as arising from changes to the route of the ECP);
 - limited, as it only considered sites and features where “*project alone*” impacts were identified so did not account for plans or projects that could have small effects alone but that become significant when combined; and
 - failed to take into account projects in the full foraging range of the European site interest features, ie in relation to marine mammals: Norfolk Vanguard, Boreas, Great Yarmouth Port, and Lowestoft Port and Operations and Maintenance for operational windfarms.
- 1.2.17. Further commentary on ICE is provided below.
- 1.2.18. No in combination LSEs were identified for the sites and qualifying features where LSE were excluded from the Proposed Development alone.

LSE Assessment Outcomes

- 1.2.19. The Applicant concluded that no LSE would occur from either the project alone or in combination with other projects and plans on the following features of the European sites:
- The Wash SPA: Bewick’s swan, common tern, little tern, pink-footed goose;
 - The Wash Ramsar site – pink-footed goose; and
 - The Wash and North Norfolk Coast SAC – otter.
- 1.2.20. HRAR paras A17.4.17 to A17.4.19 [AS-006] provided justification for concluding that there would be no adverse effects on otters and

confirmed that they were not considered further in the HRA. NE, in their combined RR/ WR [RR-021], acknowledged that no evidence of otters was found in the surveys and advised that preconstruction surveys would need to be carried out to verify their presence or absence.

- 1.2.21. The footnotes to the screening matrices in A17.1.1 of the HRAR explain that it was concluded that there would be no LSE on Bewick's swan, common tern, little tern and pink-footed goose as there would be "*no interaction of concern between the increased risk caused from the Facility*" according to the supplementary information provided by NE. IPs did not dispute this conclusion with the exception of the RSPB, who did not agree that there would be no LSE on common tern (qualifying feature of the SPA).
- 1.2.22. The sites and features identified in Table C1 above were assessed by the Applicant to determine if they could be subject to AEoI as a result of the Proposed Development alone or in combination with other plans and projects, in view of their conservation objectives.
- 1.2.23. I am satisfied, on the basis of the information provided, that the correct impact-effect pathways for each site have been assessed and am satisfied with the approach to the assessment of alone and in combination likely significant effects.
- 1.2.24. Taking into account the reasoning set out above, I consider that the Proposed Development is likely to have a significant effect resulting from the impacts identified above in Table C1, and additionally from habitat loss, on the qualifying features of the European sites identified above when considered alone, and on harbour seal in combination with other plans or projects. This was not disputed by IPs/ NE during the Examination.
- 1.2.25. I do not agree with the RSPB that there would be a LSE on common tern (see commentary below).

1.3. CONSERVATION OBJECTIVES

- 1.3.1. The conservation objectives for the European sites taken forward for consideration of effects on their integrity, and discussed in this section of this report, are set out in HRAR Section 17.3 [AS-006]. In the absence of conservation objectives for Ramsar sites, the same objectives were assumed in the HRAR for The Wash Ramsar site. No IPs made any comments on this approach.
- 1.3.2. NE, in their comments [REP8-022] on the Applicant's HRA Update [REP5-006], considered that one of the SPA conservation objectives, ie the distribution of the qualifying features within the site, had not been fully assessed in the HRA and required further consideration by the Applicant. Other points were raised by NE and the RSPB in relation to the conservation objectives. Commentary on this is provided below.

1.4. FINDINGS IN RELATION TO ADVERSE EFFECTS ON INTEGRITY

Overview

1.4.1. The European sites and qualifying features identified in Table C1 above were further assessed by the Applicant to determine if they could be subject to AEOI from the Proposed Development, either alone or in combination. The assessment of AEOI was made in light of the conservation objectives for the European sites.

1.4.2. The following matters were considered in the HRAR in relation to potential effects on site integrity:

SPA/ Ramsar site - bird species

- habitat loss;
- disturbance from construction noise;
- vessel disturbance (visual, presence and noise) during both construction and operation; and
- disturbance from construction and operational lighting at the application site and on vessels in transit through The Wash and The Haven.

SAC

- underwater noise from piling and dredging during construction - harbour seal;
- increased underwater noise and disturbance from changes in vessel traffic and movements during construction and operation - harbour seal;
- increased collision risk - harbour seal; and
- changes to air quality during operation - potential emission/deposition of NO_x, SO₂, nitrogen, acid and ammonia on the qualifying Annex I habitats.

SPA/Ramsar site

1.4.3. The HRAR explained that in order to mitigate the loss of the roosting and foraging habitats for waders, in particular redshank, works were proposed to enhance the habitat within a 'Habitat Mitigation Area' (HMA) in order to improve the existing roosting and foraging habitat. The HMA would cover 1.5 hectare (ha) and its location is comprised predominantly of saltmarsh with several small tidal creeks. It is located approximately 170m to the south east of the application site and over 250m away from the closest edge of the proposed wharf. The proposed works would involve the creation of shallow pools (10-15cm deep) in the existing marshy habitat, re-profiling the edges of existing pools and low profile banks, and increasing the volume of 'roosting' rocks in the upper intertidal area. These are detailed in the Outline Landscape and Ecological Mitigation Strategy (OLEMS) [REP10-014] and secured by dDCO Requirement 6 (R6) [REP10-004], which requires a final Landscape and Ecological Mitigation Strategy (LEMS) to be approved which must be

substantially in accordance with the OLEMS. The content of the OLEMS predominantly relates to the terrestrial parts of the application site but Appendix 1 contains (in addition to information on biodiversity net gain (BNG) measures) information on intertidal mitigation measures relating to the HMA.

- 1.4.4. The HRAR stated that piling works, likely to be the noisiest construction activity, should be undertaken between May to September to avoid effects on overwintering birds, when the numbers of feeding waterbirds peak. Condition 13 of the Deemed Marine Licence (DML) in dDCO Schedule 9 [REP10-004] relates to piling and provides that a method statement must be submitted to the Marine Management Organisation (MMO) for approval that includes details of timing of piling activities.

SAC

- 1.4.5. The HRAR stated that best practice measures would be put in place to minimise disturbance to marine mammals from the presence of and noise from vessel traffic serving the Proposed Development during construction and operation, which would mainly consist of a non-dedicated observer on board each vessel looking out for marine mammals. It was explained that these measures are secured by dDCO Schedule 9 (DML) Condition 14, which requires that a Navigation Management Plan (NMP) must be approved prior to construction which must include measures for managing potential risks to marine mammals. An outline version of the NMP was not provided with the application. A NMP template was provided at D7 [REP7-012], which was superseded by a final version at D8 (V1.0) [REP8-011]. It was concluded that, as the assessment indicated (based on a worst case scenario (WCS)) that 1% of the SAC population of harbour seals could be disturbed as a result of vessel noise during construction and operation, this would not be significant and would not result in an AEOI of the SAC in relation to harbour seals.
- 1.4.6. The Applicant highlighted at D9 [REP9-027] that, based on information about a decline in the local seal population and updated population estimates, updated assessments of the proportion of the SAC population that could be affected by the Proposed Development were provided in the updated Marine Mammals Addendum (V1.0) [REP9-020]. It found that up to 1.2% of the SAC population could be disturbed by vessel noise during construction and operation. The Applicant explained that the mitigation proposed to reduce disturbance is presented in the 'Outline Marine Mammal Mitigation Protocol' (OMMMP) (V2.0) [REP7-003] and secured in dDCO Schedule 9 DML Conditions 14 and 17.
- 1.4.7. It was concluded in the HRAR that there would be no AEOI on the SAC as a result of piling and dredging impacts on the seal population. Notwithstanding, it explained that a precautionary approach had been adopted and in relation to piling noise a pre-piling watch for marine mammals and soft-start and ramp-up procedures would be undertaken when piling activities were undertaken during high tides. This was secured by dDCO Schedule 9 Condition 14.

- 1.4.8. No mitigation was proposed in the HRAR [AS-006] for collision risk for seals during construction and operation. It was concluded that there would be no AEOI of the SAC in relation to the conservation objectives for harbour seal considering the “*small relative increase*” in the number of vessels in the area, their slow speed (6 knots or less) and restricted area of the shipping channel and anchorage site, the likelihood that seals would be able to detect and avoid any vessels in order to avoid collision, and the small number of seals that could be at risk (0.04% of the SAC population).
- 1.4.9. At D9 the Applicant highlighted [REP9-027] that updated assessments of the proportion of the SAC population that could be affected, based on the updated population estimates, were presented in [REP9-020], and found that up to 0.06% of the SAC population could be at increased risk of collision. It stated that proposed mitigation was contained in the OMMMP (V2.0) [REP7-003], which included best practice measures for vessels to avoid collisions with seals, with a reduced speed encouraged when possible. Two monitoring options were proposed, for agreement in the final Marine Mammal Mitigation Protocol (MMMP).
- 1.4.10. The Applicant concluded that there would be no AEOI of the European sites and their features from the Proposed Development with the implementation of the proposed mitigation measures. The Applicant’s conclusions in relation to the sites and features were disputed by IPs.

IP initial positions

- 1.4.11. In its combined RR)/ WR [RR-021] NE stated that, on the basis of the information submitted, it was not satisfied beyond reasonable scientific doubt that the Proposed Development would not have an adverse effect alone or in combination on the integrity of The Wash SPA in relation to redshank and the bird assemblage, the Wash Ramsar site in relation to the bird assemblage, and The Wash and North Norfolk Coast SAC in relation to harbour seal arising from additional vessel movements and anchorage. It advised that compensation measures would need to be considered as part of a derogation case once the alternatives and Imperative Reasons of Overriding Public Interest (IROPI) tests had been met. NE’s RR focused on the SPA and SAC but also referred to effects on the Ramsar site and SPA bird assemblages using the feeding/ roosting area at the MOTH arising from increased vessel movements.
- 1.4.12. In respect of The Wash SPA, NE considered in its RR/ WR that the location of the Proposed Development would potentially result in an AEOI on redshank through the following risk pathways: loss of foraging habitat on site through modification; loss of roosts on site through modification or disturbance; and loss of foraging habitat along The Haven which may be degraded through boat wash along the channel.
- 1.4.13. At D9 the Applicant responded [REP9-027] that the loss of foraging habitat was very minor and would comprise a change from soft sediment seabed to hard areas of coarse sediment to support the berthed vessels. It considered that the loss of the roosting area at the application site would be fully mitigated through enhancement of the adjacent roosting

area (the HMA), outside of the potential area of disturbance to key species including redshank. No impacts were anticipated along The Haven resulting from boat wash from the increased vessel numbers.

- 1.4.14. NE provided a Risk and Issues Log at D1 [REP1-057] which summarised the issues raised in its RR/ WR and provided an update on discussions held with the Applicant and other IPs since the submission of the RR/ WR. It submitted updated logs at subsequent deadlines, and explained that a final Statement of Common Ground (SoCG) would be submitted only once all issues had either been resolved or progressed as far as was possible. A draft SoCG was submitted by the Applicant at D7 [REP7-020] and a final SoCG was submitted at D10 [REP10-033]. The majority of HRA issues were shown as not agreed.
- 1.4.15. LWT agreed [RR-011] with NE and considered that the information and data provided in the application was insufficient to demonstrate no AEOI of the SPA and SAC. It raised the same concerns as NE that WCSs had not been considered within the HRAR and highlighted the potential for significant effects on wintering redshank and breeding harbour seal. The Applicant submitted a draft SoCG at D7 [REP7-016] and a final SoCG at D10 [REP10-024]. The majority of HRA issues were shown as not agreed.
- 1.4.16. At D9 the Applicant responded [REP9-027] that mitigation had been proposed for wintering redshank and harbour seal as detailed in [APP-055, REP1-026 and REP7-003].
- 1.4.17. LWT reiterated its position in its WR [REP1-055] and stated that WCSs should be clearly defined. It considered that necessary compensation or mitigation should be proposed for potential impacts on harbour seal of piling, ship movements and anchorage; and for the effects arising from the loss of saltmarsh and mudflat. Any areas chosen as compensation sites should be assessed for potential disturbance impacts during construction and operation on the SPA and SAC features. It welcomed the Applicant's decision to submit an in principle derogation case and that the necessary compensatory measures would be secured in the application. It acknowledged that the Applicant was aware of recently available information about a serious and rapid decline in the east coast harbour seal population and requested in relation to this that the Applicant provide noise modelling information on the piling required for the Proposed Development.
- 1.4.18. At D9 the Applicant responded [REP9-027] that WCSs were detailed in the relevant ES chapters and the Ornithology Addendum [REP1-026], which presented specific WCSs for wharf construction and operation and for vessel passage at the MOTH. If required, underwater noise modelling would be presented within the final MMMP, to ensure that the proposed mitigation was in line with the actual modelled impact ranges. The potential for use of alternative pile installation techniques (eg, vibro-piling) would be considered once the pile design was finalised. Updated assessments had been provided in the ES/ HRA Marine Mammals Addendum (V1.0) [REP9-020] to take account of the decline in the local harbour seal population.

- 1.4.19. The RSPB expressed concerns in its RR [RR-024] about potential effects on the SPA and Ramsar site; it considered that the Applicant had provided insufficient information, particularly in relation to bird survey data, to demonstrate no AEoI of these sites and their features. It set out similar concerns to NE and LWT and confirmed that it also supported the views of NE and LWT on potential effects on the SAC, notably in relation to adverse effects on harbour seal. It considered that the Applicant should submit a detailed derogation package, which should include a full suite of relevant and secured compensation measures in order to protect the overall coherence of the National Site Network (NSN). In its WR [REP1-060] it stated that a key concern was that the Applicant had provided limited justification for the Proposed Development to be sited in the identified location and had not set out alternative options to demonstrate that there were no less environmentally damaging alternatives. Its WR reiterated information contained in its RR and also contained updated data tables and subsequent analysis.
- 1.4.20. The RSPB concluded in its WR that in relation to effects of the application both alone and in combination with other plans and projects it did not agree that an AEoI could be excluded for the following sites and qualifying species:
- redshank, DBBG, shelduck, oystercatcher, black-tailed godwit, lapwing, curlew, turnstone, golden plover, ruff, and common tern associated with The Wash SPA;
 - redshank, DBBG, shelduck, oystercatcher, black-tailed godwit, lapwing, curlew, turnstone, golden plover, ruff, common tern associated with the Wash Ramsar site; and
 - harbour seal associated with The Wash and North Norfolk Coast SAC.
- 1.4.21. The Applicant submitted a 'Without Prejudice In-Principle Alternative Locations Case' at D8 [REP8-015] in response to comments made by the RSPB and United Kingdom Without Incineration Network (UKWIN) at D4 and D3, respectively. It submitted a draft SoCG with the RSPB at D7 [REP7-017] and a final SoCG at D9 [REP9-039]. No issues were shown as agreed.
- 1.4.22. The MMO, in Section 4 of its RR [RR-008], stated that it deferred to NE as the Statutory Nature Conservation Body (SNCB) (now ANCB) for the HRA. It also noted that the Applicant had included the proposed HMA within the application as mitigation for the loss of bird foraging area and stated its agreement with NE that the HMA should be viewed as compensation, and must be proven to be effective and secured in the DCO. It also confirmed in its WR and 'Comments on Relevant Representations' contained in Annex 1 of its D1 Submission [REP1-056] that it deferred to NE and supported their position on the effects of the Proposed Development on the European sites. At D10 the MMO confirmed its view [REP10-035] that the HMA represented compensation, not mitigation. This was reflected in the final SoCG [REP9-053].
- 1.4.23. NE commented in its RR/WR [RR-021] that the assessment within the HRAR of pressures on The Wash SPA did not consider how the pressures could impact the conservation objectives for the site and the current

condition of the features, which would provide the necessary context to inform the significance of any effects [RR-021]. The RSPB considered that there was a lack of consideration of the full suite of conservation objectives for the designated sites.

- 1.4.24. The Applicant stated [REP1-035] that it had provided assessments within the HRAR which systematically addressed the potential routes for impacts on each conservation objective for the designated sites and their features, and that further detail had been provided in the ES/ HRA Ornithology and Marine Mammals Addendums submitted at D1 [REP1-026 and REP1-027, respectively]. It considered that the potential impacts on the conservation objectives had therefore been properly assessed.
- 1.4.25. NE stated at D2 [REP2-045], having reviewed the Ornithology Addendum, that there was no change to the advice set out in their RR/WR. It considered that for a number of individual bird species and for the waterbird assemblage as a whole an AEOI could not be ruled out beyond reasonable scientific doubt.
- 1.4.26. The RSPB confirmed [REP2-053], in its initial comments on the Ornithology Addendum, their view that an AEOI could not be ruled out for the waterbird assemblage or any of the individual qualifying features of the SPA and Ramsar site, and that the comments made in its WR still applied. It considered that all the qualifying features of The Wash SPA and Ramsar site that had been recorded as present along the navigation channel should be considered in the appropriate assessment. It set out its reasoning for why it disagreed with the Applicant's conclusion of no AEOI for: DBBG, black-tailed godwit, oystercatcher, redshank, turnstone, lapwing, golden plover, common tern and the waterbird assemblage. It stated in [REP2-051] that it disagreed with the Applicant's conclusion that common tern and shelduck could be excluded from the appropriate assessment.
- 1.4.27. In response to the Applicant's response to ExQ3.1.18, the RSPB reiterated [REP3-033] its view at D3 that common tern should be considered in the assessment. This was on the basis that 30-40% of the SPA population of common tern breed at RSPB Freiston Shore and RSPB Frampton Marsh, and that ringing recaptures had shown that the birds moved between these two sites and would be foraging within The Wash and along The Haven. They commented that WeBS data had recorded large numbers of common terns congregating at the MOTH post-breeding.
- 1.4.28. In the Applicant's written summary of its case made at ISH2 [REP3-023], it confirmed that it had requested the relevant data from the RSPB about common tern and would assess the potential for a LSE. It queried whether the common tern were breeding inside or outside of the designated sites. The RSPB confirmed that they were breeding adjacent to the SPA boundary. The Applicant provided an assessment of the potential effects of vessel disturbance on breeding common tern at the MOTH, based on the data supplied by the RSPB, in its D5 HRA update [REP5-006].

- 1.4.29. In relation to my request at ISH2 for NE and the Applicant to expand on their positions in respect of disturbance to birds at high tide, NE responded [REP3-030] that the information on the assessment of impacts remained insufficient and that its concerns therefore remained unchanged to those set out in their WR and D1 and D2 submissions.
- 1.4.30. The Applicant responded at D9 [REP9-027] that further survey work had subsequently been undertaken to inform the assessment, and the data and assessment was presented in the various updates to the HRA, principally the HRA Update [REP5-006].
- 1.4.31. LWT stated at D4 that it supported the views of NE and the RSPB and remained of the opinion that insufficient information had been presented to demonstrate no AEOI on the features of the SPA, Ramsar site and SAC, specifically harbour seal [REP4-021]. It considered that the concerns raised in its WR [REP1-055], ie impacts on harbour seal resulting from piling, ship movements and anchorage, had not been addressed in the OMMMP [REP1-025] and ES/ HRA Marine Mammals Addendum [REP1-027] submitted by the Applicant at D1. It set out its view that an AEOI could not be ruled out for redshank at the application site and for the SPA assemblage at the MOTH.
- 1.4.32. NE stated [REP5-012] at D5 that it disagreed with the Applicant's rationale as set out in the evidence notes to the updated integrity matrices [REP3-018] for excluding an AEOI of the SPA, Ramsar site and SAC and that all its previous outstanding concerns remained. In response to ExQ2.3.1.7 [PD-010], it confirmed [REP5-012] that it remained unclear whether all of the ICEs had been identified and/ or appropriately assessed, with the exception of air quality, which it considered had been addressed within [REP1-028]. It suggested that the required ornithological mitigation and monitoring be secured in the DCO through a mitigation and monitoring plan with an outline version submitted into the Examination.
- 1.4.33. The RSPB stated [REP5-018] at D5 that its concerns remained the same as set out in its WR [REP1-060] and its comments [REP4-026] on the Ornithology Addendum [REP1-026]. It considered that it could not be concluded that the Proposed Development would not have an AEOI of the SPA and Ramsar site and that the derogation case was inadequate.
- 1.4.34. Further commentary on the specific concerns raised by IPs, and my conclusions on those matters, is provided in the Addendum to this Appendix.
- 1.4.35. I am satisfied, based on the information provided in the application and during the Examination that the correct impacts have been assessed. Further discussion is provided in the Addendum to this Appendix regarding the conclusions with respect to AEOI for each site.
- 1.4.36. The Applicant's approach to the in combination assessment is set out in Section A17.5 of the HRAR [AS-006]. Table A17-5 provides a summary of the conclusions in respect of each of the plans and projects considered,

and confirms that the Viking Link Interconnector was taken forward for further assessment. It was concluded that there was potential for ICE from underwater noise and an increased risk of vessel collision. The assessment of ICE in relation to an AEoI is set out in Section A17.6.

- 1.4.37. I am satisfied that an assessment of AEoI from the Proposed Development in combination with other plans or projects can be based on the information provided in the application and during the Examination and that no other plans or projects are required to be taken into account.

AEoI Assessment Outcomes - Summary

Proposed Development alone

- 1.4.38. The Applicant's HRAR concluded that an AEoI can be excluded for the European sites considered above from the Proposed Development alone. These conclusions were not agreed with the ANCB.
- 1.4.39. The conclusions in the Applicant's HRA Report were subject to Examination through my Written Questions, an ISH and a Rule 17 request.
- 1.4.40. NE, the RSPB and LWT disputed a number of the Applicant's conclusions.
- 1.4.41. I have found that an AEoI from the Proposed Development alone cannot be excluded beyond reasonable scientific doubt for:
- The Wash SPA – redshank, DBBG, black-tailed godwit, oystercatcher, redshank, turnstone, the waterbird assemblage;
 - The Wash Ramsar site - redshank, DBBG, oystercatcher, redshank, turnstone, the waterbird assemblage; and
 - The Wash and North Norfolk Coast SAC – harbour seal.
- 1.4.42. Table C2 below presents my conclusions in relation to AEoI alone at the end of the Examination.

Proposed Development in combination

- 1.4.43. The Applicant considered in the HRAR whether there could be an in combination effect arising from the Viking Link Interconnector project together with the Proposed Development on the SAC harbour seal population. It concluded that an AEoI could be excluded for the SAC from the Proposed Development in combination with other plans and projects. No IPs disputed this conclusion.
- 1.4.44. NE and the RSPB initially questioned whether there were other plans and projects which should be considered in the ICE assessment. By the end of the Examination they agreed that there were none.
- 1.4.45. Based on the findings of the Examination, I am satisfied that an AEoI on all the qualifying features of the European sites can be excluded from the Proposed Development in combination with other plans or projects.

1.4.46. Table C2 below presents my conclusions in relation to in combination AEOI at the end of the Examination.

Table C2: My conclusions in relation to AEoI at the end of the Examination

European site(s) and qualifying feature(s)	LSE identified from:	AEoI alone excluded	AEoI in combination excluded	Derogations engaged and compensatory measures required?
The Wash SPA/ The Wash Ramsar site				
Redshank Waterbird Assemblages	Habitat loss at the application site	Yes	Yes	No
	Disturbance from construction noise at the application site	No	Yes	Yes
	Vessel disturbance (visual, presence and noise) during construction and operation at the application site	No	Yes	Yes
DBBG, black-tailed godwit (SPA only), oystercatcher, redshank, turnstone Waterbird assemblages	Vessel disturbance (visual, presence and noise) at the MOTH	No	Yes	Yes

Waterbird assemblages	Vessel disturbance (visual, presence and noise) along The Haven	No	Yes	Yes
Redshank Waterbird assemblages	Disturbance from construction and operational lighting at the application site and on vessels in transit through The Wash and The Haven.	Yes	Yes	No
The Wash and North Norfolk Coast SAC				
Harbour seal	Disturbance	No	Yes	No
	Collision risk	No	Yes	No
	Anchorage at the MOTH	Yes	Yes	No

Engaging with the HRA Derogations

- 1.4.47. If the competent authority cannot conclude the absence of an AEoI, such that no reasonable scientific doubt remains, then under the Habitats Regulations the Proposed Development can proceed only if there are no alternative solutions and there are IROPI why the Proposed Development must be carried out. Suitable compensatory measures must also be secured to ensure the overall coherence of the UK NSN.
- 1.4.48. At D2 the Applicant reasserted its conclusion set out in the HRAR of no AEoI alone or in combination of any of the European sites. Notwithstanding, in response to representations made by NE, the RSPB and LWT, the Applicant submitted a derogation case comprised of a 'without prejudice' assessment of alternative solutions, case for IROPI, and proposed compensation measures (CMD) at D2 of the Examination [REP2-011, REP2-012 and REP2-013, respectively]. It was described as submitted on a "*without prejudice basis to allow for full consideration of all aspects during the Examination*" and in the event that the SoS was minded to disagree and conclude an AEoI of any of the European sites following appropriate assessment. The alternative solutions assessment was supported by a 'Without Prejudice In-Principle Alternative Locations Case' submitted at D8 [REP8-015]. The CMD was subsequently updated at D6 [REP6-025] and D8 [REP8-006]. The consideration of these matters during the Examination are discussed in the following sections.
- 1.4.49. The derogation case is contained within the following documents:
- Without Prejudice Habitats Regulations Assessment Derogation Case: Assessment of Alternative Solutions; [REP2-011];
 - Without Prejudice In-Principle Alternative Locations Case submitted at D8 [REP8-015];
 - Without Prejudice Habitats Regulations Assessment Derogation Case: Imperative Reasons of Overriding Public Interest (IROPI) Case [REP2-012]; and
 - Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (V2.0) [REP8-006, which superseded REP2-013 and REP6-025].
- 1.4.50. They include reference to Defra's 2021 guidance, 'Habitats regulations assessments: protecting a European site' and a checklist for compensatory measure submissions produced by NE (date unspecified).
- 1.4.51. At the ISH on 24 November 2021 NE expressed an initial view that the information provided on compensation appeared to be high level and did not provide enough detail or certainty to give confidence that an AEoI could be offset [REP3-030]. It acknowledged that the Applicant was continuing to investigate and explore options to refine the compensation measures and assumed that the Applicant was aware that more detail was required. It responded to the Applicant's derogation case in relation to alternatives and compensation at D3 [REP3-031]. Its submission included a checklist for compensatory measure submissions for developers (Annex 1). It provided comments [REP8-023] on the

Applicant's updated CMD [REP6-025] at D8 and on the final version of that [REP8-006] at D9 [REP9-058]. NE explained in [REP3-028] that it did not intend to comment on the IROPI case but could comment on any options proposed by the Applicant and assist in signposting to relevant guidance on mitigation and/ or compensatory measures.

- 1.4.52. The RSBP noted at D4 [REP4-024] that it was continuing to discuss compensation measures with the Applicant and were due to meet them on 12 January 2022. It provided its initial comments on the derogation package, which it considered to be high level at that stage [REP4-028]. It stated that it had no comments on the IROPI case at that time. It submitted its comments on the final version of the CMD [REP8-006] at D10 [REP10-043].
- 1.4.53. LWT responded to the Applicant's derogation case at D4 [REP4-021]. It stated that it disagreed with the Applicant's conclusion in [REP2-013] in respect of harbour seal that the proposed mitigation measures would reduce any effects that could occur, on the basis of which no compensation measures were identified. No HRA matters were agreed in the final SoCG; it stated that it supported the RSPB in relation to the lack of relevant compensatory packages and deferred to NE.
- 1.4.54. The MMO stated at D4 [REP4-022] that it deferred to NE on HRA matters. It supported NE's D3 comments on the derogation case. It also highlighted that (relevant) conditions may need to be included in the DML.

1.5. CONSIDERATION OF ALTERNATIVE SOLUTIONS

- 1.5.1. The wider examination of alternatives to the Proposed Development in terms of the National Policy Statements (NPSs) is reported in Chapter 3 of the Recommendation Report. This section addresses the examination of the alternative solutions test under the requirements of the Habitats Regulations.
- 1.5.2. Guidance from Defra ('Habitats and Wild Birds Directives: guidance on the application of article 6(4): Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures' (Defra, 2012) and 'Duty to protect, conserve and restore European sites (Defra, Welsh Government, NE, Natural Resources Wales, 2021)) states that alternatives must be financially, legally, and technically feasible. Alternatives must be capable of achieving the objectives of the Proposed Development and demonstrate a lesser adverse effect on or avoid an AEOI of the European site in question. Defra's 2021 guidance and a number of European Commission (EC) guidance documents, including 'Managing Natura 2000 sites: the provisions of Article 6 of the Habitats Directive 92/43/EEC' (2018), are referred to in the Applicant's without prejudice alternative solutions assessment [REP2-011]. I have considered the alternative solutions test in line with the requirements of the Habitats Regulations with reference to this guidance and the Examination submissions.

1.5.3. The Applicant's assessment of alternatives, including the 'do-nothing scenario', and of alternative solutions to deliver the objectives of the Proposed Development is presented in [REP2-011 and REP8-015]. Nine objectives are detailed in Section 5.4, Table 5-1 of [REP2-011]. They are as follows:

- provide a sustainable and renewable form of energy recovery and contribute towards meeting renewable targets and carbon emissions, in line with the requirements of the Overarching National Policy Statement for Energy (NPS EN-1) and National Policy Statement for Renewable Energy Infrastructure (NPS EN-3);
- reduce the quantity of waste disposed to landfill;
- reduce the quantity of waste exported abroad;
- nurture and develop skills within Lincolnshire;
- create employment opportunities within Lincolnshire;
- minimise adverse impacts on the function and efficiency of strategic transport infrastructure;
- minimise carbon emissions associated with transportation;
- develop the Proposed Development at a location that aligns with local planning policy; and
- minimise waste and apply the principles of waste hierarchy.

1.5.4. The Applicant explained [REP2-011] that for the purposes of the assessment of alternative solutions it had adopted (but not accepted) NE's, the RSPB's and LWT's position, ie that an AEoI could not be excluded for the SPA, Ramsar site and SAC, arising from habitat loss at the application site and vessel movements at the MOTH and anchorage site in The Wash.

1.5.5. Section 7 Table 7-1 of [REP2-011] presents a 'long list' of 12 alternative solutions considered by the Applicant and sets out how each could potentially affect the European sites during construction and operation. Table 7-2 presents a screening exercise that sets out whether each option was considered to meet/deliver the project need and objectives, and identifies those that were taken forward to a 'short list' for further assessment. Appendix 1 of the document contains a detailed assessment of the alternative modes of transport that were considered, ie road and rail.

1.5.6. The short list comprised five options: reduced Refuse Derived Fuel (RDF) capacity; use of larger vessels to transport RDF during operation; and a number of changes to the timing of vessel movements during operation, ie moving along The Haven at the same time, leaving the wharf just prior to the next ones arriving, and only arriving at the wharf at night. Section 8 Table 8-1 presents an assessment of the legal, technical and financial feasibility of the short-listed options, and identifies that only the use of larger vessels during operation was considered to be feasible. Following further assessment of this option it was concluded that although it would result in a reduced number of vessel movements it was unlikely to change the view of NE, the RSPB and LWT that an AEoI of the SPA, Ramsar site and SAC could not be excluded. This was on the basis that there would continue to be repeated vessel movements on a daily basis

at the MOTH, the vessels would still require anchorage, and it would not affect the requirement for a wharf and the associated loss of foraging and roosting habitat for redshank.

- 1.5.7. NE confirmed at D3 that it agreed with the Applicant that use of larger vessels would not sufficiently reduce the number of vessel movements to address its concerns and also highlighted that other impacts, eg vessel wash, would be likely to increase [REP3-031].
- 1.5.8. The RSPB questioned whether the long list of alternatives captured all potential alternative options and took the view that the Applicant should consider national alternative locations [REP4-028]. A more detailed evaluation of potential sites and solutions should be provided that clearly identified why there were no other locations or solutions that could meet the objectives for the Proposed Development, as set out in Table 5-1 of the Applicant's assessment of alternatives [REP2-011]. The comments made in its WR and its initial comments on the Ornithology Addendum [REP1-026] set out its concerns with the Applicant's assessment, data gaps and the reasons why it considered that an AEOI of the SPA and Ramsar site could not be ruled out beyond reasonable scientific doubt.
- 1.5.9. The Applicant stated [REP6-029] at D6 that its position on alternatives remained unchanged from that set out in [REP2-011] but that it would provide an update at D7 to address the RSPB's concerns. A 'Without Prejudice 'In-Principle' Alternative Locations Case' was submitted at D8 [REP8-015].
- 1.5.10. In its comments on [REP8-015] NE considered [REP9-057] that there were likely to be alternative energy projects that had not been fully explored as part of the derogation case, such as offshore windfarms, that could provide a greater megawatt capacity than the Proposed Development. The RSPB did not comment.
- 1.5.11. The Applicant responded [REP10-020] that a project with a greater megawatt capacity would be likely to involve an increased number of vessel movements and so would not represent a reasonable alternative. It considered that its approach was consistent with advice contained in 2021 Defra guidance on HRA alternatives and the SoS's decision on the East Anglia TWO Offshore Wind Farm, and that a project such as an offshore windfarm would not meet the original objectives of the Proposed Development (as set out in [REP2-011]). It highlighted that the purpose of [REP8-015] was to assess alternative locations only, not alternative designs.
- 1.5.12. In its comments on [REP8-015] the UKWIN considered [REP9-067] that the Applicant had taken an "*overly narrow approach*" to identifying suitable alternative locations for the Proposed Development in only considering areas that were readily accessible by sea, and that some or all of the proposed capacity could be located inland. The scoping out of unallocated sites did not reflect actual practice and that waste authorities are able to support residual waste treatment facilities on land not allocated for employment purposes wherever such sites are consistent

with the relevant waste strategies/ plans. In addition, in relation to the Applicant's scoping out of sites where there was potential for disturbance impacts to protected species, the extent to which the Applicant had assessed its ability to mitigate and compensate for such impacts on sites other than the Port of Boston (PoB) was unclear. This was in light of the Applicant putting forward an IROPI case to allow for such harm around the PoB.

- 1.5.13. The Applicant responded [REP10-020] that (as set out in [REP8-015]) objectives relating to use of a navigable waterway for transportation of RDF had been assumed for the purposes of the assessment and that these were in line with NPSs and key to the Proposed Development. It had considered local plan allocations and relevant policies within the waste plans in relation to whether waste development could be approved on unallocated sites. It had reviewed its alternatives in light of these policies and provided reasoning (in [REP8-015]) for why each of the long-listed sites had been scoped out. It had considered whether development at the alternative locations would result in a lesser effect on the European sites compared to development at the application site and proceeded on the basis that any alternatives that would have the same or a greater effect would not be a viable option. The Applicant highlighted that it considered that the Proposed Development would have no AEOI of the SPA, Ramsar site and SAC and had provided the alternatives assessment on a without prejudice basis.
- 1.5.14. On this basis, I am satisfied that no alternative locations or sites exist for the Proposed Development that would present a feasible alternative solution.
- 1.5.15. I have concluded that a need for the Proposed Development has been established and that the 'do nothing' option is not a feasible alternative. In HRA terms the 'do nothing' option would fail to meet the objectives of the Proposed Development and is not considered an alternative solution.
- 1.5.16. Alternative technology and layouts for the Proposed Development are not described in [REP2-011 and REP8-015]. They are considered in Section 4.5 of ES Chapter 4 [APP-042], which contrasts the design proposals set out in the Preliminary Environmental Information Report (PEIR) with the final design taken forward within the application. They relate to RDF handling (by conveyor rather than trailers) and processing (no requirement for rigorous pre-treatment of the raw RDF), and use of thermal treatment rather than gasification technology.
- 1.5.17. Taking into account this information, I am satisfied that no alternative design parameters are known to be implementable that would present a feasible alternative solution.
- 1.5.18. Table 3-4 of [REP8-015] presents an assessment of the potential effects on the European sites of the shortlisted alternative options (depicted on Figure 3-7). Of these four options, three are identified as immediately adjacent to the European sites, and it is concluded that they would be likely to have greater effects on the European sites than the Proposed

Development. The remaining option is identified as approximately 2.6km from the European sites and it is concluded that it would not have a lesser effect on them than the Proposed Development. I am satisfied that no alternative options were considered that would have a lesser effect on the European sites than the Proposed Development.

- 1.5.19. Alternatives must be financially, legally, and technically feasible to constitute an alternative solution. I consider that the alternatives assessed would not constitute an alternative solution that would meet the objectives of the Proposed Development. I am satisfied that no alternative solutions exist which would deliver appreciable benefits in terms of adverse effects on the European sites.

1.6. IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST

- 1.6.1. The need for the Proposed Development is discussed in Chapters 3 and 5 of the Recommendation Report. This section addresses the examination of the IROPI test under the requirements of the Habitats Regulations.
- 1.6.2. The Applicant's without prejudice case for IROPI under the HRA process is presented in [REP2-012]. Sections 3 - 7 set out the Applicant's reasoning that there is an imperative need for the Proposed Development, with reference to the need for:
- electrical energy;
 - the need to diversify and decarbonise electricity generation (including by waste combustion);
 - to continue to have secure and reliable supplies of electricity in the transition to a low carbon economy;
 - to divert waste materials from landfill in line with the aims of the UK's Circular Economy Package (CEP);
 - to reduce UK exports and increase domestic use of RDF and promote the proximity principle;
 - to process rather than dispose of residues;
 - lower carbon transportation;
 - development in a location which aligns with local planning policy; and
 - the socio-economic need for economic growth and jobs.
- 1.6.3. Para 8.1.2 sets out the case that the reasons are overriding and in the public interest.
- 1.6.4. The Proposed Development would not affect any priority habitats or species (under the Habitats Regulations) and therefore the IROPI case can include consideration of social and economic reasons in addition to human health, public safety, or beneficial consequences of primary importance to the environment. The Applicant confirmed in Section 2 of [REP2-012] that as it had concluded that the Proposed Development would not have an adverse effect on a priority habitat or species the competent authority could consider IROPI in relation to human health, public safety, important environmental benefits, and social or economic benefits.

- 1.6.5. It considered that IROPI was justified in relation to the Proposed Development based on:
- an urgent need for electrical energy;
 - an urgent need for waste management;
 - the need for lower carbon transportation, key for maintaining public safety and human health;
 - the need for development in a location which aligns with local planning policy; and
 - socio-economic benefits related to job creation during construction and operation.
- 1.6.6. Sections 3 – 8 of the document considered the above matters in detail. Reference was made to Government policy set out in NPS EN-1 and NPS EN-3 that was considered to support the Applicant’s position. In addition, cross-reference was made to supporting information contained in ES Chapter 21 (Climate Change).
- 1.6.7. In relation to the need for lower carbon transportation, Section 5 highlighted information contained in its ‘Comparative Analysis of Greenhouse Gas Emissions from Road and Marine Vessel Transport Options to the Site’ [REP1-020]. It was concluded therein that marine vessels would reduce greenhouse gas (GHG) emissions by approximately 30% when compared to heavy goods vehicles, and that in addition to a beneficial reduction in carbon emissions it would have human health benefits in relation to air quality.
- 1.6.8. The Applicant considered that the Proposed Development would support good human health and public safety through diversifying energy supply, improving energy security, providing additional electricity generation to meet rising demand, diverting waste from landfill, and providing key social and economic benefits both UK-wide and locally. It concluded that this established that the Proposed Development would have long term benefits which were imperative and overriding, and that there was a public interest in it proceeding which outweighed the views of NE and other IPs on its potential effects on the conservation objectives of the European sites.
- 1.6.9. NE stated in [REP3-028] that it would not be commenting on the IROPI case. Neither the RSPB nor LWT mentioned it in any their submissions.
- 1.6.10. Given the evidence available, with regards to the case for IROPI I have not been able to conclude that IROPI for the Proposed Development could be established on the basis of the evidence submitted.

1.7. COMPENSATORY MEASURES

- 1.7.1. The Applicant submitted a without prejudice package of proposed compensatory measures (the CMD) in [REP2-013], which was subsequently updated at D6 [REP6-025] and again at D8 [REP8-006], in response to ExQ3.3.1.29 [PD-013].

- 1.7.2. Section 3.5 of the CMD provided information on potential compensation sites that could provide additional or enhanced habitat for birds should this be required. It was explained that no compensation was identified in relation to harbour seals as following the assessment of the additional data obtained it was concluded that the proposed mitigation measures, as set out in the ES/ HRA Marine Mammals Addendum [REP9-020], would reduce any potential effects to not significant.
- 1.7.3. It was anticipated that, in the event that the SoS determined that an AEOI could not be excluded, based on the comments received from NE, the RSPB and LWT, it would be due to at least one of the following potential reasons: loss of wader roosting habitat at the application site; vessel disturbance of waterbirds at the application site; vessel disturbance of waterbirds at the MOTH; and vessel disturbance of waterbirds along the middle stretches of The Haven.
- 1.7.4. NE stated at D3 [REP3-031] that the information provided on compensation measures was high level and lacked detail and certainty. In relation to the requirement for compensation it noted that as the design of the Proposed Development was still being refined and further data and assessment was required there could be as yet unidentified impacts on other species/habitats.
- 1.7.5. NE noted that the information provided in relation to vessel transit through The Haven did not consider management of risk associated with the HMA or some of the other areas identified as potential compensation sites. NE agreed that long-term maintenance and monitoring of the success of the compensation sites would be needed, and advised that this should cover establishment and long-term maintenance issues, such as habitat succession, habitat erosion and climate change impacts.
- 1.7.6. The Applicant confirmed at D3 [REP3-023] that it would take into account recreation and predation pressures when considering compensation sites.
- 1.7.7. In relation to loss of saltmarsh at the application site resulting from erosion caused by boat wash, the Applicant stated that the saltmarsh loss included within its calculations related to the construction of the proposed wharf and scour protection around it and that a scour protection worst case had been assumed [REP5-008]. It referred to its evidence contained in ES Chapter 16: Estuarine Processes [APP-090] and conclusion therein that the annual effect of erosion by wind waves and tidal currents along The Haven would continue to significantly exceed the erosion caused by boat wash, the increase in which resulting from the Proposed Development would be negligible. At D9 NE [REP9-063] stated that it remained concerned regarding wash/ erosion impacts on supporting habitats.
- 1.7.8. In response to ExQ2.1.0.4 [PD-010] the Applicant stated that budgetary provision had been made for the purchase cost of land required for compensation measures and the costs of delivering and ensuring such measures were maintained for the lifetime of the Proposed Development including to the end of decommissioning [REP5-004]. It was explained

that if the SoS determined that the wharf site was functionally linked to the SPA, the measures to provide habitat for birds using that area would be maintained following decommissioning, unless the intertidal habitat was reinstated to a condition that enabled waterbirds to return to use it for roosting.

- 1.7.9. The compensation would be secured by a without prejudice DCO Schedule 11: 'Ornithology Compensation Schedule', a draft of which is contained in the updated dDCO submitted at D6 [REP6-002] and subsequent versions. It requires the establishment of an Ornithology Engagement Group (OEG) and the SoS's approval of an Ornithology Compensation Implementation and Monitoring Plan (OCIMP) of measures designed to compensate for the predicted disturbance to waterbirds. The OCIMP had to be based on the principles of ornithological compensation set out in the CMD [REP8-006] (referred to in the Schedule as the 'ornithology compensation plan'). The OCIMP must include an implementation timetable that ensures that all the compensation measures would be in place prior to the impacts occurring during construction (eg, from dredging or construction works on the intertidal habitat) and operation (from disturbance at the MOTH). The OCIMP would have to include details of ongoing monitoring and reporting measures and adaptive management measures. The Applicant stated in [REP6-025] that it would be content to enter into a mechanism to secure these measures "*around the time*" of the implementation of any compensatory measures to provide reassurance that the measures would be retained and maintained during the operation of the Proposed Development.
- 1.7.10. The RSPB commented [REP6-041] that Defra and EC guidance were clear that compensation measures should be fully functional before any damage occurs. It considered that the necessary detail required to determine if the chosen locations and designs of the compensation measures could deliver the ecological functions required and the length of time it would take for each to be fully functioning had not yet been provided. In the absence of this it was unable to assess the Applicant's statement that sufficient funding would be available to establish and maintain any compensation measures.
- 1.7.11. The Applicant responded to ExQ3.1.0.4 in respect of the RSPB's comments on funding at D7 [REP7-010]. It referenced Defra's 2021 HRA guidance ('Habitats regulations assessments: protecting a European site') and noted it advised that measures should be in place and effective before a negative effect occurs but also recognised that this may not always be possible and additional compensation may be required to cover interim losses. Works to the HMA were relatively quick to implement and would be usable as soon as they were in place. For operational impacts from vessel disturbance the compensation measures (offsite habitat creation) would be in place prior to operation. An implementation schedule would be included in an updated version of the CMD which would set out the timetable for implementing the measures to ensure they would be functional prior to the impacts occurring. dDCO Schedule 11 ensured funding would be in place for the delivery of the

compensation measures, and also provided for maintenance of the HMA (if necessary) at decommissioning stage. Impacts from vessel disturbance would cease when the Proposed Development was decommissioned and the off-site habitat creation measures could only be decommissioned with the SoS's approval.

- 1.7.12. In response to ExQ3.3.1.34 the RSPB noted [REP7-031] that redshanks, ruff and other waterbirds would be displaced by the construction of the wharf and the increased vessel movements, the existing redshank roosting area would be lost, and birds would be disturbed and displaced from foraging habitat adjacent to the Proposed Development. The provision of an alternative roosting area for redshank could also have benefits for other waterbirds during high tide and had the potential to mitigate construction and operational impacts. However, its effectiveness would be dependent on a number of factors: being of sufficient scale to accommodate all birds displaced by the wharf construction and operation; providing suitable shelter from weather conditions to ensure birds were attracted to it; its level of disturbance from vessel movements; and its protection from overtopping by vessel wash, especially on high tides. The RSPB's concerns about the appropriateness of the proposed 250m piling works buffer remained and were reinforced by NE's D5 comments on the OLEMS that the affected area would extend out to 450m. The creation of pools in the HMA to create foraging habitat would result in the loss of a priority saltmarsh habitat.
- 1.7.13. The RSPB accepted that the HMA could be considered a mitigation measure, if enough evidence was presented to demonstrate it would avoid the adverse impacts arising from construction and operation of the Proposed Development. However, it remained unconvinced that sufficient evidence had been provided to demonstrate that it would be effective and that an AEOI of the SPA/ Ramsar site resulting from the loss of the functionally-linked land could be ruled out. On that basis it considered that the HMA should more properly be considered as compensation rather than mitigation. It also considered that alternative foraging habitat was required to address the direct loss of a foraging area resulting from the wharf construction and operation, and that the HMA would not provide this.
- 1.7.14. The version of the OLEMS submitted by the Applicant at D7 [REP7-037] (a late submission, accepted at the discretion of the ExA) included an additional statement that the 250m buffer would be extended if the monitoring showed that there was a disturbance response for birds beyond this zone.
- 1.7.15. At D8 the Applicant [REP8-014] maintained the position it held at application submission on roosting. The HMA was of sufficient size and design to host a roost that could contain the maximum number of redshank, ruff and other waders recorded in a single high water survey of the application site (175 birds). The roost was already established, would be functional by the construction phase, and the low level of increased vessel traffic during construction was not expected to cause disturbance and displacement to birds downstream of the application site. The

flexibility for birds to roost and move between multiple sites would be increased prior to operation by the creation of a wetland site with roosting capacity within 1km of the HMA and a further site within 1km of that, which would form part of the compensation wetland site network.

- 1.7.16. In relation to the RSPB's comments about existing conditions at the HMA, the Applicant stated [REP8-014] that the lowering of the bank would expand the sightline of redshank roosting at the existing location. It was likely to benefit roosting conditions for waders, and shelter from the west and south would still be provided by the height of the land further from the roost. The flattening of the bank was not expected to alter the level of shelter from other wind directions, and the loose rocks roosting substrate there would effectively provide shelter.
- 1.7.17. In respect of the avoidance of disturbance the Applicant considered [REP8-014] that the existing roost location had shown consistent use by waders at high tide under baseline vessel traffic conditions. This indicated that baseline vessel disturbance conditions did not affect the viability of the roost and, as concluded in the HRA, the magnitude of change in utilised navigable tides and the number of vessels would not be enough to alter its viability.
- 1.7.18. In relation to protection from vessel wash, the Applicant stated [REP8-014] that the final design of the HMA would include consideration of measures to further increase the proportion of high tides where roosting would still be possible, such as providing a variety of heights of refugia above water. However, it recognised that spring high tides are associated with waders seeking non-tidal roosting sites. It considered that the proposed "*off-Haven*" wetlands to be created within 1 km of one another could accommodate thousands of roosting birds.
- 1.7.19. In respect of foraging, the Applicant [REP8-014] maintained its position held at application submission, ie that the proposed HMA was of sufficient size and design to host the maximum number of foraging redshank, ruff and other waders recorded in any single low water survey visit of the application site. The final HMA design would include consideration of the provision of a range of foraging substrates (eg, isolated lagoons, intertidal substrates, intact saltmarsh) for the widest diversity of waders and waterbirds. Previously submitted assessments had shown that activities associated with the Proposed Development were not expected to impact foraging waterbirds in the vicinity of the HMA and that its associated vessels would not cause disturbance during the main foraging period for shorebirds, ie low water. The final HMA design would maximise the potential for baseline forms of disturbance to be excluded, eg off-lead dogs, although these would be restricted in any case by the significant height drop to it from the coastal footpath.
- 1.7.20. In relation to replacement of a priority habitat, the Applicant [REP8-014] highlighted Appendix 1 para A1.2.1 of the updated OLEMS [REP7-037] which noted that saltmarsh, including in the vicinity of the HMA, naturally includes pools and therefore that improvement of or the creation of pools in the HMA should not be considered to constitute habitat loss.

- 1.7.21. NE stated post-D4 [AS-002] that their position that an AEoI of the SPA could not be ruled out was unlikely to change. This was because of the proposed additional number of vessel movements which would be adjacent to known roost sites for birds which are known to: either be disturbed and leave but not return (therefore not maintaining the distribution of species within the SPA as required by the conservation objectives); or be repeatedly disturbed and return, resulting in potential impacts to energy budgets (which could affect abundance within the SPA in the long term). They also considered that although the focus of the compensation discussion had been on redshank, there were potentially 24 SPA species/ assemblage features exposed to the same risk at the MOTH, which would be likely to require similar compensation.
- 1.7.22. The Applicant responded that the compensation measures being developed for the roosting areas around the MOTH were for all species that could require compensation, should the SoS decide that an AEoI of the SPA could not be ruled out [REP5-008]. At D9 the Applicant added [REP9-027] that when birds are displaced following disturbance their movements do not necessarily affect the distribution other than in a highly localised area, and pointed out that most of the movements observed only involved small distances (below 250m). It considered that the displaced birds (and also those that remain on site following disturbance) were likely to have been displaying such behaviour since large vessels began using The Haven.
- 1.7.23. NE considered that as there were uncertainties about the scale of impacts and deliverability of compensation, a higher ratio of compensation was required [AS-002]. They advised that options for like for like roost creation within the SPA should be the first consideration within the compensation hierarchy, however they noted that this was likely to be to the detriment of features of the SAC, the boundary of which overlaps with the SPA, and that therefore further compensation may be required.
- 1.7.24. The Applicant acknowledged that a higher rate of compensation was a standard practice approach and confirmed that the compensation sites under investigation were all outside of the designated sites [REP5-008]. It confirmed in [REP6-025] that discussions had been held with NE who had advised that it would not be acceptable to create new roost sites within the designated sites.
- 1.7.25. NE refuted this in their comments [REP8-023] on the updated CMD [REP6-025]. It advised that any compensation measures should not be to the detriment of the SAC features such that the conservation objectives are hindered. However, if there were no other viable alternatives this option should still be considered, notwithstanding that there would be consequential impacts to address on the SAC.
- 1.7.26. At D9 the Applicant explained [REP9-027] that like for like compensation had been considered however it was not possible to provide an intertidal site that would be outside the SPA and SAC and also beyond the distance within which the vessels would cause disturbance. Accordingly, it had sought compensation sites adjacent to The Haven but behind the seawall

and therefore outside of the disturbance area. A greater scale of habitat was proposed to ensure that the compensatory measures would be sufficient.

- 1.7.27. At D9 the RSPB commented [REP9-065] that it remained unclear whether 250m would be appropriate and suggested that impacts from vessel movements had caused displacement out to at least 800m. It stated that its concerns, previously raised in [REP1-060] and [REP3-035], remained about how the Applicant's proposal in the HRAR to stop and restart construction work in the event that a threshold (agreed with NE) for the number of birds within a 250m radius was exceeded, would be enforced. The HRAR [AS-006] states that these monitoring measures are set out in the OLEMS and secured by dDCO Requirement 5, which requires the approved LEMS to be substantially in accordance with the OLEMS.
- 1.7.28. The LWT deferred to NE and the RSPB in relation to impacts on the SPA features but stated that options for compensatory sites for the effects on functionally linked land needed to be assessed and secured, and the appropriate habitat needed to be created and functioning prior to construction [REP4-021].
- 1.7.29. In its updated CMD [REP6-025] the Applicant reiterated its view set out in [REP5-006] that it was unlikely that there was a functional link between the application site and the birds using the SPA and Ramsar site. This was based on the requirement for functionally linked habitats to lie within reasonable flight distances, comprise suitable foraging/ loafing/ resting habitats, and be sufficiently large to support 1% of a SPA/ Ramsar site population. It explained that the proposal for compensatory habitat was based on the assumption that this view was not accepted and that IPs believed that the sites were functionally linked.
- 1.7.30. Three options were proposed in total in [REP6-025], however, two options were subsequently discounted and only Option 1 was carried forward into the D8 updated CMD [REP8-006]. Two sites were identified under Option 1. The first site of approximately 19ha is adjacent to The Haven and approximately 1.2km from the SPA boundary and 1.3km from the application site. It was considered to be a suitable site in which to create shallow freshwater lagoons, containing islands, surrounded by short sward grassland, suitable for many of the waterbird species using both the application site and the SPA. The second site, of approximately 7.3ha, approximately 1km from The Haven and 650m from the RSPB's Frampton Marsh reserve near the MOTH, was considered to provide suitable habitat for lapwing and golden plover in particular. It was suggested that it could be planted with short sward grassland maintained as foraging habitat and wetter areas of marshy grassland, and that scrapes and islands could also be created.
- 1.7.31. If any compensation measures were proposed in intertidal areas the Applicant would engage with the MMO and obtain a Marine License if required, and if any measures triggered the need to obtain an environmental permit for a flood risk activity the Applicant would apply to the Environment Agency (EA). The Applicant considered that any

consenting processes could be completed in time for the measures to be implemented sufficiently in advance of impacts occurring.

- 1.7.32. In response [REP7-007] to ExQ3.3.1.29, the Applicant considered that the level of detail already provided about the proposed compensatory measures was sufficient to provide me and the SoS with confidence that the measures are secured and could be delivered. However, to provide further comfort it committed to providing additional information in the updated CMD [REP8-006] submitted at D8. As ongoing negotiations with the landowners of the proposed compensation sites were commercially sensitive it would not yet provide a plan/ figure which explicitly identified the sites but would provide a Figure at D8 which illustrated the search areas. Together with the additional information that should provide a “*fairly clear indication*” of the site locations. Subject to the progression of the negotiations it aimed to provide a figure identifying the exact site locations subsequently.
- 1.7.33. The Applicant highlighted that the SoS had not required the identification of specific compensatory sites to make its decision to grant consent for the Norfolk Vanguard and Norfolk Boreas DCO applications. It considered that the level of detail it had provided was comparable to that provided by other DCO applicants who had presented without prejudice HRA derogation cases.
- 1.7.34. It stated that dDCO Schedule 11 secured the compensation measures and provided the mechanisms to ensure they would be delivered, including the approval of the OCIMP by the SoS. This must include details of locations where compensation measures would be delivered and their suitability (including why the location is appropriate ecologically), and details of landowner agreements demonstrating how the land would be bought/ leased and assurances that the land management would deliver the objectives of the OCIMP.
- 1.7.35. The Applicant stated that it was confident that the information it had provided satisfied the derogation tests. Notwithstanding its position that there would be no AEoI on any European site its derogation case identified that there were no feasible alternative solutions which were technically possible apart from the use of larger operational vessels. It considered it unlikely that NE, the RSPB and LWT would view this alternative as less damaging as daily vessel movements would continue and the need for a wharf would remain.
- 1.7.36. In the event that the SoS determined that there may be an AEoI and that there was no alternative solution the Proposed Development could proceed because the Applicant had demonstrated there were IROPI, as set out in the derogation case. The Proposed Development would have long term imperative and overriding benefits, and there was a public interest in it proceeding despite the effects on the conservation objectives of the European sites alleged by NE and other IPs.
- 1.7.37. In its comments [REP8-029] on the Applicant’s response to ExQ3.3.1.29 the RSPB argued that tangible, targeted compensation measures that

would meet the ecological requirements of the impacted species were needed to satisfy Regulation 68 of the Habitats Regulations and had not been provided. The proposed compensation was not based on the reasonable WCS. It pointed to developments where the location and design of compensation packages had been provided prior to the end of (planning) inquiries with landowner agreements in place (eg, Bathside Bay Container Terminal, Port of Bristol Deep Sea Container Terminal).

- 1.7.38. In response to ExQ3.3.1.33 the Applicant [REP7-007] submitted an outline version of the OCIMP, based on that submitted following the SoS's minded to approve letter on the Hornsea Three Offshore Wind Farm Order 2020. However, it highlighted that an outline OCIMP was not requested prior to the determinations of the Norfolk Boreas Offshore or Norfolk Vanguard Offshore Wind Farm DCO applications.
- 1.7.39. In response to ExQ3.3.1.31, NE confirmed [REP7-026 and REP7-027] that it considered Areas A and B comprised land that was functionally linked to the SPA and Ramsar site. It considered in [REP8-022], in response to the Applicant's HRA Update [REP5-006], that the text therein showed confusion about the consequences of impacts on functionally linked land. It advised that a scaled, not binary, approach was required, and that further assessment was needed. It accepted that the strength of the functional linkage was uncertain due to a lack of information. It advised that in the absence of information connectivity should be assumed according to the precautionary principle, especially so given the utilisation of Areas A and B by 150 plus birds on a regular basis; and incomplete understanding of redshank utilisation of The Haven, strength of connectivity, and consequences of loss of a portion of the population. Where effective mitigation for impacts in the Haven, to ensure continued functionality is provided by functionally linked areas, cannot be provided compensation should be. NE disagreed with the conclusion that the functional linkage of redshank or the habitats they use at the application site could be determined according to the Applicant's quoted studies, on the basis that they did not reflect the linear habitat of The Haven. As a result of the uncertainty it did not agree that redshank or the habitats they use at the application site were not functionally linked to the SPA.
- 1.7.40. The RSPB confirmed in its response [REP7-031] to ExQ3.3.1.31 that it considered that Areas A and B were functionally linked to the SPA and Ramsar site. It pointed to the gaps in survey coverage identified in its WR and highlighted that all areas of The Haven could be used by SPA and Ramsar site features. The Applicant's own surveys had identified that SPA and Ramsar site features were present along The Haven and could occur in significant numbers. Although redshank and ruff were most notable the full importance of The Haven for waterbirds had not been assessed by the Applicant. It had failed to apply the precautionary approach to the HRA, especially relevant where there are data deficiencies. It was the Applicant's responsibility to prove beyond reasonable scientific doubt that there would be no AEOI of the qualifying features of the SPA and Ramsar site.

- 1.7.41. The RSPB commented [REP8-029] on the Applicant's HRA Update [REP5-006], particularly Section 4 (about connectivity between the SPA and Ramsar site and both The Haven and the application site) at D8. It considered that the Applicant had misinterpreted/ misrepresented some of the data in the quoted studies. It had focussed on the Burton study ringed redshank data (probably mainly at high tide when birds are close enough for rings to be read) rather than the Burton radio tracking data which concentrated on low tide, which provides a more representative view of redshank movements. It was clear from Burton that the birds moved between sites that were 4km apart, so it was incorrect to suggest they would not travel between the application site and the SPA and Ramsar site (up to approximately 3.6km apart). Another (unpublished) study (Winter 2015-2016) by the RSPB's Lucy Wright (Principal Conservation Scientist) of the same survey area as Burton indicated that redshank regularly travelled approximately 15km. The quoted 1996 Rehfish study focussed on the movement of birds between high tide roost sites rather than the daily movements of birds through the tidal cycle, so was not representative. The RSPB fundamentally disagreed that for land to be functionally linked there needed to be a specific percentage of the SPA population being supported by it. Any supporting habitat connected with or functionally linked to the life and reproduction of a qualifying species should be considered in a HRA.
- 1.7.42. The Applicant commented at D8 [REP8-014] that data had been collected for this area over two years to show that the site does support overwintering redshank. This and other available data supported the finding that Areas A and B are not functionally linked to the SPA. Where there was uncertainty the precautionary approach was applied, ie for the central section of The Haven between the SPA boundary and Areas A and B, where it was concluded that there could be a functional link. It maintained its D6 position that redshank and other features of the SPA populations showed no connectivity with the application site population. However, it had assumed for the purposes of the derogation case that the application site is functionally linked to the SPA populations of all waterbird species.
- 1.7.43. As of February 2022, the surveys recorded only two SPA individual species in significant numbers (ie, exceeding 1% of the SPA mean peak 5-year WeBS population count) in the central section of The Haven around high water: DBBG (173); and gadwall (2), neither of which were observed to be disturbed by vessels. Other species present and/or undertaking disturbance responses were similar to those at the application site, ie redshank, turnstone, ruff, and mixed aggregations of gulls. Other assemblage species similar to those recorded at the application site were recorded in significant numbers, but not disturbed by vessels (cormorant, little grebe). Other SPA individual species were recorded in very low numbers (less than 12 individuals during high water: black-tailed godwit, curlew, grey plover, oystercatcher, wigeon). The conclusion of the HRA that the waterbird assemblage is the key SPA feature in relation to LSE within The Haven remains robust when the outstanding length of The Haven is considered. The existing assessments therefore captured the importance of The Haven for waterbirds.

- 1.7.44. The winter surveys found limited evidence that redshank using the SPA at other stages of the tidal cycle were present on The Haven upstream of the SPA boundary during high water, and did not indicate that these individuals were utilising the application site. Therefore, the impact pathway from the Proposed Development on SPA birds such as redshank was likely to be limited to vessel movements.
- 1.7.45. In response to the RSPB's D8 comments [REP8-028] about functionally linked land the Applicant commented at D9 [REP9-033] that it maintained its D5 position that there was no evidence that birds wintering at the application site, such as redshank, were functionally linked to the SPA and Ramsar site. Nevertheless, its updated CMD [REP8-006] took a precautionary approach and assumed that a functional link could not be ruled out. It considered that the updated document contained sufficient detail about the proposed mitigation and compensation sites to provide confidence that they could be delivered and would effectively maintain the integrity of the European sites.
- 1.7.46. The Applicant responded at D8 [REP8-017] to NE's comments in REP7-027 (and reflected in [REP8-022]) on the HRA Update [REP5-006] that while exposure to pressure of 1% of a European site population is often used as a threshold for identifying functionally linked land it should not be assumed to be definitive. Where populations are declining impacts affecting 1% could have wider ecological implications than when the population is increasing and more resilient. The Applicant noted that, as discussed in ES Chapter 17, functionally linked land was defined in Law Insider 2022 as land outside the boundary of a NSN site that provides habitat critical to supporting the interest feature or features for which the site is designated (in this case the non-breeding redshank in particular). Among other criteria it advises that it should be large enough to support 1% of a NSN population; which the Applicant applied to its assessment of the functional linkage of areas of The Haven.
- 1.7.47. The Applicant recognised that the assessment of functional linkage is scaled and was not endorsing a binary approach. Its assessment considered whether the SPA species were likely to be using the habitats at the application site and if so in what numbers. It utilised the survey and other sources of data on redshank movements between roosting sites in The Wash, which included assessing numbers of birds at the localised level and comparing to the wider SPA populations. Where there was insufficient information to inform the assessment the precautionary principle was applied, ie to the central section of The Haven.
- 1.7.48. Sufficient evidence of the ornithology baseline had been collected for Areas A and B, having surveyed waterbirds over two winter and two breeding seasons. The central section of The Haven, from downstream of the application site to the MOTH, was surveyed during winter 2021/ 22. NE's reference to 150 plus birds appeared to have confused the number of individual redshank in Areas A and B (62 mean count across all autumn/ winter surveys and tides; 76 mean count across high tides) with the total count of all bird species for those areas. Area A was observed to be used by less birds than Area B, which is larger. The HMA proposed for

Area B was expected to provide sufficient habitat for the numbers of birds that used both areas combined. The HMA would be maintained following decommissioning of the wharf, unless the intertidal habitat was reinstated to a suitable condition to enable waterbirds to return to it for roosting.

- 1.7.49. In respect of NE's point on the linear nature of The Haven, the Applicant replied that it was identified as such in the ES. The area along The Haven had not previously been identified as sensitive for bird usage, even in NE's assessment previously undertaken for changes to the coastal access path.
- 1.7.50. ExQ3.3.1.38 [PD-013] asked the Applicant how it could be assumed, in the current absence of detailed information on the compensation site options and on the number and species of birds that any compensation site could accommodate, that the proposed compensation measures would provide alternative habitat for birds displaced by additional disturbance along the central section of The Haven. In response the Applicant stated [REP7-007] that no evidence had been provided of any areas of sensitivity for birds along this stretch, however the potential compensation sites included a site mid-way along The Haven between the SPA and the application site, which would provide an additional area of habitat for any species that did use this area.
- 1.7.51. The Applicant responded at D8 [REP8-017] to comments made by NE and the RSPB in their D7 submissions. It stated that the exact location of the proposed two compensation sites was not identified as it was commercially sensitive information at that time. It confirmed that both were on the same side of The Haven as the application site and explained that both sides of The Haven had been considered, however the eastern side was considered to be too busy with recreational uses. Adaptive management and monitoring of all mitigation and/ or compensation sites would be undertaken to ensure the sites were meeting their objectives and continuing to function throughout the life of the Proposed Development. Monitoring would also continue at the MOTH.
- 1.7.52. It confirmed that the distribution of the qualifying features had been considered in terms of where the birds are roosting and where they are currently disturbed. This assessment was informed by data collected through the Applicant's survey work and from WeBS. The WeBS counts provided detailed information on the numbers of birds using the wider area around the MOTH, while project-specific information had been collected for more localised areas around the MOTH. Project-specific surveys had subsequently been completed over winter 2021/ 22 for areas of The Haven in the vicinity of all the WeBS Sectors previously analysed, ie the central section of The Haven. The results (due in March 2022) were not expected to change the outcomes of any of the assessments due to the precautionary approach taken to any assessments associated with that area. The data from the project-specific surveys of all sections of The Haven would be presented in a summary at D8.

- 1.7.53. The Applicant considered that its surveys showed that the birds using the main roost on the revetments at the MOTH were often able to use alternative roost sites within the same area, eg remaining mudflats, following disturbance by the vessels currently and did not exhibit flight responses at these roost sites, reflecting that their levels of abundance and distribution were not affected. This behaviour would not change with an increase in vessels, as it related primarily to the spring/neap tide cycle rather than the frequency of vessel movements at the MOTH.
- 1.7.54. NE raised some concerns in its answer [REP7-028] to ExQ3.3.1.32 about dDCO Schedule 11 (Ornithology Compensation Measures) [REP6-003]. It referenced wording in the recent Boreas and Vanguard Offshore Wind Farm DCOs and proposed additional conditions based on those in the Boreas DCO. It noted that the wording of Condition 2 did not secure the need to consult the OEG members on their membership or the contents of key documents and suggested changes to ensure that the SoS had sight of OEG members' comments on key documents before signing them off.
- 1.7.55. NE pointed to a contradiction between Schedule 11 Conditions 3(d) and 4. Condition 3(d) required compensation measures set out in the Ornithological compensation plan to be in place prior to the impact occurring; Condition 4 required the measures to be implemented prior to operation. The impacts of Boston Alternative Energy Facility (BAEF) would occur both during construction and operation. In the Hornsea 3, Boreas and Vanguard DCO decisions the SoS consistently determined that compensation must be in place prior to impact. It should be secured that compensation would be in place and functioning prior to impact.
- 1.7.56. NE noted that Schedule 11 included a Condition (3(g)) that only required the annual submission of a monitoring and reporting plan to the SoS. It did not require the Applicant to provide details on the success of the measures or provide that any approved proposals to address any inadequacies must be undertaken, as in Boreas. NE considered that it may take some time before measures implemented to address inadequacies become effective. This should be considered in making any amendments to Condition 3(g) and in any new conditions included to secure the adaptations. An adaptive management plan may also be needed to ensure that the compensation remained fit for purpose over the lifetime of the Proposed Development.
- 1.7.57. In its response to ExQ3.3.1.32 [PD-013] the RSPB [REP7-032] considered that the updated CMD [REP6-025] was still not fit for purpose. For it to adequately form the basis of DCO Schedule 11 and the OCIMP the Applicant had to acknowledge and agree the AEoI. It needed to have a proper understanding of the different species affected, the ecological functions any compensation would need to replace, and the habitat measures that would address those functions in full, in order to provide a proper audit trail for the OEG. The OCIMP would govern the implementation and oversight of the compensation measures for decades and needed to be clear. Each potential compensation site would require detailed ecological assessment to determine whether it could provide the

required functions. An 'In Principle' compensation plan is not the same as an 'Outline' compensation plan; it needed to contain sufficient detail to satisfy me and the SoS that the compensation measures were secured legally, financially, would be effective ecologically, and would protect the coherence of the NSN. The RSPB made a number of specific points about the content of Schedule 11.

1.7.58. The Applicant responded to NE and the RSPB's comments on Schedule 11 at D8 [REP8-017]. It stated that the benefits of the HMA works would occur immediately, however it wouldn't be known if they were functioning effectively until the activities occurred and potentially displaced the birds from the original site. The same applied to some extent to the wider compensation sites that may not be fully utilised until the Proposed Development reached its operational capacity. The updated CMD (V2.0) [REP8-006] set out a timeline for their implementation (Figure 4-3) to ensure the sites would be landscaped/ engineered at least two years before the potential AEoI resulting from disturbance from vessels occurs and before the Proposed Development entered the operational phase. This would be sufficient time for the sites to be effective and functional.

1.7.59. The Applicant submitted an updated dDCO at D8 (V4.0) [REP8-004] which included an amended Schedule 11 to address NE's concerns. It included a new paragraph to explicitly provide for the annual reporting. The Applicant considered that the adaptive management was already provided for in paragraph 5(f), through the OCIMP. It stated [REP8-017] that the drafting of Schedule 11 was based on the windfarm DCOs. Additional details of the compensatory sites (eg, habitat requirements and timings for habitat creation at multiple sites) had been provided in the (final) CMD provided at D8 (V2.0) [REP8-006]. The detail of the measures would be developed post-consent and set out in the OCIMP. This was the appropriate approach, as set out in its response [REP7-007] to ExQ 3.3.1.29 [PD-013]. [REP8-017] included the following statements:

- the RSPB and NE had been added to the definition of the OEG;
- as set out in the Applicant's responses to ExQ3.3.1.29 and ExQ3.3.1.35 the submission of detailed site locations and plans was secured by Schedule 11. They were best considered following consent since it would only be then that the impact magnitude would have been determined by the SoS;
- as set out in its response to ExQ3.3.1.35, Schedule 11 secured through the OCIMP the submission of details of locations where compensation measures would be delivered and the suitability of the sites to deliver them (including why the locations were appropriate ecologically and likely to support successful compensation); and details of landowner agreements demonstrating how the land would be bought or leased and assurances that the land management would deliver the ecological objectives of the OCIMP. It had shortlisted two sites for which it intended to progress option agreements. In the event of the SoS determining there would be an AEoI it would undertake feasibility studies and environmental appraisal to identify

the works needed to create the habitats. If those sites proved to be unsuitable it would shortlist other sites. Schedule 11 ensured that the compensation measures would be implemented prior to the impact occurring, and the SoS could choose not to approve the OCIMP if it considered the measures set out in that document would be unsuccessful;

- the determination of monitoring, reporting, and adaptive management measures post-consent was consistent with the approach approved by the SoS on the recent windfarm DCOs. The conversion of arable land/ grassland to waterbird habitat was not new and had been successful at many locations, including RSPB reserves;
- it agreed that where compensation sites were offsetting the permanent loss of habitat they needed to remain in perpetuity and as such were more likely to become part of the designated sites. However, as these sites were intended to address disturbance impacts the measures could contribute to the overall coherence of the NSN without becoming a formal component (similarly to functionally connected habitat areas). It was appropriate to maintain the compensation sites for operational impacts up to the point the Proposed Development was decommissioned, when the impacts would then cease. The compensation measures could not be decommissioned without the written approval of the SoS; and
- paragraph 8 of the Schedule was included to ensure that the HMA was maintained following decommissioning; maintenance could only cease if the intertidal habitat lost as a result of the wharf construction was reinstated to a condition that enabled waterbirds to return to roosting there.

1.7.60. NE considered [REP8-021] that the oOCIMP was too high level and didn't provide the necessary certainty that any DCO/ DML requirements would be delivered and/ or to a level that would address their substantial ornithological concerns.

1.7.61. The Applicant responded [REP9-033] that the oOCIMP was an outline of the plan required under Schedule 11 in the event that the SoS determined there would be an AEoI and that compensation was required, and related to the implementation and monitoring of compensation measures only. It was not intended to secure other ornithology mitigation measures, which were already substantially detailed in the OLEMS [REP7-037) and would be in the final LEMS (which must be based on the OLEMS) secured by DCO R6 and DML Condition 18. The oOCIMP was based on that submitted following the SoS's minded to approve letter on the Hornsea Three Offshore Wind Farm Order 2020, and the level of detail included was commensurate with that plan.

1.7.62. NE stated at D8 [REP8-023] that the updated CMD had not resolved its previous concerns. An AEoI could not be excluded due to reasonable scientific doubt resulting from limited project-specific ornithological data, key operational impacts not being clearly defined and assessed (eg, vessel movements and speeds), the adequacy of the proposed mitigation and/ or the securing of mitigation measures to ensure impacts were

suitably minimised. No evidence had been presented to demonstrate that an AEOI would not occur.

- 1.7.63. It advised that where considerable uncertainty remains about potential impacts a more precautionary approach should be adopted, in line with the Habitats Regulations. Sufficient details of the compensation measures must be provided to afford certainty that they can be implemented and delivered to more than offset any WCS and address uncertainties in relation to the scale and significance of any AEOI. EC Guidance on Article 6 (4) of the Habitats Directive states “..*compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time*”. NE considered that insufficient evidence had been provided to suggest this applies. No evidence had been presented to demonstrate that the proposed locations for compensation measures had been secured, could be adapted and/ or be 100% effective in reinstating the supporting habitat structure and functionality and/ or maintain the coherence of the NSN. No adaptive management measures had been identified to address non-delivery of the compensation measures.
- 1.7.64. In response to NE’s point about key operational impacts not being clearly defined the Applicant stated [REP9-027] that the potential for impacts resulting from the proposed increase in vessel numbers over the baseline levels had been assessed in detail, including for birds at the MOTH and the application site and for marine mammals within The Wash. It confirmed that WCSs had been used for all of the assessments and highlighted that information on operation was contained, in particular, in [APP-043, APP-055, REP1-026, and REP7-003].
- 1.7.65. The RSPB noted at D8 [REP8-028] that Sections 5 and 7 of the HRA Update [REP5-006) in respect of the impact of disturbance on waterbirds using The Haven focussed on energetics, ie that everything would be fine as long as the birds could get sufficient food to survive with the level of disturbance and number of resulting flight responses. This was a very mechanistic view and an inadequate approach. The assessment of disturbance impacts also needed to consider bird behavioural ecology, eg such as whether birds’ behavioural responses to disturbance reduce the carrying capacity of the protected site if some birds completely avoid areas with high disturbance. In addition the potential impact of stress, which can affect overall fitness/ survival, should be considered.
- 1.7.66. The Applicant responded at D9 [REP9-033] that considering energetics as a percentage of daily intake was a valid approach to determining the severity of a disturbance impact, and that the conclusions had taken into account ecological needs and behavioural ecology. It considered that its conclusions were robust and that the potential magnitude and frequency of disturbance would not be enough to result in an AEOI of the SPA and Ramsar site.
- 1.7.67. The Applicant submitted a final version of the CMD (V2.0) at D8 [REP8-006], which included the following updates/additions:

Section 3: Requirement for compensation in case of AEoI

- 3.2.6 – if it was determined that there would be an AEoI the HMA would provide compensation and no further compensation would be needed for roosting habitat loss at the application site;
- 3.4.7 – the winter 2021/ 22 surveys at high and low water showed that individual SPA features were present at high water in low numbers (relative to the SPA populations) on the central section of The Haven and that vessel-based disturbance to these birds did not act upon significant numbers. DBBG and redshank (individual features) were not disturbed; ruff and gulls (assemblage features) were disturbed (but only a fraction of 1% of the SPA assemblage). A higher diversity and number of SPA species (mainly due to DBBG aggregations) were recorded at low water, when vessels associated with the Proposed Development would not be moving. The surveys did not suggest that there would be an AEoI from increased vessel activity on any of the individual SPA features or the waterbird assemblage on the central section of the Haven;
- a summary of the potential (without prejudice) impacts and affected areas and numbers of birds (Table 3-1);
- 3.5.7 – there was no location outside of the European sites that could create like-for-like habitat in the local area. Compensation site locations were therefore sought where brackish or freshwater off-Haven sites could be created that could support up to 175 high-tide roosting birds from the application site and 7,000 birds from the MOTH during high water. When considering the average numbers of birds, based on the MOTH WeBS sectors, of the qualifying species that showed significant disturbance, this would more than cover the cumulative average number (3555 birds). The MOTH roost surveys reported a minimum of 100-200 waterbirds and routinely 2000-3000 waterbirds; 7000 birds was an approximation of the peak count of waterbirds recorded at the MOTH (according to the 19 December 2019 Changes in Waterbird Behaviour survey). Not all of these birds were displaced but a worst-case assumption has been used that all birds are ultimately displaced and require alternative habitat provision. The created habitats would need to provide good quality habitat for roosting birds using the SPA at high tide together with adjacent pastoral and arable habitats for roosting/ loafing and foraging. It was confident it could secure one 19ha site and one 7.5ha site that could be converted to appropriate habitat to support the displaced species in these numbers. The larger site would include a lagoon of approximately 4 - 5ha in a wider area of continuous suitable open and/ or wet habitat. The second site, within less than 1km, would also provide extensive open habitat for waterbirds (in particular black-tailed godwit, lapwing, golden plover and wigeon). The above site counts suggest the compensation wetlands could support the expected numbers of waterbirds that would be displaced from the application site and the MOTH;

Site Selection and Land Acquisition Process

- 4.6.1 - discussions with landowners were at an advanced stage, the next stage was to conclude them and negotiate commercial agreements;
- 4.7.2 – the 19ha site adjacent to The Haven was suitable for creating shallow, non-tidal, freshwater lagoons with islands for roosting by intertidal-feeding birds such as redshank and ruff. It is 1.2km from the SPA boundary and 1.3km from the application site. This was slightly over the 1km target range but due to its size could attract and be a suitable site for many of the waterbird species using both the application site and The Haven both outside and within the SPA;

4.7.4 - both sites have similar soils/ geology to the RSPB reserves and are flat. Recent land use is agricultural;

- A summary of the recommended features (eg, lagoons, islands, grassland) of each of the compensation sites, bird activities and species supported, and the area required for each site feature was provided in Table 4-1;
- 4.8.1 – 4.8.2: in respect of the timescales for the compensation sites, following consultation with the RSPB about wetland habitat creation, it was acknowledged that two years was likely to be required between completion of initial landscaping/ engineering works to raise water levels and the sites beginning to fulfil their function as habitat for all of the species for which compensation may be required. The sites would therefore be landscaped and/ or engineered at least two years before the disturbance impacts from vessels (ie, the AEoI) would occur;
- 4.8.4 to 4.8.6 – planning permission and various permits/ licences may be required for the sites. Baseline desk-based research and surveys would be undertaken to inform any applications, understand the existing nature of the sites and inform detailed design. A 10-month design period was proposed in recognition of the potential complexities of water, habitat and species management, noting the need to potentially manage water levels and the range of required habitats. The programme was based on a worst case situation where planning permission was required. Following determination of any planning applications and licences/ permits, construction would take place from April 2024 to February 2025. The Applicant would engage with the OEG throughout the process of developing the design;
- 4.8.7 - the Applicant had taken an extremely conservative view, applying the precautionary principle fully. It is certain that the compensation sites would be effective and functional by the time an AEoI could occur, based on the following:

- disturbance (leading to AEoI) was not predicted during construction, where peak weekly vessel numbers would not exceed five;
 - the Applicant disagreed with IPs that 580 vessels per annum would result in an AEoI of the European sites;
 - the commissioning phases (ie when 'hot commissioning' occurs, when the lines start accepting some RDF) are when the vessel numbers would start to increase. Each of the three lines would be commissioned separately and sequentially using a maximum of 16.5% of the operational maximum RDF vessels per line (equating to 79 vessels per annum). Commissioning would take at least 6 months/line and would be likely to take longer as issues arise that require remediation before operation;
 - 79 vessels per annum is significantly below both the maximum peak weekly construction vessel forecast and the operational vessels maximum. Therefore it is considered conservative for the compensation sites to be constructed/ landscaped two years before the start of the commissioning of the second line, when maximum vessel numbers may rise to 158 per annum. March 2027 is identified as the worst-case (ie, the earliest that could occur) in Figure 4-3;
 - compensation for disturbance effects relates to the over-wintering birds. Figure 4-3 shows a significant buffer built in to the compensation sites programme before October 2027, ie before overwintering impacts would occur.
- 4.9.1 – provided some details of the proposed ongoing maintenance and adaptive management of the compensation sites, which would include monitoring of the sites' biotic and abiotic characteristics, and control of water level (potentially of water quality), vegetation growth and sward height, and stage of succession, such as suppression of reed or scrub growth. The means to carry out these measures would be inbuilt to the design work and associated permissive regimes applications. Management would necessarily be adaptive and iterative with regular updates required to the short-term and long-term management plan. The sites would be required to be maintained all year round;
 - 4.10.4 – provided more details of the proposed content of the OCIMP (based on NE's checklist for compensation sites). It would include management and maintenance prescriptions and a maintenance schedule appropriate to the habits to be created at each compensation location;
 - a figure showing the search area for ornithology compensation sites was added (Figure 4-2);

- a figure showing the indicative (worst-case) implementation programme was added (Figure 4-3); and

Monitoring and Review Process for Compensation Sites

- 5.1.13 - the monitoring would include bird numbers and distribution at the MOTH to identify any actual change in bird numbers and behavioural responses in this area.

1.7.68.

The Applicant submitted an updated oOCIMP at D8 (V1.0)[REP8-013] which highlighted that Schedule 11 Paragraph 4 of the updated dDCO [REP8-004] required the OCIMP submitted for approval to be substantially in accordance with the oOCIMP. It stated that dDCO Schedule 11 Paragraph 5 set out the measures the OCIMP must include to compensate for the roosting and foraging habitat loss as a result of the construction of the wharf, and the predicted disturbance to roosting, bathing and loafing waterbirds from the SPA, Ramsar site and functionally linked habitat. The OCIMP must be based on the criteria set out in paragraph 3.5.5 and must contain the relevant matters set out in paragraph 4.11.4 of the CMD. Key matters for which details must be included are:

- locations where compensation measures will be delivered and the suitability of the sites to deliver the measures;
- landowner agreements demonstrating how the land will be bought or leased and assurances that the land management will deliver the ecology objectives of the OCIMP;
- designs of the compensation measures and how risks from avian or mammalian predation and unauthorised human access would be mitigated;
- an implementation timetable for delivery of the measures that ensured that all measures would be in place prior to the impact occurring;
- criteria for assessing the effectiveness of the measures;
- proposed ongoing monitoring and reporting on the effectiveness of the measures;
- details of any adaptive management measures;
- provision for annual reporting to the SoS, to include details of the use of each site by waterbirds in order to identify barriers to success and target the adaptive management measures. This would include the number of birds using the site; evidence of birds roosting, foraging and bathing around high tide periods, and any evidence of continued disturbance from vessels at the application site and at the MOTH;

- management and maintenance prescriptions and a maintenance schedule appropriate to the habitats to be created at each compensation location; and
- minutes from all OEG consultations and copies of any responses on matters relating to the development of the OCIMP.

1.7.69. NE provided a response at D10 [REP10-036] to Question 6 in the Rule 17 letter issued 30 March 2022 [PD-015] about how, following decommissioning of the wharf, it would be determined that the intertidal habitat at that location had been sufficiently restored so that the compensation no longer needed to be maintained. It considered that it was essential that a specific description of what successful restoration would comprise was included in the agreement of any pre-construction plans, and suggested some points for inclusion.

1.7.70. NE made a number of comments [REP9-058] on the updated CMD [REP8-006]:

- the issues were slowly progressing towards a satisfactory outcome. However, insufficient clarity on some elements of the project design and evidence gaps remained and it was unlikely that appropriate compensation measures could be agreed and secured and concerns about the adequacy of the derogation case could be resolved prior to the end of the Examination;
- the proposed compensation sites were unlikely to be able to support all of the impacted species but should be sufficient to mitigate impacts at the application site and would potentially compensate for a substantial part of the impacts at the MOTH;
- critical to a positive derogation case would be (a) securing the sites; (b) refining site plans; and (c) establishing appropriate governance. If options for creating an alternative roost close to the impact site were not going to be considered further the proposed compensation locations provided a suitable option;
- it recognised that the measures proposed at survey Area B (within which the HMA is situated) are appropriate to support redshank, but considered that because Area B is subject to disturbance by vessels there was no certainty that these measures alone would mitigate the loss of the application site (Area A). While saltmarsh lagoons would be better foraging habitat than saltmarsh it was not likely to be as good as intertidal sediments. The actual number of roosting rocks had not increased (so no increased capacity) but simply moved from the wharf construction area to the HMA. The HMA would lessen the impact of the loss of Area A but was unlikely to fully mitigate it, so it constituted partial mitigation for the impacts on redshank. To be HRA-compliant compensation in the long term, an effective and enforceable management arrangement would be needed to ensure the habitat was maintained. The HMA would provide mitigation for impacts in an area functionally linked to the SPA, however if these failed to provide the

required level of mitigation compensation would be required for the residual impacts;

- vessel transit was a concern for the HMA but was not discussed in the CMD;
- the waterbird assemblage is a European site feature in its own right and needs considering as such; it should not just be the component species (ie, lapwing and golden plover) that are identified as a feature at risk;
- the mitigation, compensation and BNG measures need to be clearly identified in terms of location and purpose, especially where proposed to be used for multiple purposes.
- no letter of comfort from the local landowners had been provided to demonstrate they were agreeable to compensation being delivered on their land; the risk remained that suitable compensation locations would not be secured;
- the description of the compensation site under-represented the quantity of surface water likely be needed for the site to be effective;
- the larger compensation site was well positioned to support the HMA in mitigating the loss of the application site and ensuring that no AEOI arose from the loss of functionally linked habitat. However, that was based on the assumption that management of the site could be secured to provide both foraging and a disturbance-free roost area, which was not yet assured;
- the larger site was likely to be able to support some of the features at the MOTH for which NE considered there would be an AEOI. The description provided suggested it was approximately 4.8km from the affected roost area at the MOTH (identified as Area E in Figure 5.1 in the 'Final Waterbird Survey Report Summary of Data' [REP8-018]), making it more distant from the impact site than the other potential alternate roost areas. Therefore, it was unlikely to be adopted by displaced individuals but (as land that should be legally recognised as part of the SPA if secured as compensation) was likely to increase the carrying capacity of the SPA. In relation to the species identified in Table 4-1 (ie, that would be supported by the compensation sites) of [REP8-006], it is likely that with appropriate management the site could support lapwing, golden plover, redshank, and black-tailed godwit. It is unlikely to be utilised by significant numbers of oystercatcher (due to distance from the SPA) and turnstone (due to distance from the SPA and habitat requirements) or DBBG (due to presence of alternative areas of functionally linked land closer to the SPA);
- the smaller site was more likely to be suited to golden plover and lapwing. Both require less surface water than some other

SPA species; most critical is the availability of invertebrate-rich short swards or bare ground;

- it agreed that two years should be allowed between compensation site establishment and its need to provide compensation;
- in addition to the initial establishment works described, annual maintenance of the HMA would be required to maintain the suitability of the habitat as mitigation. Works in the HMA should be undertaken in August to avoid the nesting bird season and the migratory/ winter period;
- to be HRA-compliant, the monitoring and maintenance would need to be overseen by a governance group empowered to ensure the site is accountable (on behalf of the competent authority), is delivering its compensatory requirements, and can remedy any failings; and
- welcomed the role of the OEG but it would need to be able to ensure compliance with statutory requirements, not just be advisory.

1.7.71. In response to Question 1 in my Rule 17 request [PD-015] The Applicant provided what is described as a letter of comfort from the landowner and a locational plan in Appendix A1 (Figure 1) of [REP10-022] in relation to two proposed in-principle compensation sites identified as 'plot 1' (7.3ha) and an adjoining 'plot 1a' (12ha). It stated that their use for compensation had been agreed in principle by the landowner. It explained that discussions with the landowner for 'plot 2' (19ha) were ongoing so a letter of comfort and plan for that site could not yet be provided. Plot 1 was the second site (un-named) described in the CMD [REP8-006] and plot 2 was the first site (un-named) described therein (paras 4.7.2 and 4.7.3, respectively).

1.7.72. Plot 1a had been progressed subsequent to the submission of [REP8-006]. It is described in [REP10-022] as in arable agricultural land use, with a "*significant proportion*" of its boundary comprised of drainage ditches and a "*minority length*" comprised of rural road. It is within 1km of the SPA and Ramsar site and adjacent to the RSPB's Frampton Marsh reserve. The Applicant explained that the "wetting" of the site could be achieved through blocking of the ditches, similarly to the other two proposed sites. It concluded that the acquisition of plot 1 and plot 1a (together with plot 2) represented the "*likely prospect*" of securing two approximately 19ha sites of continuous open habitat to provide in-principle compensation for effects on individual waterbird species and the assemblages of The SPA and Ramsar site should the SoS determine that compensation was required. It highlighted that as a result of the in-principle securing of plot 1a the scale of land acquisition for compensation purposes was greater than indicated in previous submissions and considered that the in-principle compensation that could be provided was likely to exceed that previously indicated.

1.7.73. In response to Question 1 in my Rule 17 request [PD-015] made prior to D10, the RSPB commented [REP10-046] that an option on the land

would provide greater confidence than a letter of comfort that the proposed measures could be secured and delivered. It made a number of points in relation to whether the Applicant's proposals set out in [REP8-006] (V2.0) met the compensation measures criteria developed by NE (as set out in Annex 1 of 3-031). It remained concerned that the Applicant had not fully understood and therefore had underestimated the scale of potential impacts along the whole of The Haven, and that the proposed compensation may not be sufficient to fully address them. It considered that the lack of information on and detailed plans and baseline assessments of the locations meant that the likely effectiveness of the compensation was uncertain. It highlighted the current position with the consented Able Marine Energy Park development, where issues around the proposed compensation are ongoing, as an example of the risk arising from insufficient detail of compensation measures being provided prior to consent.

- 1.7.74. The RSPB also noted that the locations of the proposed compensation sites were unclear and commented on each based on its assumptions about where they were situated. It referred to the Applicant's statement in [REP8-006] (V2.0) that compensation sites to address vessel disturbance at the MOTH should preferably be within 500m and ideally within 1km of the existing MOTH roost site. It believed that plot 2 was located just under 5km from the MOTH and considered therefore that it was completely unsuitable for providing compensation for effects on birds using the MOTH roost site. In respect of plot 1 it considered that the 7.3ha size of the site was likely to be too small to support the numbers of golden plover and lapwing recorded in the MOTH 2019 winter survey (set out in [REP8-006]) and needed to be two or three times larger. It also believed that the Applicant's assumption that the drainage ditches surrounding the site indicated that the site was a naturally wetter area was erroneous, on the basis that the ditches are part of a system designed to drain the land.
- 1.7.75. In response to NE's comments about the HMA [REP9-058] the Applicant confirmed [REP10-020] its view that the works comprised mitigation that would fully mitigate the potential impacts from loss of roosting and foraging habitat and increased disturbance at the application site, and that the land was not functionally linked to the European sites. It stated that if it was determined however that there would be an AEOI and that the land was functionally linked the HMA would provide compensation and no further compensation would be needed for impacts at the application site.
- 1.7.76. In relation to NE's view that plot 2 needs to provide both foraging habitat and a disturbance-free roost area, the Applicant [REP10-020] stated that the proposed compensation sites could provide foraging and roosting habitat. However, it considered that that there were very few, if any, areas around The Wash that could provide disturbance-free roosting areas (as a result of, eg recreational activities, vessels, aircraft and predators), and that it would not be feasible to provide them.

- 1.7.77. The Applicant responded [REP10-020] to NE's comments that even a site 4.8km away from the affected roost area at the MOTH could provide alternative habitat given that there are additional sites proposed that would together form a network of sites. It highlighted that oystercatcher and turnstone had been recorded as far up The Haven as the application site and roosting both there and adjacent to one of the proposed compensation sites, and DBBG had been recorded close to the compensation sites. The compensation sites are designed to provide islands in a large, isolated waterbody and would be able to support the species identified in Table 4-1 of the CMD [REP8-006].
- 1.7.78. NE provided a response at D10 [REP10-036] to Question 2 in the Rule 17 letter issued 30 March 2022 [PD-015] about for which species NE considered an AEOI at the application site and MOTH could be ruled out. It stated that as a result of multiple uncertainties its D9 comments were overarching. It considered that based on the information provided there was a risk that the compensation measures may not fully offset the potential effects due to an unknown scale and significance of impacts, insufficient space, disturbance limiting their usage by birds, and that the areas may not provide 100% suitable habitat.
- 1.7.79. In relation to the RSPB's D8 comments about the HMA the Applicant responded [REP9-033] that it maintained its position as set out at application submission, ie that the HMA would provide sufficient roosting and foraging habitat for the number of redshank and other wading birds recorded during the project-specific high-tide surveys at Areas A and B. In addition, the updated CMD (V2.0) [REP8-006] detailed further offsite compensation in the event that the birds using the HMA were subject to vessel disturbance and it was determined to be an AEOI.
- 1.7.80. At D9 the RSPB [REP9-065] stated its view that the proposed compensation measures were not acceptable or in any way adequate. It concluded that the Applicant had not presented a package of measures that would meet the ecological requirements of the impacted SPA and Ramsar site species such that the coherence of the NSN would be protected.
- 1.7.81. The RSPB commented [REP10-043 and REP10-045] on [REP8-005] at D10. It reiterated its concerns made in previous submissions, and indicated that the information provided had not changed the RSPB's position, as notified to the Applicant prior to the resubmission of the application, that an AEOI could not be excluded for the SPA and the Ramsar site. The submission included the following points about the information on compensation:
- sufficient detail has not been provided to demonstrate that the replacement habitat had been secured and would effectively address the ecological requirements of the affected individual species;
 - it was clear that features of the SPA and Ramsar site use The Haven and can occur in significant numbers (ie, over 1% of the European site populations) and that compensation was required;

- the Proposed Development construction timetable fails to allow for the design, delivery and implementation of fully ecologically functional compensation measures before the predicted adverse effect(s) occur. Planning permission and other consents and licences are likely to be required, for which baseline surveys will need to be undertaken and data provided. These could identify that a site may be unviable. It is not acceptable that the detail is to be left to the OCIMP;
- insufficient evidence had been provided to show that the location of the HMA 250m from the application site would be sufficient to address all disturbance issues given that vessels would pass the HMA when travelling to and from the application site and there is a lack of information on measures to address recreational pressures, eg from people and dogs entering it. As the effectiveness of the HMA is uncertain, and according to definitions contained in the CIEEM 2018 Guidelines for Ecological Impact Assessment, the HMA should be considered compensation rather than mitigation, and an additional site should be provided in an alternative more suitable location;
- the proposed amount of compensatory habitat for the habitat loss at the application site is insufficient; and
- the compensation requirements cannot be fully understood due to the lack of survey data for the central section of The Haven and between the MOTH and the PoB anchorage area.

1.7.82. NE, stated at D9 that their comments [REP9-059] on the oOCIMP [REP8-012] were substantively the same as their D8 comments. The scope was reasonable, but it needed to set out how the OEG would be constituted, its membership and how it would have governance powers that would enable it to ensure that suitable management was secured. In the absence of this the OCIMP could not be relied on to secure HRA requirements. Initial monitoring post-establishment needed to be identified, to include both bird numbers and the development of the physical attributes of the sites to ensure the statutory requirements could be delivered. It needed to include an agreed success criteria.

1.7.83. The Applicant responded [REP10-020] that the terms of reference for the OEG were set out in Paragraph 2, Schedule 11 of the dDCO, and the monitoring arrangements would be set out in the approved OCIMP secured in Paragraph 3, Schedule 11 of the dDCO.

1.7.84. In its comments [REP9-059] on the Final Waterbird Survey Report Summary of Data [REP8-018] NE agreed that the presence of a roost site adjacent to the proposed compensation site increased the likelihood that the compensation site would be rapidly adopted once available.

1.7.85. In its response [REP10-045] to the Applicant's Fifth Report on Outstanding Submissions [REP9-033] the RSPB reiterated its position as set out in previous submissions and confirmed that its concerns about the potential effects of the Proposed Development on the European sites remained. In its response to [PD-015] it reiterated its concerns that the area between the MOTH and the PoB anchorage area had not been surveyed and no assessment of the potential effects of an increase in vessel movements had been provided. It considered that this

represented a significant evidence gap and meant that it could not conclude that there would not be an AEOI of the SPA and Ramsar site for species present in that area.

- 1.7.86. In response to Question 7 contained in the Rule 17 request [PD-015] about how it would be determined that maintenance of the proposed compensation sites would not be necessary following decommissioning of the wharf, the RSPB repeated its view that any habitat created as compensation must be secured in perpetuity. It considered that the presence of the wharf and associated infrastructure would have considerably altered the surrounding area and that the Applicant would need to demonstrate that the intertidal habitat had been reinstated sufficiently to support the same level of ecological interest as currently.
- 1.7.87. In the Applicant's response [REP10-022] to Question 7, it stated that it had amended paragraph 11 of Schedule 11 (Ornithology Compensation Measures) (and DML Condition 27) of the dDCO to provide that the SoS would make the determination in consultation with the relevant ANCB based on monitoring data that showed that the intertidal habitat had been restored to a condition similar to that prior to the construction of the wharf. It explained that this would allow the Applicant to choose to either continue to maintain the works in the HMA or to restore the lost habitat (mudflats and saltmarsh).

My Conclusions on Compensatory Measures

- 1.7.88. I consider that the information that has been provided during the Examination does not provide sufficient confidence that the measures proposed by the Applicant would effectively compensate for the AEOI on The Wash SPA and Ramsar site or that they can be secured.
- 1.7.89. Of the two sites proposed in the final version of the CMD [REP8-006], a letter of comfort was provided at D10 [REP10-022] only for the smaller site (plot 1), and the content does not provide the required certainty that the land can be used by the Applicant. As discussions with the landowner are ongoing and no letter of comfort can be provided in relation to the larger site (plot 2) (as explained in [REP10-022]) there is even less certainty that this land will be made available to the Applicant. In addition, as discussions are less advanced, insufficient information has been provided on the location of this site. Limited information has been provided on the additional area of land proposed in [REP10-022] (plot 1a) and the introduction of this site at the final Examination deadline has precluded any subsequent discussion or the opportunity for any questions to be asked about it. In the event that all three proposed sites could be secured, it is indicated that 33.3ha of compensatory habitat could potentially be provided, however currently only 19.3ha appears to have a prospect of being secured.
- 1.7.90. Insufficient information has been provided on the nature of the proposed sites, their carrying capacity, suitability, survey data, and whether any additional consents or licences would be required before they could be utilised as compensatory habitat. The compensatory sites would be

required to be fully functioning prior to any impacts occurring, however the timeline for implementing this is unknown.

- 1.7.91. Taking all of the above considerations into account, I consider that there is insufficient information for the SoS to establish that appropriate compensatory measures have been secured at this time that would allow them to fulfil their duty under the requirements of Regulation 68 of the Habitat Regulations. I conclude that it cannot be ascertained at this stage that the overall package of proposed compensation measures would ultimately ensure the overall coherence of the UK NSN.

1.8. HRA CONCLUSIONS

- 1.8.1. The Proposed Development is not directly connected with, or necessary to, the management of a European site, and therefore the implications of the Proposed Development with respect to adverse effects on potentially affected sites must be assessed by the SoS.

LSE

- 1.8.2. Three European Sites and their qualifying features were considered in the Applicant's assessment of LSE: The Wash SPA, The Wash Ramsar site and The Wash and North Norfolk Coast SAC. LSE were identified for all of these sites from the Proposed Development alone, as identified in Table C1. An in combination LSE with other plans or projects was identified for The Wash and North Norfolk Coast SAC.

- 1.8.3. The methodology and outcomes of the Applicant's screening for LSE on European sites was subject to some discussion and scrutiny, however, the sites and features for which LSE were identified were not disputed by any IP. I am satisfied that the correct European sites and qualifying features have been identified for the purposes of the assessment, and that all potential impacts which could give rise to significant effects have been identified.

AEoI

- 1.8.4. My findings are that, subject to the mitigation measures to be secured in the dDCO, an AEoI resulting from the assessed impact-effect pathways from the Proposed Development can be excluded in combination with other plans or projects for each of the European sites.

- 1.8.5. However, my findings are that an AEoI cannot be excluded on the European sites and their qualifying features as a result of the assessed impact-effect pathways from the Proposed Development alone in respect of the following:

- disturbance to birds from construction activities at the application site;
- disturbance to birds from vessel movements during construction and operation at the application site, the MOTH and the central section of The Haven; and
- collision risk impacts on harbour seal during operation.

- 1.8.6. If the SoS is minded to agree with this conclusion, then they are required to consider information to inform a derogation case.

Alternative solutions, IROPI and compensation measures

- 1.8.7. The Applicant has submitted a without prejudice assessment of alternative solutions, the case for IROPI, and proposed compensation measures. The subject of compensation in particular was given substantial consideration during the Examination. I am satisfied that no feasible alternative solution exists that would represent a lesser adverse effect than the Proposed Development. Given the evidence available, with regards to the case for IROPI I have not been able to conclude that IROPI for the Proposed Development could be established on the basis of the evidence submitted.
- 1.8.8. The findings of the Examination are that the compensation package as currently proposed is insufficiently certain and not adequately secured in the dDCO/ DML.
- 1.8.9. I consider that there is sufficient information before the SoS to enable them to undertake an appropriate assessment and to apply the derogation tests of the Habitats Regulations of alternative solutions, IROPI in order to fulfil their duty under the requirements of the Habitats Regulations.
- 1.8.10. Whilst the SoS is the competent authority under the Habitats Regulations and will make the definitive assessment, my finding is that the proposal would be likely to have an adverse effect on the integrity of European sites, for which compensation is required. Due to the late submission of material by the Applicant covering proposed compensation sites their deliverability remains uncertain. I therefore have no option but to conclude that the requirements of Regulation 68 of the Habitats Regulations have not been satisfied at this time in respect of compensation measures.
- 1.8.11. The SoS may be in a position to draw a different conclusion based on the information presented or in the event that further detail and certainty regarding the efficacy and securing mechanism of the compensation measures becomes available. I have provided in Appendix D the matters I recommend the SoS may wish to consider in order to resolve the outstanding uncertainties.

ADDENDUM – FURTHER COMMENTARY AND CONCLUSIONS

- 1.8.12. The commentary below addresses overarching matters that are relevant to all of the European sites. Site-specific matters are addressed within the relevant sections of below.

Survey data

- 1.8.13. NE considered [RR-021] that insufficient bird data had been provided with the application, however they acknowledged that additional bird

counts were due to be undertaken. The RSPB raised the same concern [RR-024].

- 1.8.14. The Applicant stated in [REP1-035] that additional bird survey information was included in the HRA Ornithology Addendum [REP1-026] and would be included in the derogation case to be submitted at D2. The measures set out in the Addendum and the OLEMS (to be updated) included the provision of additional habitat at the MOTH (eg, creation of a sufficiently large wetland area), to provide refugia and additional roost sites in close proximity to the existing roosting and bathing sites, as well as around the application site. The Applicant confirmed that data had been collected at both broad (MOTH) and narrow (application site) sections of The Haven that demonstrated how disturbance to foraging or roosting birds from vessel movements (whether visual disturbance from presence or physical disturbance through producing a wake) was attributed to the different types of vessels using The Haven at the different channel widths (presented in Section 6 of the Ornithology Addendum). Additional data that had also been collated for the WeBS sectors around and along The Haven was discussed in the Ornithology Addendum.
- 1.8.15. The Ornithology Addendum [REP1-026] contained updated information and assessment in respect of baseline information on estuarine birds, and provided an update to the HRAR in respect of the SPA and the Ramsar site. It generally referred only to the SPA but did state that the assessment also applied to the Ramsar site. It explained that it focused on disturbance effects at the application site and within the designated sites, including at the MOTH where vessels enter The Wash from The Haven. Appendix A1 contained an analysis of WeBS data and an assessment of the potential effects of the additional vessel disturbance at the MOTH; Appendix A2 contained 2019 – 2021 winter bird survey data for the application site; and Appendix A3 contained Changes in Behaviour (CIB) 2021 survey data (March to July) for the application site (A3.1) and November 2019 – July 2021 survey data for the MOTH (A3.2). It confirmed that there were no changes to the designated features and assemblages or to the conservation objectives of the designated sites identified in the HRAR.
- 1.8.16. The RSPB [REP2-051] noted that it was unclear whether all the qualifying features of the Ramsar site had been considered within the Ornithology Addendum. The Applicant clarified [REP6-032] that all the Ramsar site features were also SPA features and so had been considered within the assessment in the Addendum.
- 1.8.17. The Applicant explained [REP1-035] that:
- data had been collected over two full wintering bird seasons (October to March 2019/ 20 and January to March 2021, 18 visits in total) and two full breeding bird seasons (April to June of 2020 and 2021, six visits in total), therefore comprising two years of ornithological activity;

- collection of data for passage numbers included two years of spring passage and one year of autumn passage;
- CIB observation sessions quantifying bird responses to vessel movements at the application site were carried out on six dates in winter 2020/ 21 and Summer 2021; and
- CIB observation sessions were completed at the MOTH over two full winter seasons: November to March 2019/ 20, and January to March 2021, and also in May to July 2021 to quantify response to vessel traffic of waterbirds present during spring passage and the breeding season (although the Applicant stated that The Wash SPA does not include any species that are part of a passage population).

1.8.18. NE welcomed the additional survey data and commented that although it did not represent two full years survey, according to best practise, it did extend the surveyed period considerably and now included part of two winter seasons [REP3-029]. The RSPB [REP2-051] noted that further data had been provided but considered that it was limited and did not comprise two winters' worth or two full years of ornithological data.

1.8.19. In NE's response [AS-001] to ISH2 Question 4.d, about whether it agreed that the Applicant had identified all of the relevant European sites and features in the HRA, NE highlighted that the additional survey data and assessment only related to The Wash SPA over-wintering birds and didn't recognise that the SPA is also designated for passage birds. The RSPB supported this comment [REP3-033]. NE advised that The Wash passage periods were between March and May and August and October. NE confirmed at D9 [REP9-063] that it agreed that the Applicant had identified all the relevant European sites and their features.

1.8.20. The Applicant stated in its written summary of its case at ISH2 [REP3-023] that spring passage birds had been included within the survey work and the assessments already undertaken, and that additional survey data had been collected for autumn passage birds (in the area of the application site). This was submitted at D3 [REP3-019]. 12 surveys of Sections A and B, depicted on Figure 1, were undertaken at high and low tides in August, September and October 2021. Section A incorporates the application site and approximately 700m of The Haven (70-75m wide) up to Section B; which incorporates the HMA and approximately 670m of The Haven (70-80m wide) immediately downriver of Section A. (Sections A and B are also referenced in other Examination documents, particularly survey reports, as Areas A and B or Sites A and B; I have referred to them as Sections A and B throughout this report).

1.8.21. The number of individual bird species recorded in each survey is presented in Tables 1 – 5 of [REP3-019] and their locations are depicted in Appendix 1 Figures 5 - 16. It was considered that most birds did not occur in significant numbers, however ruff (part of the waterbird assemblage) were highlighted. They were observed on seven visits, with a peak count of 32 in Section A equating to 40% of The Wash population; and 51 across both Section A and Section B equating to 63.75% of The Wash population, based on the current five-year mean. It was concluded in the survey report that these count numbers were significant.

- 1.8.22. At D9 the Applicant commented [REP9-027] that although these numbers were significant, the numbers of ruff visiting the site were atypical and generally much lower numbers would be expected. It was also noted that ruff are not site-faithful. The Applicant explained that the proposed mitigation for redshank would equally provide mitigation for ruff.
- 1.8.23. At D9 the Applicant highlighted [REP9-027] that although the SPA Citation mentions the importance of the site for early autumn moulting waders and wintering passerines, the SPA features with qualifying numbers are the breeding little tern and breeding common tern and wintering populations of waterbirds; the Citation does not list any qualifying numbers of passage birds. Nevertheless, it had undertaken surveys of, and assessed the potential for, impacts on passage birds.
- 1.8.24. NE agreed [REP5-013] with the Applicant's conclusion and advised that impacts on ruff in the area of the application site (in addition to the MOTH) needed to be considered in the HRA in respect of the SPA. They considered that further work was required to ensure that the impacts were avoided, reduced, mitigated and compensated for if necessary. They advised that measures proposed to manage risks to redshank would also manage risks to ruff.
- 1.8.25. NE noted, in their comments [REP8-022] on [REP5-006] Table 5-4 (waterbird assemblage WeBS counts for The Haven area 2014 – 2019) that no project-specific data, as is standard best practice, has been provided to support the WeBS counts. They also pointed out that no metadata was presented on the WeBS data to determine the levels of disturbance on the days the counts were taken, to help determine if the assigned levels of importance were accurate, and therefore advised caution in the interpretation of the counts data.
- 1.8.26. In response to ongoing comments from the RSPB and NE, the Applicant submitted breeding bird survey data covering April to June 2020 and 2021 (two full breeding seasons) at D7 (within a summary report and a full report [REP7-014 and REP7-015, respectively]). It covered the spring wader passage season and geographically covered the application site and adjacent stretch of The Haven (ie, the same stretch as the wintering bird surveys).
- 1.8.27. The D7 draft SoCG with NE [REP7-020] reflected NE concerns about gaps in the data relating to Annex I passage birds. The Applicant's position was that the survey data included two years' worth of survey data at peak times for waterbirds (ie, overwinter) and that it was supported by the WeBS data obtained predominantly for count sectors at the MOTH. It stated that it had undertaken 19 months of counts at the wharf site (winter/ breeding bird and passage surveys), four months of counts at the central/ intervening section of The Haven (between the application site and the MOTH) with another month's count planned for March 2022, and 16 months of disturbance surveys at the MOTH.
- 1.8.28. NE [REP8-021] welcomed the D7 survey reports [REP7-014 & 015] and accepted that there was no evidence that the area of the application site

provided breeding bird support for the SPA other than foraging avocet (part of the SPA waterbird assemblage). In response to ExQ3.3.1.7 [PD-013] it identified, in Annex 1 of [REP8-021], the features of each of the European sites about which it remained concerned, their location, and whether it considered that there would be an AEOI alone and/ or in combination. Most of NE's concerns related to an AEOI alone on SPA and Ramsar site features (including the waterbird assemblage) at the MOTH; in respect of the application site its concerns related to redshank (It did not specifically identify ruff, however they are part of the assemblage).

- 1.8.29. The Applicant [REP9-033] welcomed clarification of NE's position, but noted that the rationale was not clear in all cases, in particular for considering species that were not recorded during project-specific surveys (such as Bewick's swan and pink-footed goose) to be adversely affected, or for concluding AEOI for features of the SPA but not for the same features of the Ramsar site (eg, knot and DBBG).
- 1.8.30. In response to Q3.3.1.7 the RSPB, in Appendix 1 of [REP7-031], identified the features in the different parts of The Haven about which it had concerns and for which it considered data was missing, ie the application site; The Haven central section; at the MOTH; and between the MOTH and the PoB anchorage area (replicated from [REP5-018]). It did not identify any potential ICE. It considered that there were significant data gaps for The Haven central section and the area of The Wash out to the PoB anchorage area, and noted that the more surveys conducted the more interest was observed, eg significant numbers of ruff using The Haven in September 2021, as well as redshank. The additional surveys heightened its concerns that The Haven is an important area for waterbirds associated with the SPA and Ramsar site, and that appropriate measures would need to be implemented to ensure adverse effects were avoided.
- 1.8.31. The Applicant stated at D8 [REP8-014] that the winter 2021-22 survey programme sought to close the geographic data gap for waterbird use of the central section of The Haven. It enabled the importance of The Haven for waterbirds along the length transited by project-related (and baseline) vessels, to be assessed. It reiterated that no programme had been proposed for surveys of The Wash or anchorage area, as previously justified, on the basis of safety, practicality and time limitations. It acknowledged that additional survey effort captures additional interest but suggested it was a general fact of survey effort, which can be demonstrated to be decreasingly influential. It highlighted that more recent observations from baseline surveys typically did not require any change to assessment outcomes or management plans, eg the autumn counts and observation of greater numbers of ruff did not require movement of the proposed seasonal window for piling activity.
- 1.8.32. The Applicant submitted the outstanding winter 2021/ 2022 baseline waterbird survey report at D9 [REP9-032]. A summary of the data contained within it was submitted at D8 [REP8-018]. The stretches of The Haven between: i) the downstream limit of the application site and the SPA boundary (at Hobhole Drain) ('Section C') (the remaining stretch

outside the European sites to be surveyed); ii) from Hobhole Drain to HMP North Sea Camp ('Section D'); and iii) at the MOTH ('Section E'), were surveyed over December to March 2021/ 2022 at high and low tides. Sections D and E are both within the SPA. The survey sections are shown on Figure 5-1 of [REP8-018]. Table 4-1 contains the project-specific winter survey results at high and low water for Sections C, D and E. Tables 4-2 and 4-3 identify the peak high water counts, and the peak counts across all tides, respectively, according to the project-specific winter and Changes In Waterbird Behaviour (CiWB) survey results for Sections C – E, and also for the application site and adjacent area (Sections A and B, respectively), and the relevant WeBS data for Sections D and E. The Applicant made the following observations [REP8-018]:

- the surveys of Sections C & D at high and low water overall showed SPA features were present at high water in low numbers (relative to the SPA population). Only gadwall and redshank occurred in numbers exceeding 1% of their SPA five-year peak mean WeBS count in Section C and only DBBG and gadwall exceeded 1% in Section D;
- while numbers of redshank in Section C at both high and low tide were higher than for other shorebirds, a high tide roost or a count above the 1% five-year peak mean occurred on single occasions across surveys. DBBG were generally absent or in low numbers during high water apart from a group of 43 on one occasion. All other SPA features were present at 14 individuals or less at high or low water. Mixed gulls and ruff (SPA assemblage features) were generally present in numbers similar to those recorded at the application site. Disturbance was recorded at high tide due to pilot boats (DBBG and mixed gull took flight and returned to the same spot), large commercial vessels (redshank, turnstone and ruff were displaced to on-Haven lagoons where a high tide roost was noted on one occasion subsequently), and recreation (quad bikes), similarly to the application site. Additional SPA features were recorded at the application site over a longer period, it was assumed that the diversity is similar in Section C;
- a similar species assemblage was present at high tide within Section D as within Section C, but numbers were generally lower (all species except DBBG were present at 14 individuals or less). No substantial or repeatedly used wader high tide roosts were observed. Approximately 170 DBBG were present on two high tides, mainly on saltmarsh adjacent to The Haven. A similar assemblage composition of waterbirds was present at low tide, but in greater numbers, in particular due to large flocks of DBBG;
- vessel-based disturbance recorded in Section C (on one occasion per species across all surveys) did not affect significant numbers of individuals. At high water no individuals out of 58 redshank on a lagoon set back from The Haven in Section C, and out of 173 DBBG on saltmarsh beside The Haven in Section D, were disturbed by vessels. Disturbed birds were generally species within the assemblage, broadly similar to those at the application site, ie ruff (up to 15 present within Section C) and a mixed aggregation of gulls (up to approximately 150 present). Not considered significant on the basis

it is a fraction of the SPA waterbird assemblage (400,367 individuals according to the December 2015 update of the SPA Citation);

- a higher diversity and number of SPA species (predominantly due to DGGB aggregations) were recorded on the central section of The Haven at low water when vessels serving the Proposed Development would not be transiting; and
- no wader species other than redshank displayed roosting aggregation (redshank high tide roost locations are shown on Figure 5-1). Surveys at Sections C and D recorded single instances of redshank roosting at three locations with no recurrently used roost sites recorded. The recurrent roost sites are at Sections A and B and the MOTH, as reflected in the HRA.

1.8.33. The Applicant confirmed [REP8-018] that between 2019 and 2021 The Haven in the area of the application site was surveyed at low and high (except during the breeding season in April to June) tides in January to June and October of two calendar years; and August, September, November and December in one calendar year. CiWB high tide surveys were previously undertaken at the MOTH in January, February, March and November of two calendar years; and in May to October and December of one calendar year. The MOTH was subsequently surveyed at high and low tide during December to March of winter 2021/ 22. CiWB surveys were also undertaken at the application site.

1.8.34. NE [REP8-024] considered the additional CiWB 2021 survey report submitted at D6 [REP6-034] a useful start to quantifying responses to vessel presence, and clearly demonstrated that large cargo vessels cause disturbance responses. However, it was of the view that further survey data was required to provide the evidence needed to support the application. NE believed that the report supported its concerns that vessels entering The Haven displace birds from their roosts, and in some cases foraging grounds both in The Haven and at the MOTH; and that as large cargo vessels are more disturbing than smaller vessels, movements associated with the Proposed Development were likely to significantly increase the disturbance of birds. It considered that there was clear evidence of birds swapping between Area A and the adjacent Area B (site of the proposed HMA) which further supported the need for project-specific mitigation measures to provide a local network of sites. It noted that the most significant source of disturbance was the presence of large vessels, causing 99.88% of disturbance events at the MOTH and 95% at the application site, with wake disturbance being secondary. It pointed out that the response varied between species but the predominant response to the presence of cargo vessels was to abandon roosts and relocate to more distant roost sites; with repeated flushes some birds moved considerable distances along the Haven. NE noted that as only daytime surveys had been undertaken the sensitivity at night was unquantified.

1.8.35. At D9 NE [REP9-059] confirmed that its comments on [REP8-018] remained unchanged from its comments made at D8 in [REP8-024]. It welcomed the additional information contained within [REP8-018] but considered it was only indicative as it was a single season survey and

anything less than two years was only partial. It was reassured by the indication that the intermediate stretches of The Wash were less utilized. However, it highlighted that although sector-by-sector the intermediate areas were less well utilized than the MOTH or application site, the sector-by-sector totals needed to be added together to confirm the total number of birds at risk, particularly in relation to redshank and ruff. Although some individual sectors did not exceed 1%, the newly surveyed ones were additional to already-surveyed sites.

- 1.8.36. In response to NE's concerns the Applicant [REP9-027] stated that two years of survey data had been provided for the overwintering counts, spring passage, breeding season and disturbance behavioural responses, and one year for autumn passage ([APP-112, REP1-026 Appendices, REP3-019, REP6-034, REP7-014, REP7-015, and REP8-018]). Together with the WeBS data it considered that this provided extensive data for the count sectors within the SPA and along The Haven, and that the data collated during the Examination had confirmed the assessments made in the earlier documents. It believed that this data represented the best available evidence to support the assessment and a conclusion that an AEoI could be excluded beyond reasonable scientific doubt.
- 1.8.37. In relation to SPA breeding populations of little tern and common tern the Applicant stated [REP9-027] that little tern was not recorded across project-specific surveys of The Haven, including at the application site and the MOTH, and that there were no potential impact pathways. It had concluded in its D5 HRA update [REP5-006] that vessel movements along The Haven were beyond the distance considered likely to cause disturbance to common terns in the breeding colonies at the RSPB Freiston Shore and Frampton Marsh reserves (3.5km and 1.8km from the MOTH, respectively), and that the conservation objectives were unlikely to be compromised.
- 1.8.38. The Applicant explained [REP9-027] that previous survey coverage had not included the intervening section of The Haven between the application site and the MOTH as it had not been identified as an area that supported high numbers of birds. The surveys of this area subsequently undertaken [REP9-032] showed that SPA features use these areas but generally in low numbers. Redshank numbers at both high and low tide were higher than for other waterbirds but occurrence of a high tide roost, or a count above 1% of the SPA five-year mean peak WeBS count, was observed on a single occasion across all surveys. Where disturbance from vessels occurred it did not affect significant numbers of individuals. No high tide roost sites were observed to be in repeated or consistent use by waterbirds in this section. It was considered that birds using this area were likely to be similar to those at the application site, ie likely to be more habituated to disturbance than birds at the MOTH, due to the proximity to The Haven. The Applicant stated that there were other roosting areas along this section above the high water mark, where aggregations were recorded, however none of the birds in these aggregations were observed to be disturbed by vessels.

- 1.8.39. The Applicant acknowledged at D10 [REP10-020] that the survey period for the intervening section of The Haven covered a short time (one winter season) but believed that there were clear ecological similarities between that section and the application site, so that the longer-term data for the application site could be utilised for that section in relation to informing compensation requirements. In addition, it considered that the wider survey data (covering two seasons for overwintering, spring passage and breeding periods) showed that winter was the peak season for waterbirds and that very few were present in The Haven area in the breeding season. On that basis the survey season had covered the critical period for understanding waterbird use of this section of The Haven. In relation to NE's view that the sector totals should be added together the Applicant considered that could result in inaccuracies and risk overestimating the numbers.
- 1.8.40. In NE's comments [REP10-037] on the Final Waterbird Survey Report [REP9-032], it considered that while a single season's survey consisting of four high tide and four low tide visits a month was informative it was not comprehensive. It did acknowledge that two sectors (westernmost around the application site and easternmost around the MOTH) overlapped with previous study areas and that the easternmost survey section included part of The Haven which is within the SPA. It considered that the report provided some context and clarification of the importance of The Haven in supporting the SPA including 10 species found in numbers that exceeded 1% of their SPA populations. It noted that these were all part of the waterbird assemblage and considered they would be at risk from the Proposed Development resulting from disturbance along The Haven. It believed that the varying numbers of birds observed between high and low tide surveys within each month supported the assumption that The Haven is one functional area rather than formed of functionally self-contained sectors. It considered that evidence gaps remained in relation to directional bird movements between the SPA and non-SPA parts of The Haven, impacts from night-time vessel movements on birds' nocturnal activities, and disturbance pressures on bird populations during different tidal states.
- 1.8.41. The RSPB commented [REP10-044] on [REP9-032] at D10. It considered that the survey information contained in Tables 2 to 7 demonstrated that SPA and Ramsar site features were present in all of The Haven survey sections, and that the number of each species changed between low and high tides and survey dates. The recording of DBGG (an exclusively coastal/ marine species) in all sections reinforced that the application site was functionally linked to the SPA and Ramsar site. It identified what it considered to be the most significant bird counts (ie, above 1% of the SPA/ Ramsar site population), identifying the location and tidal stage. These included DBGG, redshank, ruff, golden plover, lapwing, dunlin, oystercatcher and turnstone. It considered that the data highlighted the importance of The Haven for supporting important numbers of SPA and Ramsar site features. It drew attention to the statement that "*Sites A and B*" could be of more value to redshank than the "*current SSSI boundary along The Haven*", and considered it demonstrated the significance of that area in supporting and maintaining the SPA and

Ramsar site features. It reiterated its concerns and view that the HMA should be included in the compensation package, and about the scale of habitat proposed for roosting and foraging waterbirds. It believed that the Applicant's surveys justified the need to consider more fully the area indirectly impacted by the application in addition to the area directly affected.

1.8.42. Based on the information above, I consider that the Applicant has addressed some data gaps that were identified in the application during the Examination. I note that the survey information for the central section of The Haven covers a single (winter) season only, however I am satisfied that this evidence, together with that from previous surveys which included part of this section, is sufficient to inform an assessment of potential effects on the SPA and Ramsar site features along this stretch of The Haven.

1.8.43. The results of the surveys indicate to me that the SPA/ Ramsar site redshank population and the waterbird assemblages could potentially be affected at the application site, and the waterbird assemblages at the MOTH and along the central section of The Haven. I am also of the view that the survey information and evidence presented to the Examination indicates that bird species found at the application site and along the central section of the Haven are part of the SPA and Ramsar populations, and that those areas comprise functionally linked land.

Habitat Mitigation Area

1.8.44. NE considered [RR-021] that the area proposed as mitigation for effects on redshank which are part of the SPA population (the HMA), involving the addition of coastal lagoons to existing areas of saltmarsh, would constitute a compensation rather than a mitigation measure. In addition, as it considered that the Proposed Development would result in an AEOI of the European sites, compensation measures would need to be considered as part of a derogation case once the alternatives and IROPI tests had been met. It advised, in Appendix G of its RR, that the Court of Justice of the European Union (CJEU) had held that the loss of SPA habitat cannot be mitigated for by "*not reducing the total SPA habitat or enhancing it*" and that instead compensatory measures should be considered. The BNG mitigation proposals would address the loss of priority saltmarsh habitat (under the UK Biodiversity Action Plan (UK BAP), not the Habitats Regulations) but might not provide the required compensatory habitat for roosting and foraging redshank, and conversely that the proposed redshank compensation measures might result in further loss of saltmarsh habitat depending on their location.

1.8.45. NE expressed concern that the required works for the HMA, such as reprofiling of some low banks and flattening/ removal of an "old bank", could also affect the surrounding saltmarsh, which is functionally linked to the SPA habitat, and therefore could affect the SPA species. It raised concerns about the resulting loss of saltmarsh in the proposed HMA from the creation of the pools/ scrapes in addition to the 1ha lost due to construction of the wharf and berth. It also expressed concerns about the effectiveness of the HMA in providing sufficient mitigation for effects on

qualifying features of the European sites, and also about the assessment of effects arising from its construction and existence. It considered that the description in the HRAR of the proposed works to compensate for loss of habitat important to redshank was insufficient to provide confidence that it would deliver the necessary compensation at the scale required.

- 1.8.46. The Applicant stated in [REP1-035] that further detail was provided in the Ornithology Addendum [REP1-026] and the updated OLEMS to be provided [REP3-007], and that the derogation case would cover potential mitigation measures. The information in the Addendum would comprise the basis for the compensation discussion.
- 1.8.47. NE considered [RR-021] that the Applicant had not recognised that the disturbance to birds in The Haven during construction and from vessels during operation would also apply to birds using the HMA. The RSPB raised a concern [RR-024] that more information was needed to demonstrate that noise and visual disturbance during and after construction and recreational disturbance would be effectively managed to provide sufficient confidence that the proposed alternative roost would be effective for the full period of time non-breeding redshank were present, and so avoid the risk of an AEOI of the SPA and Ramsar site.
- 1.8.48. The Applicant responded [REP1-035] that the HRA had considered the additional disturbance to the HMA in relation to the distance of the habitat measures from the edge of the wharf and how redshank are affected by disturbance, using the bird mitigation toolkit (Waterbird Disturbance Mitigation Toolkit, Institute of Estuarine and Coastal Studies (IECS), 2013). It stated that the works were planned for at least 250m away from the wharf edge as discussed in para 17.8.206 of the HRAR. It also explained that further work had been undertaken in relation to this including survey work and assessment of energy budgets for disturbed birds and was included in the Ornithology Addendum [REP1-026].
- 1.8.49. NE also advised [RR-021] that the works to the HMA would require annual management to prevent succession to poor quality (for redshank) saltmarsh and a mechanism to prevent access and associated disturbance from users of the nearby footpath. They raised a concern that there could be increased visual disturbance to redshank as a result of use of the proposed realignment of the ECP, which would pass the HMA, and questioned if the location of the HMA was appropriate. The RSPB considered that the potential change in use of the nearby footpath due to the proposed realignment of the ECP would have to be effectively managed to ensure the proposed mitigation would not be compromised.
- 1.8.50. The Applicant agreed [REP1-035] that ongoing maintenance would be necessary and explained that it would be detailed further in the updated OLEMS. It stated that there would be no change in the footpath adjacent to the HMA and it would not be any closer to the works area than previously, when the area has been used as a roosting site. Therefore, it was not expected that there would be any additional disturbance.

- 1.8.51. NE confirmed at D5 their agreement that there would be no effect on SPA features [REP5-012] resulting from the realignment of the ECP on the basis that the proposed route was through scrubby land that was nearer to Boston and in an industrial area not used by SPA birds.
- 1.8.52. At D9 the RSPB noted [REP9-065] that its concern remained that the Applicant had not undertaken any surveys to assess the level of disturbance from use of the footpath at different times of day/ year to determine if there would be any significant effects that would need to be managed.
- 1.8.53. NE noted [RR-021] that the loss of feeding grounds for 14-27 redshank (at the application site) has not been compensated for, and as a species that is site-loyal in winter there was no evidence to support the assumption that they would relocate to adjacent areas. It noted that it was unclear whether The Haven was at capacity for its redshank population, and that as a functionally linked population this impact would have a bearing on The Wash population, albeit a relatively small part of the wider population and relatively distant from the SPA. NE considered that the Proposed Development should aim to "*compensate for this loss to mitigate impacts on the SPA*".
- 1.8.54. The Applicant responded [REP1-035] that the proposed mitigation provided additional foraging areas as well as roosting areas to account for the loss of intertidal feeding habitat. It explained that the foraging areas would be provided through reinstatement of overgrown shallow ponds within the HMA but would be located far enough away to be "*outwith the prescribed disturbance levels*". The Applicant considered that with these measures in place there would be no AEOI and therefore no need for compensation. It confirmed, however, that a 'without prejudice' derogation case was being prepared which would include compensation measures where considered appropriate.
- 1.8.55. At D9 the Applicant stated [REP9-027] that the foraging habitat that would be lost was a very small area of intertidal mudflat, and that the same habitat existed all along The Haven and would provide sufficient habitat for the 14 to 27 redshank. It also highlighted that the HMA would provide additional foraging habitat through enhancement of the existing overgrown saltmarsh ponds.
- 1.8.56. NE advised at D9 [REP9-063] that if the proposed shallow lagoons in the HMA were not very carefully managed they were likely to provide lower quality foraging habitat than intertidal mud, even if of higher value than saltmarsh.
- 1.8.57. The Applicant also stated [REP1-035] that analysis of the Ornithology Addendum had raised questions about whether the redshank at the application site were all part of the SPA assemblage, and that although there was likely to be some mixing of populations the extent was unknown. It agreed that the distance between the SPA boundary and the application site, combined with individual redshanks' winter site fidelity once a successful daily and seasonal strategy has been established,

meant that redshanks roosting at the application site during high tide could include individuals which foraged within the SPA, and conversely that redshanks foraging at the application site when the mudflats are exposed could include individuals which roosted within the SPA. The Applicant stated that on this basis it had assumed throughout the HRA and the Ornithology Addendum that redshanks at the application site had connectivity with the SPA. At D9 the Applicant stated [REP9-027] that further analysis, as reported in the HRA Update [REP5-006], demonstrated that it was not connected habitat according to the definition of functional connectivity set out within [REP5-006] (Section 4.2).

- 1.8.58. NE noted at D2 [REP2-045] that the Applicant had acknowledged the need to provide redshank-specific features in the proposed HMA and to undertake annual maintenance to secure the roost habitat, but information on how the HMA would be managed had not yet been provided. The bird surveys had confirmed that the location of the HMA is subject to vessel disturbance and is within the expected disturbance zone of vessels using The Haven to access the application site, which could negate its efficacy as a roost. The Addendum confirmed that alternative provisions for redshank were being sought but that information on those was yet to be provided. NE considered that the risk to the SPA was low if the mitigation was secured and proved to be suitable roosting habitat but still had significant doubts about its efficacy. It reiterated that in the absence of such security a conclusion of no AEOI could not be concluded beyond all significant doubt as the scale of the impacts on the SPA remained unknown.
- 1.8.59. The RSBP [REP2-051] reiterated its position as set out in their WR that the HMA constituted a compensation rather than a mitigation measure and that there was no certainty that it would be effective as it would be subject to disturbance from vessel movements.
- 1.8.60. The Applicant stated [REP2-006] that it did not consider that the provision of the HMA should necessarily be defined as compensation, it noted that further information on roost design and additional options for provision of alternative roost sites for redshank would be included in the updated OLEMS to be submitted at D3. It also explained that the provision of increased roosting areas in the HMA was designed to increase the existing roosting area, which forms part of the existing roost site, rather than provide a new site, and anticipated that this would provide sufficient habitat for the birds.
- 1.8.61. The RSPB stated at D3 [REP3-033] that its concerns with the proposed HMA remained and insufficient evidence had been provided to demonstrate that it would be effective and was in an appropriate location.
- 1.8.62. The Applicant submitted an updated OLEMS at D3 [REP3-007]. It reflected the outcomes of modelled noise level contour mapping for the construction and operational periods. For the construction period it provided details of additional mitigation proposed (including seasonal

restrictions on piling activity), monitoring of birds within 250m of construction activity, and actions to be taken in the event that 1% or more of the five-year peak mean number of any SPA or Ramsar site qualifying species showed behavioural response signs of disturbance. It explained that during operation ongoing monitoring (such as of the condition of the saltmarsh habitat and scrapes in the HMA) and maintenance measures would be undertaken.

- 1.8.63. In their comments [REP5-017] on the updated OLEMS, NE raised concerns in relation to the HMA works that the proposals to decrease the gradient of one bank and flatten/ remove the old bank could increase visual and noise disturbance arising from the footpath and The Haven to the birds using the saltmarsh in the HMA. They requested that further details of the works were provided, including on the methods to be used and the volume of material to be removed. They also noted that the frequency of the proposed post-construction surveys was unclear.
- 1.8.64. At D9 the Applicant considered [REP9-027] that they had addressed NE's concerns. They explained that the detailed design for this area was not yet finalised but, as set out in the updated OLEMS [REP7-037], the plans for any works would be developed (in discussion with NE, the EA and the RSPB) with the aim of improving the area for birds and other wildlife and undertaking no works that would have an adverse effect.
- 1.8.65. The RSPB remained concerned at D5 that the HMA [REP5-019] was described as mitigation rather than compensation. They stated that they would be unable to agree the SoCG if this did not change.
- 1.8.66. In relation to the HRA Update [REP5-006] NE [REP8-022] continued to seek clarification on the HMA, in respect of the removal of the low-profile banks; location of the created three shallow pools; and placement of rocks from the application site to the HMA to facilitate roosting of redshank, and queried whether these would function in the same way as the remaining banks (Old Sea Wall). It raised a concern that it may restrict visibility of predators. It also suggested the use of fencing to restrict access to the HMA from the Coastal Path, to minimise disturbance of this area which would potentially be utilised more regularly by roosting birds.
- 1.8.67. The Applicant stated at D7 [REP7-008] that the comments provided by NE at D5 [REP5-017] on the D3 OLEMS in respect of mitigation and monitoring had been addressed in the updated OLEMS (Appendix 1) (V2.0) [REP7-037] submitted at D7. It would implement an adaptive management strategy; additional measures would be initiated in the event that the HMA did not provide sufficient habitat for the birds that could be displaced as a result of the loss of the habitat in the wharf area. This could include further management within the HMA and/ or creation of a freshwater wetland area in an agricultural field approximately 1km downstream from the HMA, which could provide an alternative area for roosting.

- 1.8.68. The Applicant further commented at D8 [REP8-017] that the updated OLEMS stated that plans for the HMA works would be developed to provide optimal benefits for biodiversity, in discussion with NE, the EA and the RSPB. This was to ensure any works undertaken would aim to improve the area for birds and other wildlife and no works would be undertaken that would have an adverse effect.
- 1.8.69. In relation to NE's concerns about the ability of the HMA to provide adequate mitigation the Applicant stated [REP9-027, REP10-020] that the design of the HMA took into account disturbance distances for redshank based on peer-reviewed research, ie the IECS Waterbird Disturbance Mitigation Toolkit, 2013. In [REP9-033] it stated its view that the HMA would provide sufficient habitat for the number of birds using the area. In the event that the DCO was granted, regardless of whether it was determined that compensation was required, a network of sites each separated by less than 1km, between the HMA and the RSPB Frampton Marsh reserve (as identified in [REP8-006]), would be provided two years ahead of the operational phase and associated increase in vessel movements. These would be suitable for redshank, ruff, golden plover and lapwing. They would be provided as BNG measures if not required as compensation.
- 1.8.70. NE, in response to ExQ3.3.1.34 [PD-013], confirmed their view that the HMA would constitute mitigation, not compensation [REP8-023]. At D9 NE reiterated their position [REP9-063] that the proposed enhancement of the HMA would not on its own provide sufficient mitigation for the potential changes to supporting habitat along the Haven resulting from the Proposed Development. It also stated that it considered that the HMA was a compensation measure on the basis that mitigation is something that reduces/ minimises the severity of an impact, whereas what the Applicant is proposing is compensation to offset impacts, and therefore to describe it as a HMA was incorrect.
- 1.8.71. The Applicant explained at D9 [REP9-027] that the proposed mitigation involved re-using the existing rocks that provide roosting habitat and moving them along the intertidal area out of Area A and into the adjacent Area B (containing the proposed HMA). It considered that the works represent mitigation as existing artificial structures would be relocated into the same overall roosting area to continue to be used as roosting habitat and would enhance existing habitat in the roosting area.
- 1.8.72. NE provided a response at D10 [REP10-036] to Question 3 in the Rule 17 letter issued 30 March 2022 [PD-015] asking it to reclarify whether it considered the HMA comprised mitigation or compensation. It noted that it was rare for there to be a need to offset effects on an SPA species both within the SPA boundary (the MOTH) and on functionally linked land (The Haven), which made it challenging to differentiate between mitigation and compensation. It considered that the HMA would mitigate for the functionally linked land habitat loss, but not the likely disturbance from associated activities (ie, vessel movements), which would need to be considered in relation to the compensation site (assumed to mean the compensation site nearest to the HMA) as birds were likely to move

between the two areas. It also believed that uncertainties remained around whether management of the HMA would continue over the lifetime of the project to ensure it continued to mitigate effects and did not return to its original state. In addition, it considered that the impacts of creating the HMA on UK (BAP) priority saltmarsh habitat had not been addressed by the Applicant. In relation to the proposed compensation for the potential AEOI from disturbance at the MOTH, NE considered that the Applicant had amalgamated the mitigation and compensation measures within its derogation case but had not determined their requirements or evidenced that the compensation package would address the effects.

- 1.8.73. Based on the information above I consider that the HMA would comprise a mitigation rather than a compensation measure on the basis that Areas A and B form part of the same larger roosting site, in which the HMA would be located, and the HMA would potentially reduce impacts on the part of that wider area from which there would be habitat loss (due to construction of the proposed wharf). However, I agree with NE that although the HMA could mitigate the effects of habitat loss it would not be sufficient to mitigate the effects of disturbance on redshank and the waterbird assemblage at the application site from construction of the Proposed Development and increased vessel movements during operation, for which compensation would be required.

Worst case scenarios

- 1.8.74. NE stated [RR-021] that they did not agree with the WCSs presented and the conclusions drawn from them in relation to indirect consequences of the proposal, eg relocation of fishing boats, increased dredging. The RSPB [RR-024] and LWT [RR-011] also considered that the WCS had not been sufficiently defined.
- 1.8.75. In relation to possible relocation of the fishing fleet, the Applicant replied [REP1-035] that relocation of the fishermen's wharf was not part of the Proposed Development. It acknowledged that it was concluded in ES Chapter 18 [APP-056] that there would be a significant effect on the fishing fleet and proposed that this would be managed through an NMP, in consultation with the fishing fleet and the PoB, as secured within Schedule 9 of the dDCO. In addition, the Ornithology Addendum [REP1-026] explained that a Navigation Risk Assessment (NRA) would be submitted to the Examination at D2 which would confirm the ability of fishing vessels to continue to transit The Haven as currently and provide further certainty of no LSE. A NMP template was provided at D7 [REP7-012], which was superseded by a final version at D8 [REP8-011]. A NRA [REP2-010] was submitted at D2, an updated version of which [REP6-022] was submitted at D6 in response to comments from the PoB (on a draft of the D2 version).
- 1.8.76. The Applicant responded in [REP1-035] that relevant WCSs were defined in ES Chapter 17 [APP-055] and that where such scenarios were considered to have an impact on features they were addressed within the impact assessment on that feature within ES Chapter 17, the HRAR [APP-111] or both documents. The Applicant stated that to remove any doubt or ambiguity the basis of all assessments and the basis for their

derivation would be confirmed in a consistent format to stakeholders during the Examination. NE welcomed this clarification [REP1-035]. The Applicant also acknowledged that the passages in the ES discussing impacts on birds did not relate back to the definitions of the WCSs explicitly, and explained that this was addressed in the Ornithology Addendum [REP1-026].

- 1.8.77. NE did not agree [REP2-045] that the approach to assessing impacts in the Ornithology Addendum represented the WCS. This was on the basis that the predicted vessel movement numbers should be rounded up; by averaging impacts across all navigable tides within a year it failed to distinguish between the variation in total numbers of vessels that could use different tides; and the number of predicted vessel movements at night was unclear. They considered that a more detailed assessment was required to identify the maximum number of vessels that could use any tide throughout a year and how the variation in vessel movements could affect the SPA and Ramsar site features. The RSBP raised similar concerns [REP2-051].
- 1.8.78. The Applicant responded [REP6-032] that its use of decimalised values enabled a more accurate estimation of average daily rates of disturbance. The arrival of vessels associated with the Proposed Development at the PoB would be at evenly spaced intervals, as occurred with commercial vessels currently. The assessment was based on a WCS of five vessels (total)/ high tide on 100% of high tides, although that was considered to be unrealistic and it was anticipated that vessels would actually continue to utilise 75-80% of high tides as currently. The assessment had assumed a worst case of 100% usage of high tides at night by vessels associated with the Proposed Development.
- 1.8.79. The RSPB responded at D9 [REP9-065] that it disagreed with the averaging of vessel movements along The Haven, as reflected in its comments [REP4-026] on the Ornithology Addendum [REP1-026]. It considered the approach was overly simplistic and failed to consider the full scale of potential impacts, and that any assessment had to be based on a WCS of five vessels/ tide.
- 1.8.80. The RSPB also considered [REP2-051] that no new information had been presented to demonstrate that the full suite of WCSs had been assessed. It raised particular concerns about a failure to assess the maximum noise levels, maximum vessel movements and the impact of night-time operation of the Proposed Development. It believed that no information had been provided on how birds were using The Haven at night and highlighted various studies that indicated that waders, including some of the SPA species, undertook night foraging.
- 1.8.81. The Applicant acknowledged [REP2-006] that night-time observations on baseline vessel disturbance were desirable but pointed to the practical difficulties of observing birds during the hours of darkness. It confirmed that the assessment assumed that night-time disturbance was similar to that during the daytime.

- 1.8.82. The RSPB pointed out at D9 [REP9-065] that although there may be challenges to night-time assessment, it had become easier to survey sites at night. It had already highlighted several species that could forage at night, including redshanks and black-tailed godwits [REP4-026], and its concerns remained. Birds may be more sensitive to disturbance at night so assuming that day-time and night-time disturbance were the same risked underestimating the potential impacts.
- 1.8.83. The Applicant stated at D9 [REP9-027] that there was potential for birds to be less disturbed during the hours of darkness and that the inclusion of night-time disturbance in the assessment represented a WCS.
- 1.8.84. The RSPB commented [REP3-033] on the Applicant's response [REP2-008] to ExQ1.3.1.8 [PD-008] that habitat loss had not been included in the HRA screening and integrity matrices because none would occur within the European sites and the impacts of habitat loss resulting from construction of the wharf were expected to be low once the HMA was in place. The RSPB believed that the Applicant had underestimated the scale of habitat loss that could occur and that the habitat loss worst case remained uncertain as scour protection at the wharf site did not appear to have been considered.
- 1.8.85. The Applicant replied at D3 [REP3-023] that the impact of scour protection had been allowed for in the WCS assessments and habitat loss calculations and that this was reflected in the OLEMS [REP3-007].

In combination effects

- 1.8.86. The Applicant considered in the HRAR [APP-111] whether there could be an in combination effect during construction arising from the Viking Link Interconnector project together with the Proposed Development on the SAC harbour seal population, resulting from underwater noise (from piling and dredging) and an increased risk of vessel collision. It concluded that there would not be an AEOI. In relation to underwater noise this was on the basis of the conclusion of the Viking Link project that a negative effect was unlikely, the mitigation it would provide, and the predicted "very low" number (up to 33.4 seals/1%) of the SAC seal population that could be at risk from the Proposed Development. In respect of collision, the Viking Link project predicted that the likelihood was very low and the WCS for the Proposed Development was that 1.7 seals could be affected. This conclusion was not questioned by IPs.
- 1.8.87. NE stated [RR-021] that it did not agree with the WCSs presented or the in combination assessment conclusions. NE considered that the in combination assessment was incomplete and did not include other projects such as Norfolk Vanguard and Boreas offshore windfarms, Great Yarmouth Port, and Lowestoft Port and Operations and Maintenance (O&M) for existing windfarms. The RSPB [RR-024] expressed concern that the in combination assessment was lacking and did not fully consider baseline disturbance effects.
- 1.8.88. The Applicant responded [REP1-035] that no likely causes of effect were predicted outside of the localised environment around the MOTH as

reflected in the HRAR. Vessel numbers were so low relative to the numbers using the main areas of The Wash that there were not considered to be any drivers for impacts resulting from offshore windfarms and Great Yarmouth and Lowestoft Ports which are at considerable distances from the application site and The Wash. All the projects identified in the in combination assessment were assessed in terms of any, including small, impacts that could occur that had the potential for interaction whether singly or combined. The Applicant maintained its conclusion of no ICE and no AEOI of the SPA in the HRAR. The Applicant [REP2-006] justified its position regarding the ICE assessment for each of the projects identified by the RSPB in its WR [REP1-060].

- 1.8.89. NE's response to ISH2 Question 4.c [AS-001] noted that no further projects had been identified by stakeholders for consideration within the ICE assessment and confirmed it had no outstanding concerns about its scope. However, it caveated that this was subject to change if an application was submitted for the nearby proposed solar farm during the Examination. Subsequently it indicated [REP8-021] that it considered that there could be an in combination AEOI on the SAC seal population resulting from effects together with the Hornsea Project Three litter removal campaign which was not a project it had previously mentioned in any of its submissions. The RSPB acknowledged that the plans and projects included in the ICE assessment could be agreed but reiterated their concerns about recreational activities [REP3-033].
- 1.8.90. NE considered, in its comments [REP2-045] on the Ornithology Addendum [REP1-026], that an updated assessment was required that considered impacts on redshank both at the application site and the MOTH alone and then the two in combination, as they could be impacted at both of these locations.
- 1.8.91. The Applicant responded [REP6-032] that the assessment of impacts at the application site and the MOTH in turn was the correct approach. It argued that the connectivity between the two locations was in doubt (as set out in the HRA Update [REP5-006] and it was likely that only the redshank at the MOTH were features of the European sites; redshank at the application site had been included in the (shadow) appropriate assessment on a precautionary basis. Due to this and the unlikely connectivity, in combination effects of activities at the application site and at the MOTH were not considered likely to affect an individual redshank. They also highlighted that impacts at the two locations would relate to the same project.
- 1.8.92. The RSBP [REP2-051] considered that there had been no assessment of recreational pressure or other activities that could be causing disturbance along The Haven and that it was required to inform the in combination assessment and the suitability of areas along The Haven to be developed as compensation sites. At least 12-24 months of further survey effort was needed to provide the necessary data. Although the Applicant had explained that recreational activities had been included within the baseline description it was unclear what data had been used and how it

had informed the assessment [REP3-033]. The RSPB confirmed at D9 [REP9-065] that it remained a concern.

- 1.8.93. In response to ExQ2.3.1.7, NE stated [REP5-012] that it remained unclear whether all of the ICE had been identified and/ or appropriately assessed, with the exception of air quality, which it considered had been addressed in the Addendum to Chapter 17 and Appendix 17.1 - Benthic Ecology, Fish and Habitats [REP1-028].
- 1.8.94. The RSPB reiterated their concern at D5 that not all potential projects that could have ICE with the Proposed Development had been considered and that it was not appropriate to rule out ICE at screening stage [REP5-019]. They drew particular attention to the Boston Solar Park. They also reiterated that the Applicant had not assessed recreational disturbance, and that this was particularly relevant to the viability of the proposed HMA and any additional compensation sites.
- 1.8.95. The Applicant responded that the in combination assessment considered all projects that were in planning at the time it was undertaken and the solar park was not in planning when the application was submitted [REP6-030]. It questioned the relevance of baseline recreational disturbance to the in combination assessment and explained that potential sources of change, such as the diversion of the ECP, had been considered. It stated that the compensation options had taken the recreational interest of the areas into account.
- 1.8.96. At D9 the Applicant explained [REP9-027] that the ICE assessment did not include the assessment of baseline effects because such effects were considered to be part of the site characteristics. The ICE assessment included all projects known to be planned or proposed within an area within which it considered there was potential for ICE, including those with "small" effects when considered alone. It was concluded that there were not likely to be any causes of effects outside of the localised environment around the MOTH. Vessel numbers were so low relative to the number using the main areas of The Wash that there were no "drivers for impact" from offshore wind farms and Great Yarmouth and Lowestoft Ports, which are a considerable distance from the application site and The Wash.
- 1.8.97. At D10 the Applicant highlighted [REP10-020] that NE had confirmed in a meeting in February 2022 (minutes within Appendix A of the final SoCG [REP10-033]) that in relation to in combination (and cumulative) effects there would be no concerns about the wider Wash area if the vessels associated with the Proposed Development used only the existing navigational routes in The Wash.

Air quality impacts

- 1.8.98. In relation to air quality NE noted [RR-021] that ES Chapter 14 Table 14-30 [APP-052], described as presenting impacts on The Wash SAC, SPA, (SSSI) and Ramsar site during operation of the Proposed Development, showed that in combination Process Contributions (PCs) of all pollutants were predicted to be above 1% of the relevant annual mean Critical

Loads/ Levels (CLs). It requested further clarity on how impacts to the designated sites would be mitigated and any measures secured. It also queried what the effects of nitrogen (N) deposition on the HMA would be in the event that the Predicted Environmental Concentration (PEC) CL was exceeded.

- 1.8.99. The Applicant responded in [REP1-035] that, although the PC exceeded 1% of the CLs, the PECs at all of the sites and at the HMA did not exceed the CLs. Therefore, it anticipated that significant impacts would not occur as the total predicted concentrations and deposition did not exceed the threshold above which the risk of harm to the habitats is increased.
- 1.8.100. NE confirmed at D2 [REP2-042] that they welcomed the inclusion of data on N deposition for the proposed HMA in the updated ES Chapter 14 [REP1-006], and considered that the matter was resolved. However, they did query [REP5-014] whether the Applicant had up to date modelling to support its statement in [REP4-016] that actual N deposition levels would be lower than the worst case figures set out in the updated ES Chapter 14 [REP1-006], and also suggested that it should be reflected in the information to inform an appropriate assessment within the HRAR. In relation to the information contained in [REP3-015] on construction dust impacts they noted that the Applicant had not yet confirmed whether the proposed mitigation and monitoring measures would be in place at the HMA. In response to ExQ2.3.1.7, it confirmed [REP5-012] that it considered air quality ICEs had been addressed within the Addendum to Chapter 17 and Appendix 17.1 - Benthic Ecology, Fish and Habitats [REP1-028].
- 1.8.101. In respect of construction dust impacts on the HMA, the Applicant responded [REP6-032] that dust generation needed to be reduced at source so mitigation measures for dust impacts would be implemented at the construction site, not at the HMA.
- 1.8.102. In relation to the Applicant's statement about N deposition it explained [REP6-028] that the assessment assumed that nitrogen oxides would be emitted at 100% of their permitted levels, but the emissions monitoring results of all energy from waste plants (EfW) in the UK demonstrated that typical emissions of Nitrogen oxides (NOx) are at approximately 80% of the permitted levels. It also considered that the limits set by the EA in the environmental permit for the Proposed Development would almost certainly be less than 100% of the allowable limits.
- 1.8.103. In response to NE's queries contained in [REP5-014] the Applicant clarified in [REP6-035] that "*permitted levels*" referred to the 2019 Best Available Techniques-Associated Emission Levels (BAT-AELs), which specify the maximum allowable emission concentrations of contaminants in flue gases emitted from EfW plants. Plate 1 of [REP6-035] presents 2017 - 2020 data comparing the actual emissions from UK EfW plants with the permitted levels. Table 1 of [REP6-035] presents a comparison of in combination NOx emissions for the Proposed Development using the realistic emissions scenario, which reflects a reduction in nitrogen deposition compared to the WCS (as set out in ES Chapter 14). The in-

combination PCs for nitrogen deposition at the SPA, SAC and Ramsar site are shown as less than 1% of the CL. The Applicant considered that as it had been concluded in the HRA that the Proposed Development would not result in significant effects according to a WCS it was not necessary to update the HRA to reflect the realistic emissions scenario.

- 1.8.104. NE did not respond to [REP6-035]. However, it confirmed in the final SoCG [REP10-033] (as at previous deadlines) that it had been unable to review the Applicant's submissions in respect of air quality beyond D4 as it had no specialist availability.
- 1.8.105. On the basis of the above information, I am satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development alone.

Water quality

- 1.8.106. Both NE and the RSPB raised a concern in their RRs [RR-021 and RR-024, respectively] that there was insufficient information on water discharge from the application site to demonstrate that it would not affect water quality in The Haven and the SPA, SAC and Ramsar site.
- 1.8.107. The Applicant responded in [REP1-035] that there would be no operational discharge to The Haven from the application site and surface water would be discharged to the surface water drainage network at its current location. An Outline Surface Water Drainage Strategy [REP1-017] was submitted to the Examination at D1 which identified the discharge location and the pollution prevention measures which would be incorporated within the site, including use of a Sustainable Urban Drainage System and penstocks to retain and slow water flows.
- 1.8.108. The RSPB [REP2-052] raised some concerns about the drainage strategy in relation to impacts on the SPA and Ramsar site features. This included requests for clarity on the volume of water that would be discharged from the Proposed Development into the drainage network and the volume that would be disposed of via infiltration; and for a water quality monitoring plan.
- 1.8.109. The Applicant, in [REP2-006], referred to discussion of potential water quality and quantity impacts in ES Chapters 15 and 17 [APP-053 and APP-055, respectively], and to the Outline Surface Water Drainage Strategy. It explained that it considered that there was no impact pathway between the Proposed Development via quality or quantity of water in the terrestrial drainage system and the European sites and therefore this was not considered within the HRA.
- 1.8.110. The final SocGs with NE [REP10-033] and the RSPB [REP9-039] did not make reference to water quality issues.
- 1.8.111. On the basis of the above information, I am satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development alone.

Sites for which an AEOI can be excluded

1.8.112. The Applicant's HRAR [AS-006] concluded that the Proposed Development will not result in an AEOI of the following European sites alone or in combination with other plans and projects:

- The Wash SPA;
- The Wash and North Norfolk Coast SAC; and
- The Wash Ramsar site.

1.8.113. I am not satisfied on the basis of the information above that an AEOI of these sites and their qualifying features can be excluded.

1.8.114. The Applicant's conclusions of no AEOI in relation to these European sites and their qualifying features were disputed by IPs and were discussed throughout the Examination. The account of the Examination of these matters is set out in the following sections.

The Wash SPA and the Wash Ramsar site

1.8.115. All of the qualifying features of the Ramsar site are also qualifying features of the SPA so these sites are considered together below.

1.8.116. A description of these European sites and their qualifying features, and the potential effects on integrity resulting from the Proposed Development, are provided in Sections A17.3 and A17.6 of the Applicant's HRAR (V1.0) [AS-006].

1.8.117. The Applicant's HRAR and subsequent updates provided an assessment which addressed the potential for AEOI resulting from:

- Habitat loss for redshank and the waterbird assemblages at the application site (dealt with above);
- Disturbance effects at or adjacent to the application site - disturbance to redshank and the waterbird assemblages from construction noise;
- Disturbance effects at or adjacent to the application site - vessel disturbance (visual, presence and noise) on redshank and the waterbird assemblages during construction and operation at the application site;
- Disturbance effects at the MOTH - vessel disturbance (visual, presence and noise) on DBBG, black-tailed godwit, oystercatcher, redshank, turnstone, and the waterbird assemblages;
- Disturbance effects along The Haven - vessel disturbance (visual, presence and noise) on the waterbird assemblages; and
- Lighting - disturbance to redshank and the waterbird assemblages from construction and operational lighting at the application site and on vessels in transit through The Wash and The Haven.

1.8.118. These matters are discussed further below.

The Wash SPA and Ramsar site - Disturbance effects on bird species - general

- 1.8.119. NE expressed concern [RR-021] about the Applicant's view that there would be no impacts along The Haven, in the absence of an assessment and supporting evidence. The RSPB raised the same concern. NE also considered that seven SPA species were likely to be disturbed by increased boat traffic within The Haven, ie DBBG, shelduck, lapwing, dunlin, black-tailed godwit, redshank and turnstone.
- 1.8.120. NE disagreed with the Applicant's characterisation of the period of disturbance being limited to one - three and a half hours around high tide as minimising risk, and conversely considered that this period is when alternate sites will be most limited and therefore the most critical for roosting birds. They also considered that increased disturbance by a minimum of 20-25% due to a move to daily boat traffic, including an increase of 34% of days in the key winter period, was not insignificant and therefore should not be dismissed. NE and the RSPB [RR-024] also raised concerns that the effects of pilot boat movements had not been fully considered in the assessment.
- 1.8.121. The Applicant responded in [REP1-035] that the period of disturbance is restricted through the limitation of draft for the vessels entering and leaving The Haven, and considered that this did minimise the risk as large vessels cannot access The Haven at other times of the tidal cycle. It stated that this is when birds currently utilise the alternate roost sites as observed during the disturbance surveys undertaken at the MOTH. It stated that the increased disturbance had been considered in detail within the HRAR in relation to the baseline situation, how birds responded to the existing levels of disturbance and how they could react to additional vessel movements, and that a fuller assessment was reported in the Ornithology Addendum [REP1-026]. In respect of pilot boat movements, the Applicant explained that the assessment had focussed on the cargo vessels as an increased number of pilot boats was not predicted because the existing boats would carry the additional pilots (out to the cargo vessels or back to port) [REP2-006].
- 1.8.122. At D9 the Applicant explained [REP9-027] that disturbance caused by the movement of large vessels would only occur around high-water periods as the vessels are too large to access The Haven on other tidal states, so this reduces the period of time when birds at the MOTH can be disturbed. It noted that alternative sites have provided a roosting area for birds currently disturbed by vessel movements, which occur on approximately 75-80% of tides. It emphasised that the disturbance issue had been investigated through survey work and drawing on other relevant research, with detailed assessments undertaken for each sensitive species. It explained that the suggested 20-25% increase in disturbance represented a worst case as it assumed that disturbance by large vessels would also occur at night, when visual disturbance would be much lower.
- 1.8.123. In relation to pilot boats it did not anticipate a significant increase in the number required, as the pilot boats would carry more pilots to the waiting vessels. There could be infrequent times when more pilots

needed to be taken to the vessels than could be transported by one pilot vessel, but as this was not expected to happen very often it had not been included in the predicted vessel numbers.

- 1.8.124. NE considered [RR-021] that the Applicant's assumption that when redshank, oystercatcher, black-tailed godwit and shelduck leave the roost they are no longer disturbed was unsupported as there had been no monitoring of receiver roosts to understand disturbance risks and it could not be assumed that birds are able to occupy nearby alternate roosts or that they are not subject to additional energy depletion as a consequence of relocation. NE also considered that the characterisation by the Applicant of the anticipated increase in energy expenditure (from movement as a result of disturbance) as trivial for lapwing, golden plover and black-tailed godwit was an unsupported conclusion without supporting evidence that birds are easily able to compensate for the additional energy needed. The RSPB also raised concerns about the potential effects of energy depletion [RR-024].
- 1.8.125. The Applicant responded in [REP1-035] that the birds that were recorded as relocating in the disturbance area in the surveys at the MOTH were still within the count area and should there have been further disturbance during the same survey period they would have been recounted. They also explained that a fuller assessment of this issue had been undertaken and was reported in the Ornithology Addendum [REP1-026].
- 1.8.126. At D9 the Applicant stated [REP9-027] that the surveys observed how far the birds flew from their original roost sites and noted that many alternative roost sites were only 150-250m away. Some species flew up to 800m to alternative roost sites within the wider MOTH area, in particular to mudflats that remained exposed on neap high tides which gave birds greater distance and visibly less disturbance from vessels. These roosts were visibly the primary preference for redshank, curlew, black-tailed godwit and golden plover, which would settle there to forage when the tide was rising. Relatively few groups of birds flew further from The Haven (for which monitoring could not then be continued). The Applicant considered that the surveys would have in most cases detected if the birds had been re-disturbed at the closer alternative roosts; it appeared that once birds had been disturbed initially they were not re-disturbed at the alternative roosts. The Applicant concluded that the observation that the birds currently utilised these alternative sites when they were disturbed by the baseline vessel traffic strongly suggested that the alternative roost sites were providing adequate alternatives.
- 1.8.127. The Applicant also refuted that it had ever described the energy usage for lapwing and ringed plover (waterbird assemblage species) as trivial. It considered that energy usage from additional flights was particularly important for these two species, that returned to the same roost site following disturbance. It highlighted the calculation that the additional energy usage was approximately 0.39% to 0.51% of their daily energy intake requirements per additional disturbance flight and pointed to the investigation of energy usage set out in the HRA Update [REP5-006].

- 1.8.128. In relation to NE's and the RSPB's comments in their RRs [RR-021 and RR-024] about a lack of information on the effects that potential changes in fishing vessel activity, in order to avoid the potential delays caused by the additional vessels turning, could have on foraging and roosting birds, the Applicant stated [REP1-035] that it considered that the Proposed Development would not significantly affect fishing vessel movements. It was working on a NRA, to be provided at D2, which would confirm the ability of fishing vessels to transit The Haven as currently, and mitigation would be provided in the form of a NMP. A new Condition 14 was inserted in the DML within dDCO Schedule 9 that provided that a NMP must be submitted for approval by the MMO before commencement of any licenced activity. It required that the NMP must include details of the construction timelines, potential risks to navigation and how each stage of the construction process and operation of the authorised development would be managed to ensure a minimal impact on navigation safety in The Haven.
- 1.8.129. The RSPB raised a concern at D3 [REP3-033] that the NMP may contain information that was relevant to HRA but would not be produced until post-consent. They considered that a draft should be made available to the Examination.
- 1.8.130. In response to ExQ2.10.0.1 the Applicant provided a 'Technical Note for Navigation Management and Ornithology' [REP6-033]. In [REP7-010] it stated that [REP6-033] set out the process to be followed and topics to be covered in developing the NMP, in lieu of a draft NMP, and had due regard to the potential impacts on bird species. It considered that it provided confidence that appropriate weight and consideration would be given to ornithology (specifically in relation to birds associated with the European sites) in the development of the NMP, which also contained a commitment to monitoring and reporting. It would be a live document subject to update. The Applicant considered that [REP6-033] therefore provided confidence that the future navigation of vessels would take full account of key ornithological requirements within The Haven and The Wash and any new ornithology data that became available. In response to ExQ3.10.0.18 a NMP template was submitted at D7 [REP7-012] and an updated version (to address PoB comments) was submitted at D8 [REP8-011].
- 1.8.131. NE noted [REP8-024] that [REP6-033] suggested it could be used as a HRA-level impact management tool, but considered that it contained no evidence that adaptation of vessel movement parameters would mitigate impacts and/ or could be secured, especially as many aspects of vessel movement, eg vessel speeds and tides, would be outside of the project's control. It was concerned that the Applicant had not identified how the NMP would take birds into account, how it could be modified, and how appropriate nature conservation oversight would be achieved. Until the NMP was provided NE had no confidence that the impacts could be managed to suitably minimise the risk to nature conservation interests.
- 1.8.132. The Applicant stated in [REP9-033] that it had updated all relevant documents to take account of the PoB's view that vessel speeds must be

in line with the 1972 'Convention on the International Regulations for Preventing Collisions at Sea' (COLREGS) (ie, a 'safe speed') and considered that none of the changes to the updated documents altered any of the assessments contained in the ES or other application documents. It pointed out that [REP6-033] stated that the final NMP would have to consider opportunities for managing vessel movements to reduce vessel speed and for minimising vessels being held at or near the MOTH. In addition, the NMP Template [REP8-011] identified a clear and overt linkage to [REP6-033], and dDCO Schedule 9 Condition 14(3)(e) required that the NMP should include "*measures for managing disturbance to designated bird species developed in accordance with the process in the Navigation Management Planning Process: Risk to Birds*". (This is identified by the Applicant as [REP6-033] although that is titled 'Technical Note for Navigation Management and Ornithology'.) The Applicant stated that [REP8-011] identified NE as a statutory body that will be consulted in the development of the NMP, together with the RSPB, and set out the consultation process.

- 1.8.133. The Applicant considered in [REP1-035] that the impacts of increased vessel movements had been fully assessed in the HRAR. However, in response to the RSPB's request in their RR for a more detailed assessment and incorporation of data from more recent seasons of bird behavioural observations, the Ornithology Addendum [REP1-026] considered how the projected increase in high tides utilised by commercial vessels and commercial vessel movements per tide, including pilot boats, translated into number of disturbances and numbers of birds involved. Appendix A1 of the Addendum also contained the five most recent years of WeBS data (2014 - 2019) covering all the WeBS sectors within 800m of The Haven as identified by the RSPB in their RR. It included the individual features and the assemblage waterbird species of the SPA and Ramsar site.
- 1.8.134. In their initial comments on the Ornithology Addendum [REP2-053], the RSPB considered that waterbirds could be disturbed and displaced by vessel movements along the whole of The Haven and along the navigation channel out to the PoB anchorage area, in addition to the application site and the MOTH. They noted that no site-specific survey data had been collected for these areas and considered it was required to inform the assessment of effects on the qualifying features of the SPA and Ramsar site. Two years minimum of survey work was needed in order to cover all seasons and to account for annual variations. Insufficient data had been presented to provide an understanding of the abundance and distribution of, and impact of recreational activities and other plans and projects on the SPA and Ramsar site qualifying features that use the area along the whole of the navigation channel throughout the year.
- 1.8.135. The Applicant responded at D9 [REP9-027] that the SPA's qualifying interests are the numbers of wintering birds. Two years of data had been provided for overwintering, breeding and spring passage bird numbers and for disturbance responses at the MOTH. Numbers were highest during the overwintering period therefore that was considered to

represent the WCS for disturbance impacts. It considered that the impact of baseline recreational activities was not relevant to the assessment but explained that it had been considered in selecting the potential compensation sites. It was not anticipated that recreational activities would change as a result of the Proposed Development and there were no known proposed plans or projects that would affect recreational activity. The potential for changes to the ECP to have significant effects on SPA features was assessed by NE in 2018 and no sensitive areas were identified for birds along The Haven. Data submitted at D8 provides a summary of data collected for the central section of The Haven [REP8-018].

- 1.8.136. The Applicant noted at D2 that the central section of The Haven was not covered by WeBS counts and acknowledged that there was therefore a data gap in relation to its usage by waterbirds [REP2-006]. However, it considered that the lack of WeBS coverage and lack of inclusion within the SPA designation reflected low ornithological importance. As it had not been identified as an area for which there were potential concerns about bird disturbance bird surveys had not been commissioned. The Applicant also noted that it was narrow, did not have extensive areas of saltmarsh, was not recognised by any designations for its bird interest and had a footpath extending along the stretch which had the potential for causing disturbance, particularly to roosting birds.
- 1.8.137. At D9 the RSPB [REP9-065] commented that the WebS data was useful in assessing the ornithological importance of sites, but needed to be supplemented by site-specific data to provide the evidence needed to inform the HRA. It considered that this was borne out by the Final Waterbird Survey Report [REP8-018], which reported that greater numbers of black-tailed godwit, redshank, golden plover, and lapwing were recorded than in WeBS sectors alone. The absence of information for areas within the central section of The Haven that were functionally linked to the SPA and Ramsar site should have highlighted the need for survey work to ensure there would be no evidence gaps. It considered that the Applicant's data reinforced its concern that ornithological surveys were essential to understand waterbird use along the whole of The Haven, and that the evidence provided was insufficient to support a conclusion of no AEOI of the SPA and Ramsar site beyond reasonable scientific doubt.
- 1.8.138. In response to ISH2 Item 5 a (as set out in [REP3-023]) the Applicant confirmed that there were three locations where birds using The Haven could be disturbed by vessels at high tide: the MOTH, the application site and the central section of The Haven. It considered that the greatest potential for vessel disturbance was at the MOTH, which lies within the SPA and Ramsar site boundary, followed by the application site, and then the central section. It considered there was a lack of evidence to demonstrate that the central section had more than negligible value to waterbirds but recognised that there were data gaps and had undertaken an initial survey of non-breeding birds there.

- 1.8.139. The Applicant considered that it had demonstrated through its surveys that under baseline conditions a moderate number of birds roosting at the MOTH (mostly shorebird qualifying features of the SPA and Ramsar site) and the application site (mostly redshank and SPA assemblage waterbirds such as ruff and gull species) were regularly disturbed by cargo vessels and pilot vessels transiting The Haven. These birds exhibited small-scale behavioural responses, either moving to an alternative roost location up to a few hundred metres away or returning to the original location a minute or so after a vessel had passed.
- 1.8.140. It considered that according to the assessment presented in Appendix 1 of the Ornithology Addendum [REP1-026] the additional disturbance caused by the Proposed Development would not compromise the conservation objectives of The Wash SPA. Nevertheless, it acknowledged that any additional disturbance was undesirable. It considered that provision of one or more new roost sites close to the MOTH, that were of equal or greater attractiveness to roosting birds as the existing roosts, would allow for additional vessel traffic along The Haven without causing additional bird disturbance. It described this as a BNG solution.
- 1.8.141. At D9 the RSPB commented [REP9-065] that the Applicant had not commissioned any ornithological surveys of the application site for the PEIR on the basis that there was a lack of evidence to demonstrate that it had any value to waterbirds. However, subsequent surveys of that area recorded significant numbers of redshank and ruff and the presence of other SPA and Ramsar site features. In addition, the surveys at the MOTH recorded significant baseline levels of vessel disturbance of waterbirds. The RSPB considered that these highlighted the need to understand the potential impacts of disturbance along the length of The Haven.
- 1.8.142. The Applicant addressed NE's and the RSPB's concerns about energy usage by birds disturbed by vessel movements in Section 7 of its D5 HRA Update [REP5-006]. Section 7.2 provides estimates of worst case energy budget expenditure arising from the Proposed Development for redshank, black-tailed godwit, DBBG, lapwing and golden plover at high tides. Based on research by Collop et al. (2016), redshank were predicted to expend an additional 0.186% of their daily energy requirement as a result of displacement from vessel disturbance at the MOTH, and 2.19 to 2.46% at the application site. Black-tailed godwit, DBBG, lapwing and golden plover were expected to expend an additional 0.29%, 0.077%, 1.77% and 1.78%, respectively, as a result of displacement at the MOTH. It was determined that the Proposed Development would place energetic demands of less than an additional 1% of daily energy requirements (but on an additional 25% of tides) on species prone to one-off displacement (redshank, black-tailed godwit and DBBG at the MOTH); and energetic demands of an additional 1-2% of daily energy requirements on species prone to repeat displacement (redshank at the application site and lapwing and golden plover at the MOTH). It was concluded that the energetic demands of responses to disturbance arising from the Proposed Development would not be sufficiently severe

or apply to a sufficient number of individuals to impact survival or subsequent breeding success of the SPA waterbird populations.

- 1.8.143. In relation to the number of disturbance events the Applicant confirmed [REP6-032] that there would be an additional 1160 vessel movements/year associated with the Proposed Development if 100% of high tides were utilised, and that this had been adopted as the worst case number of disturbance flights for bird species that returned to roosts and so were repeatedly disturbed.
- 1.8.144. In response to the Applicant's HRA update [REP5-006], NE [REP8-022] highlighted that golden plover and lapwing could be at energetic risk as a result of repeated disturbance. Based on a significance threshold of a 1% increase in background mortality and given the current golden plover population on The Wash, NE considered that increases in mortality above 41 birds would be of concern. If increases in energetic requirements directly translated into mortality of individuals at the MOTH this would equate to approximately 48 birds per annum. NE indicated that this approach was highly precautionary, however concluded that a risk of AEOI for golden plover could not be ruled out. Although the predicted impact on lapwing would be below the 1% threshold NE highlighted that both species are in decline on The Wash and so the loss of both was a concern. NE noted that golden plover were not included in the additional CiWB 2021 survey report [REP6-034] although they were described in the Ornithology Addendum [REP1-026] as responding to five of nine disturbance events by returning to their initial roost, and on four of nine occasions as abandoning it. NE noted the recognition by the Applicant that compensation may be required for effects on golden plover, and requested clarification of their observed responses to vessel movements and consideration of the implications of additional energetic requirements if compensation could not be provided.
- 1.8.145. The Applicant [REP8-017] referred back to the additional assessment of energy usage provided within the HRA Update [REP5-006] and its conclusion that the energetic demands of disturbance responses to project-related activities would not be of sufficient severity or affect a sufficient number of individuals to impact survival or subsequent breeding success of SPA waterbird populations. It highlighted that lapwing and plover are part of the SPA waterbird assemblage rather than individual qualifying species, and identified in The Wash Information Sheet on Ramsar Wetlands as species/ populations identified subsequent to designation for possible future consideration.
- 1.8.146. NE confirmed [REP9-063] at D9 that its concerns remained about the increased boat disturbance along The Haven, and that it disagreed with the Applicant's conclusion of no AEOI in relation to the waterbird assemblage as a whole, not just the component species identified. The Applicant [REP10-020] maintained its position that it had undertaken a valid assessment and that the increase of 1.6 vessels per day along The Haven would not result in the loss of a roost site or an AEOI for either the individual species assessed or the assemblage as a whole. It stated that the assemblage had been assessed as a feature in its own right in the

Ornithology Addendum [REP1-026] and HRA Update [REP5-006], but that the CMD (Final/ V2.0) [REP8-006] focused on the assemblage species considered to be most at risk of repeated disturbance, ie golden plover and lapwing.

- 1.8.147. The RSPB commented [REP9-065] that the Applicant had not considered the vessel activity out to the PoB anchorage area and potential impacts on SPA features known to use that area of The Wash, ie common scoter, eider, goldeneye and red-throated diver, and that this remained a concern.
- 1.8.148. The Applicant responded at D10 [REP10-020] that it had not provided evidence of vessel and bird use of the anchorage area but that evidence of use of the open waters of The Wash close to the anchorage area was provided in the additional CIWB 2021 survey report [REP6-034]. It considered that the CIWB survey vantage point facilitated observation of birds and vessels around the anchorage area to the extent that any other land-based survey would have done. It anticipated that the BAEF vessels would not need to utilise the anchorage area as often as the commercial vessels using the PoB as the BAEF vessels could be managed so that arrival times would routinely match the tidal window.

The Wash SPA and Ramsar site - Disturbance to birds at the MOTH

- 1.8.149. NE stated [RR-021] that it had significant concerns about the feeding/roosting area at the MOTH. It considered that disturbance to roosts at the MOTH could affect 24 of the SPA species including eight at greater than 1% of site population. This included over 20% of the SPA population of golden plover and black-tailed godwit and 7.5% of the lapwing SPA population. It also noted that significant numbers of the SPA/ Ramsar waterbird assemblage use this area at low tide, including up to 28% of the black-tailed godwit SPA population. NE highlighted that risk pathways arising from repeated boat movements would be likely to result in changes to bird use behaviours in this area and usage of this area at high tide. It considered that the data suggested that this results from visual/noise disturbance from the boats rather than from their wake.
- 1.8.150. The Ornithology Addendum [REP1-026] considered potential effects at the MOTH on the following bird species (for which an LSE had been identified) arising from vessel disturbance (visual, presence and noise during both construction and operation): DBBG, black-tailed godwit, oystercatcher, redshank, turnstone and the waterbird assemblage. In respect of the SPA populations of these species it reported that the WeBS data showed that during high tide periods the MOTH area held:
- 5-8% of DBBG;
 - 1-5% of black-tailed godwit (although absent on 77% of high tide periods);
 - over 1% of oystercatcher on 63% of high-tide periods, and over 5% on 25% of high-tide periods, with a peak count equivalent to 20%;
 - over 1% of redshank on 83% of high-tide periods, and over 5% on 20% of high-tide periods, with a peak count equivalent to 13%; and

- over 1% of turnstone on 63% of high-tide periods, and over 5% of the population on 20% of high-tide periods, with a peak count equivalent to 29% of the SPA population.

1.8.151. In relation to all of these species it was stated that the birds' response to disturbance from vessels was to fly to an alternative site. The baseline change of behaviour study showed that vessel disturbance was caused by a single event in any one high tide period, as the birds' response to a vessel passing was to move to an alternative site, therefore they were not present when subsequent vessels passed. The birds affected were likely to be roosting birds so the disturbance was not anticipated to materially affect foraging time and energy intake rates. The birds would relocate to alternative sites within 1km (apart from one occasion when oystercatcher were observed to fly 3.3km), within the MOTH and in the wider local area. The energy expenditure associated with a single flight to a location less than 1km away was likely to require less than 1% of a bird's daily energy expenditure. On this basis it was determined that a number of alternative local roost locations were available to disturbed birds. It was therefore concluded that additional vessel disturbance at the MOTH from the Proposed Development would not materially affect local distribution or abundance of the bird species across the SPA and would not have an adverse effect on its conservation objectives.

1.8.152. In relation to the waterbird assemblage at the MOTH it was concluded that as lapwing and golden plover were not SPA individual qualifying features, although occurring in numbers considerably higher than many of those, the "*small to moderate local-scale changes*" (as described in Appendix A1) that could affect these two species as a result of increased vessel disturbance would not have an adverse effect on the conservation objectives for the SPA assemblage.

1.8.153. NE agreed at D2 [REP2-045] that the risk at the MOTH was to roosting birds subject to disturbance by increased vessel traffic, and that this could result in species being displaced from roosts to alternative sites, and individuals of some species being subject to repeated disturbance because they do not relocate. It noted that Appendix A1 Table 2 of the Ornithology Addendum [REP1-026] indicated that, of the SPA waterbird assemblage, some 29,395 birds of at least 22 species are at risk of exposure to disturbance, with 20,208 birds of 22 species in the most sensitive area. Disturbance at high tide would increase from approximately 75-80% to 100% for those species that relocate in response to large vessel disturbance events, and for those species that return to the roosts and are subject to repeated disturbance the number of events per annum would rise from the current baseline of 840 to approximately 1160. NE noted that the majority of disturbed individuals abandon the roosts in response to vessel passage and do not return for the rest of the high tide period. They considered therefore that the site's conservation objectives could be affected in respect of birds' individual fitness as a consequence of increased energy expenditure, and in relation to the distribution objective as a consequence of the loss (as a result of disturbance events occurring on 100% of tides) of a significant roost (at the MOTH).

- 1.8.154. The Applicant responded [REP6-032] that the ongoing use of the MOTH in the presence of daily commercial vessel traffic indicated that the SPA bird populations at the MOTH were resilient to vessel traffic and that the increase in vessel numbers associated with the Proposed Development had been assessed. The proposed BNG measures would increase the roosting habitat available to waterbirds, as set out in the OLEMS [REP3-007].
- 1.8.155. At D9 the Applicant commented [REP9-027] that the Ornithology Addendum [REP1-026] provided bird counts and the maximum count for individual species. It was not suggesting the maximums would ever occur simultaneously but that over time the roost site had supported this number of individuals. It noted that the response of the majority of the species (except lapwing and golden plover) to the disturbance events was to fly to alternative roost locations and anticipated that the birds would continue to display this behavioural response with the (average) increase in vessels of 1.6 per day.
- 1.8.156. NE commented [REP2-045] that within the Addendum the Applicant had considered the risk of an AEoI without reference to the objectives (maintain versus restore) of individual species, or their individual energy balances, and that the permanent loss of the MOTH roost area had not been considered. They also noted that while consideration had been given to impacts on a number of individual species which are SPA features no assessment had been made of the non-breeding waterbird assemblage as a feature in its own right.
- 1.8.157. The Applicant expressed its view at D9 [REP9-027] that there would not be a permanent loss of a MOTH roost as there were alternative roost locations the birds already used on a regular basis and the birds would also return to the original roost. Notwithstanding, the compensation site selection had assumed loss of the roost site as a WCS. In relation to the waterbird assemblage it stated that it had been considered further in the HRA Update [REP5-006].
- 1.8.158. NE also noted in [REP2-045] that the titles within Table 5-1 (Screening of SPA qualifying species for further assessment) of the Addendum suggested that the calculated % level of disturbance was based on the number of birds recorded as being displaced during the surveys as a proportion of WeBS counts. NE considered that this approach was incorrect (unless the surveys reliably matched local WeBS populations) and that the analysis needed to look at the number of birds disturbed as a proportion of those recorded in the bird surveys and then consider how this proportion of the population compared to WeBS counts from the survey area. NE sought clarification and stated that any changes could result in a change to the species to be taken forward for appropriate assessment. It also noted that a number of species not taken forward had a high percentage disturbance response and considered that impacts on these species should be considered further.
- 1.8.159. The Applicant did not agree [REP6-032] that it had applied an incorrect approach. It stated that the methodology utilised the WeBS data as the

CiWB surveys of bird responses to vessels did not include counts of birds on the ground.

- 1.8.160. In its final comments on the Ornithology Addendum [REP1-026] the RSPB noted that no surveys had been conducted at the MOTH during August, September and October [REP4-026]. It considered these to be the months when the numbers of some bird species on The Wash were at their highest due to the autumn passage period, when many birds stopped over to feed or moult before onward migration.
- 1.8.161. The RSPB considered [REP5-018] that the Applicant's surveys had demonstrated that there was existing disturbance to waterbirds using the MOTH, and that any additional disturbance would add to this pressure. Its greatest concerns related to DBBG, shelduck, oystercatcher, golden plover, lapwing, turnstone, redshank, black-tailed godwit, and the waterbird assemblage. It believed it was not possible to mitigate the impacts of additional vessel movements and that additional compensation measures were required to support SPA and Ramsar site features. It also considered that evidence should have been provided on waterbird usage between the MOTH and the PoB anchorage area.
- 1.8.162. The Applicant provided an assessment of effects on the SPA/ Ramsar site waterbird assemblage based on the WeBS counts and its high tide baseline observation sessions (November 2019 – March 2021) in its D5 HRA Update [REP5-006]. It anticipated that 1% of the five-year mean peak assemblage count were likely to be disturbed on approximately 12.5% of high tides, up from approximately 9% under baseline conditions. The Applicant concluded that the potential additional vessel disturbance resulting from the Proposed Development would not compromise the conservation objectives for the assemblage. This was based on the premise that the assemblage birds that used the MOTH during the high tide period, when they would potentially be at risk from vessel disturbance, formed only a small proportion of the assemblage, and that disturbed birds relocated to a nearby alternative location (within 1km) or 'quickly' (within approximately two minutes) returned to the original roost site once the vessel had passed. Notwithstanding, the provision of one or more artificial roost sites in the vicinity of the MOTH as part of the proposed BNG measures was highlighted as a measure that would benefit the waterbird assemblage.
- 1.8.163. The additional 2021 CiWB report submitted by the Applicant at D6 [REP6-034] provided data on changes in waterbird behaviour due to vessel movements at the MOTH (and the wharf site). 16 surveys were undertaken between January and November 2021 (nine at the MOTH and seven at the wharf site), so included the Autumn migratory period. The survey area is depicted on Figure 1. The survey recorded the vessel types, all bird species that changed their behaviour due to the presence and or wash of river traffic, flight distances where birds were displaced, and flight time of birds that returned to their original location. The results are set out in Section 4 of the report:

- Table 2 presents the peak count for all species where a behaviour change was observed. 27 bird species changed their behaviour due to the presence of boats or boat wash. Based on the latest available WeBS data seven species were observed to be disturbed at levels over 1% of The Wash five-year average; DBBG (8.49%), ruff (65.22%) lesser black backed gull (8.21%), common sandpiper (8.11%), oystercatcher (4.03%), lapwing (3.70%) and great crested grebe (1.16%).
- Changes in behaviour at the MOTH were caused by boat presence for 99.88% of the total birds across all the surveys, with disturbance from boat wash disturbing 0.12% (100% of which was from pilot boats). Large cargo ships, pilot boats and small fishing vessels were responsible for disturbance of 52.90%, 47.04% and 0.06%, respectively, of all birds. Small personal boats did not trigger any behavioural changes.
- Changes in behaviour at the wharf site were caused by boat presence for 95.70% and boat wash for 4.30% of the total birds. The presence of large cargo ships, pilot boats, small fishing vessels and small personal boats were responsible for disturbance of 57.40%, 22.63%, 4.66% and 15.31%, respectively, of all birds. In relation to boat wash, large cargo ships were responsible for 100% of the disturbance behaviour of the birds.
- Large cargo ships were disturbing a much higher percentage of birds than any other vessel type.

1.8.164. The report concluded that DBBG were the species of most concern and recommended that if any mitigation was proposed it should focus on DBBG and wading birds, including ruff.

1.8.165. NE, in its comments [REP8-022] on [REP5-006], considered that the baseline vessel disturbance of the waterbird assemblage at the MOTH was significant and that an AEOI could not be excluded. It considered that it was clear that vessel disturbance was experienced by birds and that two responses were apparent: redistribution to alternate roosts (with repeated displacement of individuals in some instances); or temporary displacement which may be repeated if there were multiple boat movements. It was of the view that these would only be intensified by the Proposed Development. While the number of individuals impacted would be the same the frequency would increase, therefore the significance of the impacts would intensify and the ability of the birds to recover from the disturbance would diminish.

1.8.166. NE disagreed that the number of birds impacted at the MOTH would not be significant. The disturbance study demonstrated that the presence of large vessels routinely displaced birds to alternate roosts. They are currently displaced on 75% of high tides; they would be impacted on all high tides as a result of the Proposed Development. The distribution of the birds would be altered for the life of the Proposed Development, which should be considered as permanent. Even if birds adopted other

pre-existing roosts in the SPA there would still be a net loss of one roost site from the assemblage roost network. NE disagreed that there was no likely risk to the conservation objectives for the SPA waterbird assemblage. It welcomed the Applicant's proposal to provide artificial roost sites in the vicinity of the MOTH but advised that SPA requirements and BNG are legally separate.

- 1.8.167. At D9 the RSPB commented [REP9-065] that the Applicant's counts (presented in the Final Waterbird Survey Report Summary of Data [REP8-018]) were greater for some SPA features than the WeBS counts, eg black-tailed godwit, redshank, golden plover and lapwings, and further highlighted the importance of The Haven for SPA and Ramsar site features. It considered that this reflected that WeBS counts take place monthly and over a long-term period, which allows an assessment of the trends in bird numbers over time but does not provide the full picture. It believed that the Applicant's survey results demonstrated the need to ensure site-specific surveys of suitable duration and focus were undertaken, and that the more survey work that was completed the more species were identified in significant numbers as affected by vessel disturbance. It stated that the updated CMD [REP8-005] did not address its concerns, as significant detail needed to demonstrate that the EC 2018/ Defra 2012 compensation measures criteria (summarised in para 4.3 of [REP4-028]) would be met would not be provided until post-consent. It did not provide any confidence that the integrity of the NSN would be maintained.
- 1.8.168. The RSPB highlighted its view [REP9-065] at D9 that impacts on foraging and roosting birds from vessels' wake could be greater along The Haven than in the approaches to the MOTH. It considered that this had become a more significant issue following the Applicant's confirmation that vessels could not be restricted to six knots and may travel at 12 knots. It considered that this could have implications for the HRA in relation to direct impacts on waterbirds and indirect impacts resulting from erosion of intertidal mudflat and coastal saltmarsh and confirmed that it remained an outstanding concern. In its comments on [REP9-033] the RSPB accepted [REP10-045] that the Applicant's evidence showed that the visual presence of vessels causes the most significant disturbance and displacement of waterbirds and that ship wash around the MOTH was not likely to have significant impacts on them. However, it argued that a full assessment of the effect of ship wash and visual disturbance had not been provided as data had not been collected for the central section of The Haven.
- 1.8.169. On the basis of the above information, I am not satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development alone and considers that a derogation under the Habitats Regulations is engaged. Commentary on this is provided in Sections 1.5 to 1.7 above.

The Wash SPA and Ramsar site - Disturbance to birds at the application site and adjacent area

- 1.8.170. In respect of The Wash SPA NE considered [RR-021] that the location of the Proposed Development would potentially result in an adverse effect on redshank through the loss of roosts on the site as a result of modification or disturbance.
- 1.8.171. In relation to disturbance to birds from piling during construction the Applicant submitted an updated version of the dDCO at D1 [REP1-003]. Condition 13 of the DML contained in Schedule 9 had been updated to require that the post-consent piling method statement included details of the timing of piling activities to ensure that they would be undertaken during non-sensitive periods for overwintering birds, ie, May to September, as set out in the Register of Environmental Actions and Commitments (REAC) [REP1-014].
- 1.8.172. NE acknowledged [RR-021] the Applicant's justification for a 250m monitoring zone for noise and visual disturbance effects on birds and considered that this appeared to be appropriate for the Proposed Development considering its distance from the SPA and the reduced numbers of birds using the upper stretches of The Haven, However, it noted that data had shown that numbers of ruff and redshank in Sections A and B had exceeded the 1% threshold during monitoring, and requested assurance that it remained appropriate for ruff and redshank.
- 1.8.173. The Applicant responded within [REP1-035] that the buffer zones for works to avoid and minimise disturbance to species were taken from Cutts et al (2008), which provides peer reviewed data on disturbance distances for waders, but that site-specific surveys were also used to provide site-specific information on actual disturbance levels. In [REP2-006] the Applicant referred to information contained in ES Chapter 17 [REP1-026] about EA monitoring of ground investigation (GI) works in 2019, and the resulting suggestion by the EA that 250m was a more reasonable distance (than 500m) to consider potential disturbance effects of GI activities on non-breeding waterbirds. The EA had considered that there was no evidence of any visual or noise disturbance affecting birds over 250m away. The Applicant considered this to be a sound approach and that its proposed mitigation, ie monitoring and stopping works if a threshold number (to be agreed with NE) of birds was exceeded within a 250m radius, would successfully reduce disturbance to waterbirds.
- 1.8.174. In NE's response [AS-001] to ISH2 Question 4.b, they stated that the comments made in their D1 and D2 Risk and Issues Log [REP2-048] remained unchanged, ie they were still awaiting demonstration that the proposed 250m buffer zone was appropriate for ruff and redshank, and the behavioural response information included in the bird survey data should be reviewed to see how distances compare, and whether following Cutts was appropriate, precautionary, or not sufficiently precautionary.
- 1.8.175. The RSPB commented [REP3-033] that it was unclear whether the activities proposed by the Applicant would be of a similar nature to the

GI works undertaken by the EA and requested more detail on the similarities and differences between the works, such as the scale and duration of the works and the equipment required. At D9 the RSPB expressed [REP9-065] its view that this had not been addressed by the Applicant and remained outstanding.

- 1.8.176. In response to NE's comments in [RR-021] and [REP2-048] about the proposed 250m buffer zone, the Applicant submitted a technical note, 'Noise modelling and mapping relating to bird disturbance at the Principal Application Site' at D4 [REP4-015]. It is described as providing further quantitative information on the predicted noise levels associated with each phase and scenario of the Proposed Development, the areas over which the higher noise levels associated with bird disturbance would occur, and the effective distances from activities within which waterbirds may be disturbed or excluded (compared to the proposed 250m monitoring zone).
- 1.8.177. Figure 1-1 of [REP4-015] depicts the bird survey areas. Table 1-1 presents a summary of the baseline noise levels in those areas. Table 2-1 presents the noise thresholds (for either where disturbance was likely or 'caution' was suggested), as set out in Cutts et al., associated with disturbance responses for three waterbird species. These are redshank, ringed plover and mallard (the latter two of which form part of the SPA/Ramsar site waterbird assemblage) which are recorded on The Haven near to the application site during the winter, when redshank would be roosting in peak numbers. Figures 2-1 to 2-6 depict the daytime and night-time modelled noise contours for the construction phase (with and without piling) and the operational phase of the Proposed Development.
- 1.8.178. The Applicant stated that the modelling indicated that the Cutts et al. thresholds were not exceeded and that the noise levels at which disturbance would occur did not extend beyond the proposed 250m monitoring zone, except during piling in the construction period. "Caution" noise levels were predicted to occur over at least 300m from the application site, including at the location of the redshank roost in the HMA. The Applicant highlighted that the piling period was seasonally restricted to June, July, August and September when temperatures are higher, daylight foraging opportunity for waterbirds is greater so energy budgets are less constrained, and several SPA waterbirds (particularly redshank) are recorded as absent or infrequent near the application site (according to the Autumn survey of waterbirds [REP3-019]). It also noted that data from the Autumn counts of non-breeding waterbirds at The Haven adjacent to the application site showed that some birds are present in the final week of September in similarly significant numbers to the main winter months, including ruff, and that the application site breeding bird and vessel disturbance surveys [REP01-026] showed that waterbird numbers on The Haven are considerably lower in April to July.
- 1.8.179. NE noted [REP5-013] that piling represented the highest risk activity. They agreed the proposed seasonal restriction would limit exposure to over-wintering birds and expressed support for it as a mitigation measure as long as it was appropriately secured. However, they

highlighted that peak numbers of redshank in the UK generally occur in September and suggested that, where possible, piling activity should first be undertaken in areas near to The Haven and in more distant areas later. They agreed that operational noise was unlikely to be detrimental to the redshank roosting site.

- 1.8.180. NE agreed with the Applicant's proposed monitoring during construction of a 250m zone and to reduce, pause or postpone works where bird disturbance occurred. It advised that the survey area should be increased if persistent disturbing noise levels extended more than 250m from the point source and advised that the risk zone for piling activities should extend to 450m until bird responses were known. They queried how this mitigation would be secured and suggested it should be in the DCO/ DML or a named plan.
- 1.8.181. The Ornithology Addendum [REP1-026] considered potential effects at the application site on redshank and the waterbird assemblage (for which it had identified an LSE) arising from habitat loss and disturbance through construction noise, vessel disturbance (visual, presence and noise during both construction and operation) and lighting.
- 1.8.182. In respect of vessel disturbance of redshank in Sections A and B (shown on Addendum Figure 3-2), the bird counts (between October 2019 and July 2021) showed that numbers at high tide frequently exceeded 1% of The Wash SPA population and exceeded 1% at low tide on two occasions (presented in Table 6-2). They were disturbed on 100% of the three high-tide periods watched during the baseline disturbance study at the application site in winter, with five vessel disturbance events witnessed. Two of the disturbance events were caused by large cargo vessels, one was caused by the transit of a pilot boat, and two were caused by transit of a fishing boat. The mean and peak numbers of redshank showing a disturbance response was 46 and 120 birds, respectively, which equate to approximately 1.1% and 2.8% of The Wash SPA population, respectively. Between February and July 2021 the number of redshank disturbed by vessels exceeded 1% of The Wash population during only one of the seven high tide periods monitored at the application site and was less than 0.2% on two of the periods. It was concluded that there was a high likelihood that any redshank roosting at Sections A and B will be disturbed by passing vessels.
- 1.8.183. It was observed that the response of redshank to vessels was predominantly to fly to an alternative site, estimated to be between 100m - 400m away in the vast majority of cases. In all cases involving a cargo vessel or pilot boat some roosting birds returned to their original location within 60 seconds. For one of the cargo vessel disturbance events this was undertaken by two birds compared to 13 that moved elsewhere; for the other cargo vessels this was 77 birds compared to 40 that moved elsewhere. It was concluded therefore that repeat disturbance to redshanks was a possibility at the application site.
- 1.8.184. It was explained that it was not apparent that there were alternative roost sites locally available to redshank which could potentially avoid

disturbance from vessel movements. The disturbed redshanks that relocated to alternative roost locations between 150 – 300m away moved between area Sections A and B, at both of which disturbance from vessels was recorded. It was anticipated that re-using the rocks from Section A to provide additional roosting areas in Section B would provide enough roosting habitat to support all of the redshank using this area but would not mitigate the disturbance in this area caused by the increased vessel numbers.

- 1.8.185. It was considered that given that the majority of vessels appeared to cause disturbance to the birds in this area it was likely that they were habituated to it. However, to offset the loss of saltmarsh and mudflat as a result of construction of the wharf in Section A, the Applicant was seeking areas in which habitat enhancement and creation could take place and these would be designed to also provide additional foraging and roosting habitat for redshank. Sites were being sought within 3.5km but as close as possible to the application site and would be of a suitable scale to support the redshank. It was intended that they would be secured and in place before construction of the Proposed Development began.
- 1.8.186. It was concluded that roosting redshank at the application site that were disturbed by vessels would be able to either resettle on the roosting area in Section B or relocate to the nearby alternative roost sites created to offset the habitat loss. The distances that vessel-disturbed redshank would be required to fly in relocating to the alternative roost sites was considered to be relatively small, based on a 1996 analysis of ringing data of redshank wintering in The Wash (Rehfisch et al., A Guide to the Provision of Refuges for Waders: An Analysis of 30 Years of Ringing Data from the Wash, England.) that demonstrated that redshank refuges (roost sites) should be no more than 3.5km apart to be within reach of at least 90% of individuals.
- 1.8.187. It was concluded that the additional vessel disturbance at the application site resulting from the Proposed Development would not compromise The Wash SPA conservation objectives for redshank. This was based on a number of premises. Redshank are absent from the application site area in spring and summer, and it was considered that those likely to show a disturbance response in winter form only a small proportion (on average 1.1%, largest event witnessed 2.8%) of the SPA population. It was thought that they were habituated to vessel disturbance. They would have access to additional alternative local roost locations created through the habitat loss offset measures by the time the increase in vessel numbers resulting from construction and operation occurred. The number of redshank at risk of disturbance from the predicted additional vessel movements was anticipated to be the same as that under baseline conditions. The great majority of the birds affected were thought to be roosting birds as vessel movements are restricted to high water; therefore the additional disturbance was not anticipated to materially affect foraging time and energy intake and expenditure rates. The birds affected by additional vessel disturbance were not likely to be exposed to a materially higher predation risk, as the range and density of potential

predators at the alternative roost locations within 1km of the roost site adjacent to the application site were unlikely to be materially different, and the additional time spent in flight (when individuals may be more vulnerable to birds of prey) was anticipated to be very small.

- 1.8.188. In relation to the waterbird assemblage at the application site, Table 6-3 of the Ornithology Addendum [REP1-026] presented the sources and rates of vessel-based disturbance to birds at the application site (based on the CiWB 2021 survey data contained in Appendix A3.1), according to vessel type and bird activity. It indicated that it was largely roosting birds which were disturbed by vessel activity, resulting from visual impacts of cargo and fishing vessels. Cargo vessels caused the majority of disturbance events for foraging and land-roosting birds, while pilot boats were a "*disproportionate*" source of disturbance to birds on the water or bathing. In respect of successive disturbance from cargo vessels it was observed (between March and July 2021) that the number of birds exhibiting a response on the first and second passages of a vessel did not strongly differ, indicating that repeat disturbance was possible at the application site.
- 1.8.189. It was considered apparent that there were alternative roost sites available to some of the assemblage species, (ie bar-tailed godwit, cormorant, curlew, herring gull, lesser black-backed gull, ruff and shelduck), which relocated 200 - 400m away from the application site, within Sections A and B (where disturbance had been recorded). Roosting cormorant and shelduck that were disturbed by vessels moved 500m or more to a new roost site. In a significant proportion of instances gull species and ruff returned to their original location after having taken flight, so there was a likelihood of repeat disturbance within a tide. It was considered that the flight distances to alternative locations were short and would not have a significant effect on the birds' energy usage.
- 1.8.190. It was stated that the proposed habitat offset measures and re-use of roosting rocks (in the HMA) would be designed to also provide additional foraging and roosting habitat for assemblage birds within the localised area. It was considered that this could provide refugia for species otherwise prone to repeat disturbance.
- 1.8.191. It was considered that the potential additional vessel disturbance from the Proposed Development would not compromise The Wash SPA conservation objectives in relation to the waterbird assemblage. This was based on similar premises to those in respect of redshank: the availability of alternative roosting locations (in Sections A and B and the wider local area) available to the birds; the proposed habitat loss offset measures; the view that the great majority were likely to be roosting birds and so the additional disturbance was not anticipated to materially affect foraging time and therefore energy intake rates; and the view that the affected birds were not likely to be exposed to a materially higher predation risk.

- 1.8.192. In respect of both the MOTH and the application site it was concluded that, based on the additional bird survey data, there was no change to the conclusion in the HRAR of no AEOI of the SPA/ Ramsar site.
- 1.8.193. In their initial comments [REP2-053] on the Ornithology Addendum [REP1-026] the RSPB requested that the Applicant provide noise contour maps representing the baseline and for noise resulting from the construction and operation of the Proposed Development.
- 1.8.194. The Applicant responded [REP2-006] that noise monitoring and thresholds and noise contour plots would be developed further and included in an updated OLEMS, which was submitted at D3 [REP3-007]. It had been revised to take account of the noise monitoring results and included information on proposed noise mitigation and monitoring measures.
- 1.8.195. In a summary of NE's position (post-D4) on the potential impacts on the SPA passage and overwintering birds NE welcomed the Applicant's provision of survey data for the wharf area along The Haven and stated that it demonstrated the importance of this area as supporting habitat for the SPA bird species [AS-002]. NE confirmed that its advice in respect of the need to mitigate direct habitat loss arising from the construction of the Proposed Development remained unchanged. They considered that if the impacts to the functionally linked land could be remedied within the existing functionally linked land the Applicant would have mitigated risks to the SPA features. However, they advised that if the proposed mitigation didn't satisfactorily minimise the impacts it would become an additional compensation issue.
- 1.8.196. The Applicant confirmed its view at D5 that there was no clear link between the redshank at the application site and the SPA/ Ramsar site population and that the application site was not functionally linked to the SPA [REP5-006 and REP5-008]. Notwithstanding, it referred to its proposed works to the HMA to ensure it was suitable for redshank, ruff and other bird species in the area and to its BNG proposals to provide additional habitat along The Haven for waterbirds.
- 1.8.197. The RSPB acknowledged [REP5-018] the latest survey reports (Sections A and B, August to October 2021) submitted by the Applicant [REP3-019] and stated that although redshank and ruff were of most concern to them the assessments also needed to consider other species, ie shelduck, oystercatcher, turnstone, lapwing, black-tailed godwit, curlew and the waterbird assemblage. They acknowledged that the provision of the HMA had potential to mitigate some of the impacts on redshank at the application site but considered that insufficient evidence had been provided to demonstrate that it would be an effective alternative roost, and that it did not address the loss of waterbird foraging habitat. They were of the view that it should be included in the compensation measures within the Applicant's derogation case.
- 1.8.198. The Applicant responded [REP6-032] that at the application site ringed plover, lapwing, cormorant, mallard, black-headed gull, herring gull,

lesser black-backed gull and great black-backed gull had been considered in the (shadow) appropriate assessment as part of the SPA waterbird assemblage. Dunlin, turnstone, oystercatcher, black-tailed godwit, curlew, grey plover and shelduck (individual SPA features) had not been included as counts had recorded them infrequently and in small numbers.

- 1.8.199. The RSPB responded at D9 [REP9-065] that although some features may have been recorded in small numbers such species should still be included in the assessment to ensure that a full assessment had been made of the SPA waterbird assemblage, particularly shelducks and turnstones, which have restoration targets.
- 1.8.200. On the basis of the above information, I am not satisfied that this LSE pathway will not result in an AEoI of these European sites from the Proposed Development alone and considers that a derogation under the Habitats Regulations is engaged. Commentary on this is provided in Sections 1.5 to 1.7 above.

The Wash SPA and Ramsar site - Disturbance to birds along The Haven

- 1.8.201. NE stated [AS-002] (post-D4) that the data collected for the assessment of the wider Haven area was insufficient to provide certainty of the potential effectiveness of any mitigation measures proposed along The Haven, for either land or water-based disturbance from existing activities and/ or potential for indirect changes from increased erosion due to the presence of the wharf and/ or increased boat traffic. It considered that the suitability of ornithological mitigation would need to be resolved, including the long-term management of mitigation areas, before any construction activities could commence. It advised that in the event that the DCO was granted a full set of pre-construction survey data covering a minimum of 12 months would be required to inform the discharge of any mitigation plan prior to the commencement of construction to ensure it remained fit for purpose for the lifetime of the Proposed Development.
- 1.8.202. The Applicant responded [REP5-008] that long term management of mitigation areas had been addressed in the updated OLEMS submitted at D3 [REP3-007]. Surveys of those areas would be undertaken once they were in place however their successfulness would only be known once construction had started as prior to this the birds would still be using the area.
- 1.8.203. At D9 the Applicant [REP9-027] stated that it was unclear to what pre-construction surveys NE were referring in [AS-002]. The HMA bird surveys had already been undertaken and had informed its development. Vegetation surveys prior to construction were proposed within the OLEMS [REP7-037]. Further bird surveys would be undertaken once the HMA was in place to ensure that it was delivering the anticipated benefit. The justification and rationale for any further surveys prior to the works to the HMA being undertaken, if that was to what NE were referring, were unclear. The requirement for further pre-construction surveys in the areas where it was proposed the without prejudice compensation sites would be located was understood.

- 1.8.204. The RSPB reiterated [REP5-018] their concerns set out in [REP4-026] that there was a significant gap in the Applicant's data on waterbird usage and the effect of disturbance between the application site and the MOTH. As a result adverse effects could not be discounted for DBBG, shelduck, wigeon, oystercatcher, avocet, ringed plover, grey plover, golden plover, lapwing, turnstone, redshank, black-tailed godwit, bar-tailed godwit, curlew, ruff and the waterbird assemblage. They considered that potential impacts could not be mitigated and that appropriate compensation measures were likely to be required to avoid an AEOI of the SPA and Ramsar site. They believed that a minimum of 12 months survey work would be required to develop the evidence base, followed by an additional 12 months survey work to inform annual variation in waterbird use.
- 1.8.205. The Applicant addressed the concerns about impacts on birds using the central section of The Haven at D5 [REP5-006]. As data for this stretch was unavailable it was undertaking winter 2021/ 2022 abundance and distribution surveys of SPA waterbirds (December 2021 to March 2022), the data from which would be made available during late March 2022. In the absence of information on whether SPA populations would be impacted it had assumed that this stretch of The Haven qualified as functionally linked land. It concluded that the proposed BNG/ compensation measures would provide alternative habitat for any birds that were displaced by any additional disturbance. It acknowledged in [REP5-008] that there was a lack of data for this area and highlighted that it was not included in the WeBS counts.
- 1.8.206. The RSPB commented that it was unclear what could be gained from a one-off survey effort, noting that a year-round survey over two years was standard and that one year of survey effort would not reveal potential variation between years [REP6-041].
- 1.8.207. The Applicant submitted a summary of the winter bird survey report at D8 [REP8-018] and the full report at D9 [REP9-032].
- 1.8.208. At D9 the RSPB [REP9-065] stated that the additional survey information provided did not adequately address its outstanding concerns regarding gaps in survey coverage for the central section of The Haven and that it remained an outstanding issue.
- 1.8.209. The Applicant stated at D9 [REP9-027] that the intermediate area of The Haven comprised very narrow intertidal habitats adjacent to the area where vessels would travel. It pointed to a previous assessment by NE (2018) of the potential for proposals for the ECP in this area to have a significant effect on the SPA features. That did not identify any sensitive areas for birds away from the main designated sites and the RSPB reserves apart from arable fields which are sufficiently far away from the area potentially disturbed by vessels. The Applicant also considered that the absence of WeBS count sectors in this area indicated that it was not a key area for birds.

- 1.8.210. The Applicant reiterated its arguments at D4 [REP4-014] in respect of vessel speed as set out at ISH2 and in [REP3-023]. It explained at D5 [REP5-004] that the PoB had stated that they would not agree to a speed limit within The Haven that compromised vessel safety. Therefore, vessels associated with the Proposed Development would have to conform to current practice in the Haven and adhere to a maximum speed limit of six knots.
- 1.8.211. The RSPB considered that this reinforced the need for compensation measures to address the impacts of vessel speeds as it was not possible for them to be adjusted to provide mitigation [REP6-041].
- 1.8.212. The Applicant responded [REP7-010] that vessel speed must comply with the navigational safety requirements of the PoB. It considered that the main impact relating to increased vessel speed was wave wash which rolls towards nearby birds and aggregations in the wake of a vessel movement, and explained that pilot boats were the fastest vessels and responsible for most wave wash. However, it pointed out that the number of cases of disturbance recorded during baseline surveys (ie, CiWB surveys) resulting from both the pilot boat and wave wash were relatively low, and considered that vessel speed was often secondary to visual presence in relation to bird disturbance. It drew attention to dDCO Schedule 9 Part 14(1)(3)(e), which requires that the NMP must include details of measures for managing disturbance to bird species according to the process set out in in the 'Technical Note for Navigation Management and Ornithology' [REP6-033]. This states that opportunities to manage vessel movements to reduce vessel speed would be considered. On this basis the Applicant did not agree that there was no ability or mechanism to consider vessel speed.
- 1.8.213. The RSPB noted [REP8-028] that Appendix 1 of the Applicant's HRA Ornithology Addendum [REP1-026] stated that speed restrictions for vessels using The Haven were an appropriate measure to manage disturbance to all key species assessed. However, it was concerned by the latest information in the updated oMMMP [REP7-003] that a speed limit could not be enforced and that vessels currently travel up to approximately 12 knots (but could be faster). It considered that any measure proposed to manage speed would not be mitigation because it could not be enforced.
- 1.8.214. The RSPB set out a number of concerns. The information on vessel speed was only included in the oMMMP and was not mentioned in documents relating to impacts on birds and their supporting habitats. Vessels travelling at 12 knots would generate a greater wash and more noise. Given the width of The Haven, this had significant implications for erosion of foraging and roosting habitats and the disturbance and displacement of birds. No evidence had been provided to enable these impacts on SPA and Ramsar site features to be assessed. The rock armour protecting the edge of The Haven in its upper reaches is not very high and no assessment had been made of whether vessel wash inundates this area and impacts on birds using the rocks and area behind it. This had serious implications for the effectiveness of the HMA if the area is inundated

when vessels pass as a result of the high speed and inability to mitigate impacts through speed restrictions. It was unclear how these higher speeds have been considered in the HRA for disturbance and displacement of waterbirds using The Haven, erosion of supporting habitats, scale and type of mitigation needed to avoid an AEOI, and scale and type of compensation measures needed to ensure the overall integrity of the NSN would be maintained. The change only heightened the RSPB's concerns about the potential effectiveness of the proposed HMA and failure of the Applicant to identify any compensation measures that could be considered to meet the ecological requirements of the impacted species. Clarity was needed on how it affected the HRA and derogation case.

- 1.8.215. The Applicant highlighted [REP9-033] that it had discussed potential erosion effects with the EA. It had submitted a response at D3 (V0.0) [REP3-020] to questions the EA had raised which was updated at D9 (V1.0) [REP9-024] to reflect the changes to maximum vessel speeds. The updated OLEMS (V2.0) [REP7-037] included a plan for monitoring erosion in the inter-tidal area, with which the EA were content. The EA confirmed in the final SoCG (V3.0) [REP10-032] that it was satisfied with the information provided in [REP9-024]. The Applicant referred [REP9-027] to the note of its meeting with the RSPB in February 2021, contained in the HRAR (V1.0) [AS-006], at which the RSPB stated that it was that the proximity of the larger vessels that caused the disturbance rather than ship wash. The Applicant stated that it recognised this and concluded that compensation measures that addressed visual disturbance were likely to be the most effective measures. Accordingly, it considered that an assessment based on a higher maximum speed with the same assumed number of vessels would result in similar conclusions to those previously made.
- 1.8.216. On the basis of the above information, I am not satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development alone and considers that a derogation under the Habitats Regulations may be engaged. Commentary on this is provided in Sections 1.5 to 1.7 above.

Lighting

- 1.8.217. The RSPB also raised a concern [RR-024] about the potential impacts of lighting for the Proposed Development on bird species using The Haven.
- 1.8.218. The Applicant responded in [REP1-035] that this was addressed in the HRAR and that artificial lighting would be targeted and minimised to only what was necessary to provide light for the operation of the Proposed Development; it was not anticipated that lighting would have an adverse effect on birds. In [REP2-006] the Applicant explained that R10 of the dDCO (Code of Construction Practice (CoCP)) [REP1-002] included the requirement for an artificial light emissions management plan during construction. It would detail the appropriate management and mitigation measures to be taken to manage artificial light emissions; outline details would be provided in the Outline CoCP. The Applicant highlighted its Outline Lighting Strategy [APP-124] that detailed the operational lighting

requirements. It stated that a lighting effects assessment would be undertaken and submitted to the Examination.

- 1.8.219. The RSPB responded that a more detailed assessment was required, particularly in respect of the wharf area [REP2-051 and REP4-026].
- 1.8.220. The Applicant addressed the RSPB's concerns and provided an assessment in its D5 HRA Update [REP5-006]. It concluded that lighting during construction and operation, including from vessels, was unlikely to affect foraging or the availability of roosting sites for SPA/ Ramsar site species, also taking into account the roosting area that would be provided in the proposed HMA.
- 1.8.221. In its comments on the Applicant's HRA update [REP5-006], NE [REP8-022] welcomed the commitment that the Lighting Strategy would be designed to ensure impacts on birds at the application site would be minimised.
- 1.8.222. On the basis of the above information, I am satisfied that this LSE pathway will not result in an AEoI of these European sites from the Proposed Development alone.

The Wash and North Norfolk Coast SAC

- 1.8.223. A description of the European site and its qualifying features, and the potential effects on integrity resulting from the Proposed Development, are provided in Sections A17.3 and A17.6 of the Applicant's HRAR [AS-006].
- 1.8.224. The Applicant's HRAR provided an assessment which addressed the potential for AEoI resulting from:
- collision risk for harbour seal - arising from changes in vessel traffic and movements during construction and operation;
 - disturbance to harbour seal - arising from increased underwater noise and changes in vessel traffic and movements during construction and operation;
 - in combination effects on harbour seal during construction; and
 - changes to air quality during operation on the SAC qualifying habitats (dealt with above).
- 1.8.225. These matters are discussed further below.

The Wash SAC - Harbour seals – collision risk

- 1.8.226. NE advised [RR-021] that recent monitoring of The Wash harbour seals population had demonstrated that the numbers in The Wash had significantly declined along with the national population and considered that a 5-10% further decline in the population would be an AEoI. They queried from where the predicted area of impact (10.46 km²) for harbour seals was derived and believed that the assessment of collision risk was based on outdated survey data (Russell et al, 2017). The HRAR refers to the 2017 (Russell) data and also to 2018 seal count data (Thompson) in relation to potential effects on seals arising from disturbance and collision

risk. The HRAR states that 2018 data was used and explains why it was considered that there was no need to update the assessment to take account of the most recent 2019 data.

- 1.8.227. The Applicant explained [REP1-035] that 10.46km² included the shipping channel from The Wash to the application site, and the vessel anchorage area (as described in the HRAR and ES Chapter 17 and shown on Figure 17.6 [APP-091]). It stated that at the time of writing the HRAR there was no evidence to suggest that there was a decline in the harbour seal population within The Wash, and no risk was anticipated due to the anticipated low level of activity (the only impact being an increase in vessels within The Wash) and the proposed mitigation to ensure that there was no risk (including vessel speed limits and observers on all vessels). Mitigation would be secured by the requirement in the dDCO for a NMP (dDCO Schedule 2, Paragraph 14).
- 1.8.228. The Marine Mammals Addendum [REP1-027] included an update to the assessments to reflect the most recently published baseline information (SCOS, 2020) on harbour seal counts in 2019 in The Wash and on reference populations. It also noted that in relation to at-sea harbour seal density an updated report had been published in 2020 (Carter et al.). However, that presented predicted distribution maps according to relative density (ie, percentage of the total at-sea population in each 5km x 5km grid at any one time) whereas Russell et al. presented absolute density (ie, number within each grid at any given time). It confirmed that the assessments in the Addendum relied on Russell et al. as it was considered that it represented the best available information on absolute harbour seal densities. It indicated that harbour seal usage was high in and around the shipping channel and the anchorage area (3.189 per km²), and lower within The Haven itself (0.80 per km²).
- 1.8.229. NE welcomed [REP2-043] the Applicant's consideration of the most recent seal count data. However they stated that there was no current evidence to suggest that the decline had plateaued and that they were working on an update to change the SAC conservation objective for harbour seals to "restore". On this basis they advised that a more precautionary approach must be taken and impacts which could further hinder the restore objective should be avoided, reduced or mitigated. They noted that the Marine Mammals Addendum and OMMMP [REP1-025] relied on Russell et al. (2017) rather than Carter et al. (2020) and requested that the assessment was updated accordingly.
- 1.8.230. In relation to the potential impacts of any increase in collision risk with vessels the Applicant stated [REP1-027] that, despite a significant decline in the population levels from the 2018 to 2019 counts, this resulted in only small changes in the percentage of the harbour seal population that could be impacted (from between 0.03 - 0.05% in the original assessment to between 0.05 - 0.07%) (although both the OMMMP and the final version of the HRAR [AS-006] state that 1.7 seals could be impacted, para A17.6.133 of the HRAR equates this to 0.04% of the SAC population). The Applicant considered that these changes were not significantly different from the original assessment and did not result in

any change to the overall magnitude levels and therefore no change to the impact significance.

- 1.8.231. At D4 the Applicant responded [REP4-014] in respect of NE's proposed change to the SAC conservation objectives that there was no publicly available information on this change, and that the current target set out in all relevant documents was to "*maintain*", against which the assessments within the HRAR had been undertaken. It stated that a precautionary approach based on worst-case scenarios had been applied to all of the assessments.
- 1.8.232. In relation to NE's comment that the harbour seal density numbers should have been based on Carter et al., the Applicant responded that it did not provide absolute density data as the updated seal density shapefiles were based on relative, not absolute, density estimates, unlike previous versions, such as Russell et al. Therefore it considered that Russell et al. provided the best available information.
- 1.8.233. NE [RR-021] considered that due to the elevation of the vessels and the need for views directly adjacent to the vessel in addition to the 360 degree views, the Applicant's proposal to have an observer on vessels as mitigation for potential collisions was unlikely to provide the required mitigation.
- 1.8.234. The Applicant initially responded [REP1-035] that, in addition to having an observer onboard, all vessels would be required to travel at no more than four knots when transiting through The Wash and The Haven, and considered that this speed limit would effectively reduce the potential for any harbour seal collision with a vessel. It updated this statement to explain that it had subsequently identified that this would not be possible due to minimum speed requirements for safety and manoeuvrability, and that therefore the vessel speed limit needed to be six knots in both The Wash and The Haven.
- 1.8.235. The Marine Mammals Addendum [REP1-027] explained that the outline mitigation measures as set out in ES Chapter 17 had been used to inform the OMMMP [REP1-025], which set out the measures proposed to mitigate the potential impacts of any physical injury or permanent auditory injury (Permanent Threshold Shift (PTS)) to marine mammals resulting from the construction and operation of the Proposed Development. It consolidated measures contained within the dDCO. These included: (non-dedicated) observers on board each vessel, monitoring for marine mammals as vessels travelled through The Wash and up The Haven; safety, weather and tidal conditions permitting, speed limits of six knots for all vessels travelling within The Haven and The Wash (considered to reduce the potential for fatal collisions with marine mammals); and, safety permitting, vessels would maintain the same course (if possible) and speed to give, if required, any seal time to avoid the vessels. These measures would form part of the NMP.
- 1.8.236. NE commented on the Applicant's proposed mitigation measures at D2 [REP2-042]. It acknowledged that vessel crew members have the

necessary training to be a Marine Mammal Observer (MMOB) but did not support having a non-dedicated MMOB as mitigation for a number of reasons: they would undertake this duty when not undertaking other work; due to the size of the vessels, they would not have 360-degree views looking away from the vessels and vertical views downwards adjacent to the vessel; and the cargo would be likely to obstruct the scan across the vessel. The LWT sought clarification [REP4-021] at D4 as to whether a MMOB would have a full view of the whole area around a laden vessel and whether the vessel would be able to change course to avoid a marine mammal should any be observed. It considered that the MMOB role should be undertaken by a dedicated crew member.

- 1.8.237. The Applicant responded [REP4-014] that the MMOB would be fully trained and may undertake other vessel duties while not required on watch or when the vessel was outside of The Wash or The Haven (as outlined in the OMMMP) but would be dedicated to undertaking the monitoring when required, such as when entering The Haven. They would be positioned to obtain the best view, and consideration would be given to having two MMOBs on some vessels.
- 1.8.238. In relation to vessel speeds, NE considered [REP2-042] that further justification was required that vessel speeds could not be reduced and that there was no evidence to demonstrate whether committing to six knot vessel speeds was mitigation or just the agreed vessel speed limit within The Haven.
- 1.8.239. At ISH2 and in [REP3-023] the Applicant stated that reductions in lethal collisions of marine mammals with vessels had been found where a 10 knot vessel speed restriction had been in place. It also referred to a study into the impact of icebreaking vessels on phocid seals, which found that the probability of collision was significantly increased with increasing vessel speed. At a speed of four knots or less the potential for collision was very low, however it increased significantly from six knots or higher. No further details of the studies were provided. The Applicant considered that there was no indication that a reduction from six knots to four knots would result in a further reduction to collision risk, however it would give rise to vessel safety and manoeuvrability concerns. It concluded that the evidence suggested that any speed below six knots provided a significantly decreased potential for collision.
- 1.8.240. The RSPB agreed with NE that the six knot speed limit would not constitute a mitigation measure and also commented that the Applicant had not identified how it would be enforced [REP3-033].
- 1.8.241. The Applicant reiterated its arguments at D4 [REP4-014] in respect of vessel speed as set out at ISH2 and in [REP3-023]. It explained at D5 [REP5-004] that the PoB had stated that they would not agree to a speed limit within The Haven that compromised vessel safety. Therefore, vessels associated with the Proposed Development would have to conform to current practice in the Haven and adhere to a maximum speed limit of six knots.

- 1.8.242. An updated OMMMP [REP7-003], was submitted at D7 to take into account PoB comments on vessel speed, which included additional references to and descriptions of monitoring measures. It stated that subject to the pilotage requirements for navigational safety and efficiency and application of the "safe speed" principle, vessel speeds "as low...as reasonably practicable" were to be encouraged within The Haven and The Wash. As the potential for fatal collision with marine mammals was shown to be significantly reduced at vessel speeds of under 10 knots, BAEF vessels would aim to travel below that.
- 1.8.243. The OMMMP explained that the PoB had advised that although there was currently a general advisory speed limit of six knots along The Haven (to mitigate erosion from wash) it was not subject to enforcement, and cargo vessels travelled at up to approximately 12 knots, slowing as they moved further up The Haven to between four - six knots near the Port itself. The current speed limit is "safe speed at all times" in accordance with the COLREGS. An enforced speed limit would be inconsistent with this, and would restrict the number of vessels able to transit to the Port on each tide and significantly increase the number of vessels within the anchorage area. Accordingly, the reference to the speed limit had been removed from the mitigation measures previously set out in the OMMMP.
- 1.8.244. Two monitoring options were proposed in the updated OMMMP: non-dedicated MMObs onboard all BAEF vessels transiting through The Wash and The Haven; and a land-based adaptive monitoring programme along the banks of The Haven (and potentially vessel-based within The Wash anchorage area) using observers to monitor all vessel and seal interactions over set periods. High-definition, underwater and infrared cameras at each of the observer stations could also be used. Monitoring would take place prior to and during operation (a year was suggested for each). If changes were observed in the presence and behaviour of harbour seal during these periods the monitoring programme may be extended. This would be decided in consultation with the MMO and NE and based on the recorded data.
- 1.8.245. In response to ExQ3.2.1.5, NE stated [REP8-021] that it did not agree that the mitigation proposed in the updated OMMMP would avoid effects on harbour seal. In [REP8-025] it confirmed that the majority of concerns raised in its RR and in [REP2-043] remained. It also pointed out that the impact significance had been determined based on EIA matrices rather than according to the Habitats Regulations. It suggested that a more precautionary approach, given the SAC conservation objective to restore and that the number of harbour seals was declining, was to acknowledge a potential impact pathway and adopt appropriate mitigation measures to remove an AEoI.
- 1.8.246. The Applicant responded [REP9-033] that, as stated at D4 [REP4-014), the assessments of the SAC features were based on the current Conservation Objective of "maintain" which was the information available when the application was submitted. While NE had previously stated their wish to update the Objectives to "restore" [REP2-043] there was no publicly available information relating to this. Given the predicted low

number of harbour seals that could be affected, and the relatively small potential ranges of effect, the Applicant considered there was no potential for an AEOI of the SAC. Mitigation would be implemented in any event to ensure as low a risk as possible and that any effect to the overall population would be insignificant.

- 1.8.247. NE [REP8-025] stated it was unable to support use of non-dedicated MMObs. In addition to points it had previously raised about this measure, it considered that due to the length of time marine mammals spend underwater it is unlikely that a single non-dedicated individual would be able to detect signs of a marine mammal being present, especially during poor visibility and high sea states. It also questioned the ability of observers to detect seals in front of the vessels so that vessels would slightly alter course, and stated that the space in the Haven could not allow anything other than a direct route along the deepest part of the river. It noted that vessel speed restrictions had been removed from the OMMMP and so could not be relied upon as mitigation. In relation to monitoring, NE stated that the suitability of the chosen locations would need to be evidenced to demonstrate that there is the most likelihood of monitoring vessel interactions; and where that evidence was limited the Applicant should increase the number of observation points.
- 1.8.248. At D9 NE [REP9-063] referred back to the comments contained in its D8 response [REP8-025]. It remained concerned about the lack of secured vessel speed restrictions and considered it imperative that there were no additional impacts which could further reduce the harbour seal population, given that it was already declining.
- 1.8.249. At D9 the Applicant confirmed [REP9-027] the PoB advice that there was an advisory speed limit of six knots along The Haven that was not subject to enforcement, and highlighted that the implications of this change for harbour seal were set out in the updated OMMMP [REP7-003].
- 1.8.250. The Applicant [REP9-033] referred to the statement in the OMMMP that BAEF vessels would aim to travel at below 10 knots, where it was safe to do so, and considered this would help to reduce potential impacts on marine mammals. It was secured by DCO DML Condition 17, which requires the approval of a final MMMP which must be substantially in accordance with the OMMMP. In addition, the NMP secured by DML Condition 14 would include measures for managing potential risks to marine mammals in accordance with the approved MMMP. In respect of monitoring, if fixed points were progressed as the preferred approach the monitoring plan would be designed to maximise the potential for monitoring interactions. If a camera system was used, cameras would be placed on land rather than vessels. Observers would be placed in locations with maximum potential for monitoring interactions. As stated in the OMMMP and DML Condition 17, the final MMMP, which included monitoring options, would be finalised in consultation with NE. At D10 the Applicant confirmed [REP10-020] its position that the additional vessels would not impact on the harbour seal population and that the mitigation contained in the OMMMP was sufficient to address IP concerns.

- 1.8.251. NE provided a response at D10 [REP10-036] to Question 5 in the Rule 17 letter issued 30 March 2022 [PD-015], requesting that NE clarify the locations where it considered there would be an AEOI in relation to seal. It considered that there were impact pathways from interactions with vessels in The Haven and The Wash which would not be fully mitigated by the Applicant's proposals.
- 1.8.252. In its final comments on vessel speed limits [REP10-038] NE stated that its concerns remained. It highlighted that the reference to vessels travelling at four or six knots had been removed from relevant documents [REP9-010, REP9-020, AS-005 and REP8-011] and replaced with references to 10 or 12 knots and travelling at a 'safe speed' as defined by COLREGS, which relates to navigational safety, not ecological impacts. The reduced vessel speed had previously been identified in the relevant documents as mitigation but the assessments had not been updated to consider the potential impacts of its removal. It had been indicated that the NMP secured by DML Condition 14 (dDCO Schedule 9) would control vessel speeds but the NMP template (V1.0) [REP8-011] contained no details of a speed limit and how one would be enforced. NE concluded that a WCS of a 12-knot vessel speed should be used to inform the assessments and that in the absence of a speed restriction, and vessels potentially travelling at 12 knots, the mitigation proposed by the Applicant could not be relied upon to sufficiently minimise impacts. It also confirmed that the same considerations applied to the potential effect of vessel wash on intertidal habitats.
- 1.8.253. In response to Question 5 in my Rule 17 request [PD-015] about mitigation to avoid/ reduce collision risk for harbour seal, the Applicant stated that the assessments contained in ES Chapter 17 (V1.0) [REP9-011] and the HRA Marine Mammals Addendum (V1.0) [REP9-020] did not indicate that there would be any significant effects on marine mammals during construction or operation of the Proposed Development. Neither did the HRA indicate that there would be an AEOI on the SAC as a result of increased vessel presence. It explained that the measures within the OMMMP (V2.0) [REP7-003] (with which the final MMMP must substantially accord) were provided on a precautionary basis. The OMMMP states that vessel speeds "*as low as reasonably practicable*" are to be encouraged and BAEF vessel speeds should aim to be below 10 knots. The Applicant believed that this would help reduce any potential impacts on marine mammals, together with the other mitigation secured by DML Condition 17 (MMMP) and the measures (which must accord with the MMMP) included in the NMP secured by DML Condition 14.
- 1.8.254. The Applicant noted that there was no evidence to indicate that the recent decline in the harbour seal population in The Wash area was related to vessel activity and that the PoB had no recorded instances of vessel collision with harbour seal. It also commented that although NE had stated that there was anecdotal evidence of negative interactions between harbour seals and vessels within The Wash it had not provided any supporting evidence.

1.8.255. I do not consider that the assessment of impacts on harbour seal has considered the potential worst case operational scenario in the light of the revised information on speed limits in The Haven and The Wash, or that sufficient mitigation has been proposed to avoid an AEOI on harbour seal. I am also not convinced by the effectiveness of the proposed MMObs to spot seals in The Haven and implement course corrections. In the absence of the ability to enforce a speed limit and therefore no certainty that vessels could or would reduce their speed to minimise the risk of collision, and on the basis of the above evidence, I am not satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development alone.

The Wash SAC - Harbour seals - disturbance

1.8.256. In relation to the piling needed to construct the wharf at the application site, NE considered [RR-021] that, whilst appropriate for birds, the proposal to undertake the noisiest activities, such as piling, during periods less sensitive to birds using the mudflats and saltmarsh (ie, between May and September) didn't take into account impacts to harbour seals when they are at their most vulnerable during the pupping and moulting period, ie June to August. NE also advised that if a hammer piling technique was used, mitigation measures would be required for marine mammals if works were undertaken outside of low tide.

1.8.257. LWT also raised a concern that the impacts on harbour seal had not been adequately assessed in relation to visual and noise disturbance from vessels and piling activity, particularly during the breeding, pupping and moulting periods [RR-011].

1.8.258. The Applicant confirmed [REP1-035] that the piling assessment was based on WCS assumptions for the piling works using the latest (published) thresholds for potential impacts to harbour seal, and therefore impacts were expected to be lower than predicted by the assessments. It considered that piling at the application site was not expected to cause a significant effect on harbour seals who are pupping or moulting as there was no evidence to suggest that either occurs within The Haven. Information was provided in ES Chapter 17 [APP-055] on the number of pups born in the most recent yearly count (2018) at the closest sites to the vessel anchorage and corridor. The Applicant explained that the closest of these sites was 840m from the vessel areas, beyond the distance at which disturbance had been recorded for harbour seal (less than 600m) in a study of the reactions of harbour seal from cruise ships (Jansen et al., 2010). The Applicant considered that therefore there would be no potential for the increased presence of vessels to cause disturbance to pupping sites or flight into the water.

1.8.259. It was stated in the Marine Mammals Addendum [REP1-027] that the updated data resulted in only small changes to the original assessment of the percentage of the harbour seal population that could be impacted by underwater noise from piling and dredging activities during construction (an increase from between 0.000005 - 0.01% to between 0.000006 - 0.015%, presented in Addendum Table 5-1). It was considered that these were not significantly different and resulted in no change to the

overall magnitude levels and therefore no change to the impact significance concluded in the original assessment.

- 1.8.260. OMMMP Table 2-1 [REP1-025] contains a summary of the assessment of potential impacts from underwater noise resulting from piling and dredging activities during construction (and from collision risk during construction and operation) and the proposed mitigation. It is explained that the outline mitigation measures as set out in ES Chapter 17 had been used to inform the OMMMP and comprised a pre-piling watch for marine mammals (when piling activities are undertaken within three hours of high water) which would follow the standard Joint Nature Conservation Committee (JNCC) Protocol (2010) for minimising the risk of injury to marine mammals from piling noise, and soft-start and ramp-up procedures for piling activities undertaken within three hours of high water. These measures would form part of the NMP (significant levels of noise were not anticipated from piling undertaken during low water due to the water levels at the application site during that period). In the updated OMMMP [REP6-021] the references to within three hours of high water in respect of the pre-piling watch and soft-start and ramp-up procedures had been removed from the main text (but remained in the title of the piling mitigation protocol set out in Box 1).
- 1.8.261. In relation to disturbance from vessel noise during construction and operation, the updated data resulted in a small increase in potential impacts on harbour seal, which increased the change in the predicted overall impact significance from 'negligible' to 'negligible to minor'. It was considered that this was not a significant impact and did not change the overall conclusions of the original assessment, and that with the proposed measures in place to reduce the potential for disturbance to harbour seal the impact would be reduced to negligible.
- 1.8.262. The Applicant acknowledged [REP1-035] that harbour seals had been reported swimming within The Haven and observed to occasionally haul out on the sandbanks along its edges. It stated that mitigation would be put in place to ensure there would be no potential for auditory injury to seals, including the use of soft-starts and ramp-up for any piling undertaken during high tides. It explained that piling during low tide was not expected to generate significant levels of underwater noise due to the limited potential for noise propagation in very shallow water. The mitigation would include a piling pre-watch by a fully JNCC accredited observer over an area of up to 500m, following the standard JNCC guidelines for reducing injury to marine mammals from piling works. The mitigation is contained within the OMMMP. It was noted in the Marine Mammals Addendum that there has been no change to the information on harbour seal haul-out sites and so there was no change to the assessments relating to haul-out sites.
- 1.8.263. An updated version of the REAC was submitted at D1 that included reference to the Marine Mammals Addendum [REP1-027] and OMMMP [REP1-025] and the post-consent MMMP and NMP. An updated version of the dDCO [REP1-003] was submitted that included, in the DML contained in Schedule 9, updated and new provisions in respect of marine

mammals. Condition 13 (Piling) had been updated to require the (post-consent) piling method statement to include measures that were in accordance with the OMMMP. Condition 14 (new) required the NMP to include measures for managing potential risks to marine mammals in accordance with the MMMP. Condition 17 (new) required that the MMMP to be submitted to the MMO for approval must be in accordance with the OMMMP.

- 1.8.264. In response to ExQ2.10.0.1 [PD-010] the Applicant provided at D6 a 'Technical Note for Navigation Management and Ornithology' [REP6-033]. It explained that this was in the absence of submitting an outline NMP to the Examination as a NMP would be produced once a principal contractor had been appointed post-consent and it was considered that a draft version would not contain sufficient detail to inform HRA matters. It stated that the NMP would take into account the mitigation proposed in the finalised HRA documents at the end of the Examination, the measures in the approved MMMP and any decision by the SoS on compliance with the (HRA) regulations and the likelihood of an AEoI. It considered that the process set out in the Note, secured by the DCO, would result in practicable and appropriate navigation management to ensure that an AEoI was not triggered. Regular monitoring and reporting would feed into adaptive management and the NMP would be updated as necessary throughout construction and operation. Article 14(1) of the dDCO required that NE were consulted on the NMP (including future iterations) in respect of birds and marine mammals.
- 1.8.265. NE commented at D9 [REP9-063] that the NMP should be considered during the consenting phase in order to provide the SoS with the necessary confidence that the AEoI would be managed. The Applicant responded [REP10-020] that it and the PoB considered that the post-consent ongoing development of a NMP and NRA was the most effective way to mitigate impacts on navigation safety, and consequently on ornithological features. This was because it allowed ongoing consultation with relevant parties and enabled them to respond to the detailed design, construction and operational proposals. The Applicant highlighted that this was consistent with the approach adopted by the EA (and agreed with the PoB) for the Boston Barrier Order 2017.
- 1.8.266. NE commented on the Applicant's proposed mitigation measures at D2 [REP2-042]. It advised that JNCC's 2010 guidance was developed to mitigate impacts resulting from large scale piling operations for offshore windfarm arrays. The smaller (pin) pile for the Proposed Development was likely to be installed before the completion of the 20 minutes soft start and the maximum hammer energy was likely to be reached almost immediately with no ability to ramp up. Therefore, this was not appropriate mitigation. It recommended that the Applicant further consider non-impact piling, such as vibro piling, and questioned whether piling could be restricted to low tide only, thereby negating the need for MMObs.
- 1.8.267. LWT highlighted NE's comments about soft start up procedures and considered that the Applicant should provide information to support use

of this as mitigation [REP4-021]. It considered at D4 that specific piling methodology, further underwater noise modelling, and assessment of the potential effects piling may have on harbour seal was still required and questioned if piling could be limited to low tides only.

- 1.8.268. The Applicant acknowledged [REP4-014] that a full soft start and ramp-up procedure may not be possible and referred to the information contained in para 3.2.5 of the OMMMP [REP1-025] in that event. This explained that the piling would commence with hammer energies as low as is reasonably practical, with a ramp-up to full hammer energy for as long a period as is possible. Monitoring for marine mammals would be undertaken prior to all piling and until a marine mammal was outside of the mitigation zone for 20 minutes and the full 30 minute pre-piling watch had been completed. The Applicant stated that this was the approach used for similar scale pile driving for wharf/ harbour developments. (The D7 updated OMMMP [REP7-003] renamed the mitigation zone as the monitoring zone.)
- 1.8.269. In relation to consideration of non-impact piling the Applicant stated that a full review of potential pile and installation techniques would be undertaken once the final design of the Proposed Development was confirmed and geotechnical information compiled. Any possible alternative piling options would be investigated further and confirmed in the final MMMP.
- 1.8.270. In respect of restricting piling to low tide, the Applicant explained that this would require the piling period to be extended from the proposed period, which would potentially result in impacts on ornithological and fish receptors. It was not therefore possible to commit to only piling at low tide. However, it considered that the mitigation set out in the OMMMP would reduce the risk to marine mammals to an acceptably low level.
- 1.8.271. NE advised [REP2-042] that the advice on using MMObs had been updated and that project-specific underwater noise modelling should be undertaken at the wharf location to determine the PTS Zone rather than adopting the 500m observational zone as proposed by the Applicant. It noted the Applicant's statement that, due to a bend in the river, observations to the North (at the wharf location) would only be at a distance of 110m but as this was greater than the 90m PTS range for seals this was unlikely to cause concern. NE did not support this conclusion and requested that further modelling and evidence was presented. LWT also took the view that underwater noise modelling should be undertaken at the wharf site to determine the PTS Zone, rather than adopting the 500m zone [REP4-021]. It requested that the Applicant justify the PTS range being set at 90m.
- 1.8.272. The Applicant responded [REP4-014] that the final MMMP would be developed post-consent, in consultation with the MMO and NE, once final piling design and methodologies are known. If required, it would include any site-specific underwater noise modelling to determine the PTS maximum impact range and the range over which monitoring by the

MMObs would need to be undertaken. The Applicant submitted an updated OMMMP [REP6-020] at D6 to address comments made by the NE and the MMO, as explained in [REP4-014]. It included additional details of the information that would be included in the MMMP and confirmed the revised provision that piling would be undertaken between June and September only.

- 1.8.273. NE [REP2-042] did not support the use of Passive Acoustic Modelling (PAM) as mitigation during times of poor visibility, as proposed by the Applicant. They advised that PAM are used to detect clicks and vocalisations of cetaceans but that harbour seals do not vocalise like cetaceans, and therefore considered that it was unsuitable mitigation. It recommended that piling was not undertaken during periods of poor visibility. LWT noted that PAM is generally used to detect cetaceans in low visibility conditions rather than pinnipeds like harbour seal, and also considered that it was not appropriate mitigation [REP4-021]. It also suggested that piling operations should be halted during periods of low visibility.
- 1.8.274. The Applicant stated [REP4-014] that piling (from June to September) would only take place in the daytime, from 7am – 7pm or 8am – 8pm, for up to 83.5 days in total. It explained that the limitations of using PAM, especially for seals, had been considered and that it had been included in the OMMMP on a precautionary basis and was unlikely to be relied upon. Where possible, piling would not be undertaken during periods of poor visibility or at night, when MMObs are unable to monitor the area. In the updated OMMMP [REP6-020] the unsuitability of PAM had been acknowledged and the reference to its use had been removed.
- 1.8.275. In relation to haul out, the Applicant stated at D9 [REP9-027] that while there was the potential for a small number of seals to be present within The Haven, the core haul-out sites are located only within The Wash, and it is only those sites that are used for breeding, pupping, and rearing pups. The closest haul-out site to the application site is at least 8km away.
- 1.8.276. In response to ExQ3.2.1.5 [PD-013], NE [REP8-021] stated that it disagreed that the mitigation proposed in the OMMMP would avoid effects on harbour seal. In [REP8-025] it reiterated its comments in respect of soft-start piling about the Applicant's reliance on JNCC 2010 guidance and that it was not appropriate for the Proposed Development. In relation to MMObs at the wharf site it welcomed that project-specific underwater noise modelling would be undertaken to determine the PTS Zone rather than adopting the 500m observational zone. However, it noted that the Applicant had highlighted that, due to a bend in the river to the North, the monitoring zone for some piling locations could be 150m radius. NE's concerns about this mitigation measure would remain until modelling and evidence was presented. It suggested that other mitigation measures to minimise underwater noise impacts, such as non-impact piling (ie, vibro piling) should be further considered.

- 1.8.277. The Applicant [REP9-033] drew attention to the acknowledgement in the OMMMP [REP7-003] that full soft-start and ramp-up procedures may not be possible. It explained that once the final pile design was available the potential soft-start and ramp-up procedures would be based on that, in consultation with NE, as secured under DML Conditions 13 and 17. It was confident that these measures were sufficient to address concerns about the potential for effects on marine mammals. The potential would be investigated for reduced strike rate rather than reduced hammer energy as an alternative soft-start and for non-impact piling, eg vibro-piling. As provided in the OMMMP, if required, site-specific underwater noise modelling would be undertaken to determine the PTS zone for harbour seal. The final piling mitigation would be designed to ensure that there were no individuals within that zone. If required, the option for additional observers to be located around the bend in the river would be investigated, however the bend is likely to form an effective barrier to sound movement around it. Due to the bend in the river being north of the piling location, inshore of the entrance to The Wash, the Applicant considered that it was highly unlikely that any harbour seal would be present.
- 1.8.278. NE provided a response at D10 [REP10-036] to Question 5 in the Rule 17 letter issued 30 March 2022 [PD-015] which asked it to clarify the locations where it considered there would be an AEOI in relation to seal. It considered that there would be impact pathways from underwater noise in the Haven and The Wash which would not be fully mitigated by the Applicant's proposals.
- 1.8.279. I note that [REP9-020] used updated seal count data to conclude that up to 0.015% of the harbour seal reference population could be impacted by underwater noise from piling and dredging activities during construction. I am satisfied, on the basis of the proposed mitigation measures set out in the OMMMP [REP7-003] and secured by Conditions 13, 14 and 17 of the DML contained in dDCO Schedule 9 [REP10-004] that there can be sufficient certainty at this stage that the proposed measures would be effective in avoiding or minimising auditory injury to the SAC population harbour seal during construction. I am satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development.

The Wash SAC - Harbour seals – impacts within the anchorage area

- 1.8.280. NE stated [RR-021] that consideration of impacts to the SAC from anchorage in The Wash whilst waiting for an appropriate tidal window to enter The Haven had been omitted from the assessment. In particular, they were concerned about the potential for seal pups to become entangled in propellers and anchor chains and requested that consideration was given to a requirement for all vessels associated with the Proposed Development to have guarded propeller ducts.
- 1.8.281. The Applicant responded [REP1-035] that the vessels using the anchorage areas would use the same methods as currently used in this

area and that harbour seal, due to their small size, were not considered to be at high risk of entanglement in anchor chains.

- 1.8.282. The Marine Mammals Addendum [REP1-027] included an assessment of risk to adult and pup harbour seals as a result of interactions with vessels within the anchorage area awaiting a suitable tidal window. It also included an assessment of the overall effect on the integrity of the SAC in relation to the conservation objectives for harbour seal. It was considered highly unlikely that vessels would remain stationary (through the use of dynamic positioning (DP)), within the anchorage area, due to the high levels of fuel that would be required by this method. In the rare event that DP was used, it was concluded that the information available (based on a desk-based review of the risk) and resultant assessment indicated that it would be unlikely for any seal (adult or pup) to be at increased risk of collision with DP propellers. This conclusion also relied on the view that harbour seal are very rarely attracted to vessels (Onoufriou et al.) and that any corkscrew injuries were more likely to be a result of grey seal predation than the use of DP or ducted propellers.
- 1.8.283. Similarly, in respect of entanglement in anchor chains, it was concluded, based on the additional information within the Addendum, that there would be no risk to harbour seals. It was stated that no information was available to support any view that harbour seal pups were more at risk from vessels within the anchorage area than adults, and that therefore the assessments were relevant to both harbour seal adults and pups.
- 1.8.284. A summary of the conclusions of the updated assessments of potential effects on harbour seal is provided in Table 5-2 of the Marine Mammals Addendum. It was concluded that without taking the proposed mitigation into account that there was no potential for adverse effects on The Wash and North Norfolk Coast SAC in relation to the conservation objectives for harbour seal.
- 1.8.285. The Applicant stated at ISH2 and in [REP3-023] that DP systems are not generally fitted to cargo vessels and that the PoB harbour master had confirmed that no vessels calling at the port had such systems onboard.
- 1.8.286. NE agreed [REP2-042] that there was unlikely to be a significant effect if anchorage was used rather than DP and suggested that the DCO include a 'condition' that only permitted the use of anchors within the Boston Anchorage Area whilst waiting for optimum tidal windows to enter The Haven. They advised that any use of DP should require ducted propellers. LWT made the same suggestion at D4 [REP4-021].
- 1.8.287. The Applicant reiterated [REP4-014] at D4 the points it made in [REP3-023] and stated that DP was used only on specialist vessels, eg drill ships and rock dumping vessels, in order to hold their position in carrying out their work.
- 1.8.288. In relation to the Applicant's reliance on Onoufriou et al. (2016) to demonstrate that seals are not attracted to vessels in open seas, NE noted that its staff had observed seals and seal pups approaching several

vessels associated with the Lincs Offshore Wind Farm cable installation within The Wash, and that fishing vessels often have regular interactions with seals [REP2-043]. They commented that it would be helpful if further evidence from The Wash colony could be presented to demonstrate whether seals do avoid interactions with vessels within the SAC, thus reducing collision risk.

1.8.289. In response the Applicant stated [REP4-014] that an extensive review of the literature on harbour seal and vessel co-existence had not found any evidence to support seals being attracted to vessels specifically within The Wash and asked NE to provide any such reports/papers to inform any further response. It noted that it was plausible that the seals could be attracted to vessels with the potential to provide a food source but explained that this would not apply to cargo vessels.

1.8.290. At D9 the Applicant reiterated [REP9-027] points it had made in [REP8-014] about anchoring. It explained that the need for anchoring for vessels associated with the Proposed Development would be less than for other large vessels associated with current commercial shipping because of the nature of its operation. The vessel movements would be more predictable and should require significantly less time at anchor than vessels that arrive on a spot basis. It was in the Applicant's interests not to have vessels at anchor so would be managed by routinely matching arrival times with tidal windows to keep anchoring to a minimum.

1.8.291. On the basis of the above information, I am satisfied that this LSE pathway will not result in an AEOI of these European sites from the Proposed Development alone.

The Wash SAC - Harbour seals - in combination effects

1.8.292. The Applicant addressed potential in combination effects arising from the Proposed Development within HRAR Section A17.5 [AS-006]. The HRAR explained that, due to the wide-ranging nature of the harbour seal, which may forage at considerable distance from their principal haul-out site, there was the potential for ICE from projects at a greater distance from the application site. Therefore, projects that were within the same reference population and that had the potential to overlap temporally were screened in for further assessment.

1.8.293. The Applicant considered whether there could be an ICE during construction arising from the Viking Link Interconnector project together with the Proposed Development on the SAC harbour seal population, resulting from underwater noise (from piling and dredging) and an increased risk of vessel collision. It concluded that there would not be an AEOI. In relation to underwater noise this was on the basis of the conclusion of the Viking Link project that a negative effect was unlikely, the mitigation that would provide, and the predicted "very low" number (up to 33.4% harbour seals which equates to 1% of The Wash and North Norfolk SAC population) of the SAC seal population that could be at risk from the Proposed Development. In respect of collision, the Viking Link project predicted that the likelihood was very low and the WCS for the

Proposed Development was that 1.7 seals could be affected. This conclusion was not questioned by IPs.

- 1.8.294. I am satisfied, on the basis of the evidence provided by the Applicant, and the predicted WCS of the number of seals that could be affected, that this LSE pathway would not result in an AEOI of the SAC from the Proposed Development in combination with other plans and projects.

APPENDIX D: CONSIDERATIONS FOR THE SECRETARY OF STATE

APPENDIX D: CONSIDERATIONS FOR THE SECRETARY OF STATE

The Table below lists several matters which do not affect the Examining Authority's (ExA's) recommendation based on the evidence available at the close of the Examination, but the Secretary of State (SoS) may wish to consider them should the decision on the application for development consent differ from the ExA's recommendation.

The Section reference is provided to signpost where more details about the issue can be found.

Section Reference	Unresolved Issue
	<p>Habitats Regulations Assessment (HRA) matters essential to resolve before development consent can be granted</p>
6.10	<p>The Applicant to provide evidence of agreement with each of the landowners that the three proposed compensation sites can be secured and certainty that the land can be used by the Applicant for the purposes proposed.</p>
6.10	<p>Information on the nature of each of the proposed compensation sites in terms of:</p> <ul style="list-style-type: none"> • land survey data; • suitability of the habitat to effectively address the ecological requirements of the affected individual species and that this does not displace qualifying species of the designated sites; • carrying capacity; • planning permission and other consents and licences required before they could be utilised as compensatory habitat; and • a Proposed Development construction timetable which allows for the design, delivery and implementation of fully ecologically functional compensation measures before the predicted adverse effect(s) occur.
6.10	<p>What other mitigation measures does the Applicant propose to minimise collision risk impacts on harbour seal during operation due to:</p> <ul style="list-style-type: none"> • the absence of the ability to enforce a speed limit and therefore no certainty that vessels could or would reduce their speed to minimise the risk of collision; and • to improve the effectiveness of the proposed Marine Mammal Observers to spot seals in The Haven and implement course corrections.

6.10	Commentary and evidence of agreement, where possible, from relevant Interested Parties/ consultation bodies on the final compensation proposals.
6.10	If the SoS determines that the habitat lost as a result of the construction of Work No. 4 does not result in an adverse effect on integrity, then text in Schedule 9 (Deemed Marine Licence) should be included in the Development Consent Order (DCO), and the text in paragraph 11 of Schedule 11 should be deleted. The Applicant's Final Schedule of Changes to the draft Development Consent Order [REP10-021] points 4 and 9 refer.
6.10	The Applicant to provide further evidence with regards to the case for Imperative Reasons of Overriding Public Interest (IROPI).
	Natural England's (NE) advice on air quality issues
5.2.32	NE to update its advice on air quality issues since Deadline (D)5.
	England Coast Path diversion
5.11.20	The Applicant to provide a detailed plan of NE's suggested alternative to the proposed diversion route [REP2-047] – see Figure 1. This is described in [REP5-015] as: <i>"This alternative would continue with approximately 200m of the northern section of BOST/14/4 and introduce a short new section of footpath (110m) which would join BOST/14/11."</i> (My recommended changes to Schedules 4 and 6 of the draft DCO refer).
	Crown Land
8.3.4	The Applicant to provide evidence of: "The Crown Estate have provided consent pursuant to s135(2) of PA2008 by email to the Planning Inspectorate on 6 April 2022."

APPENDIX E: THE RECOMMENDED DCO

202[] No. 0000

INFRASTRUCTURE PLANNING

The Boston Alternative Energy Facility Order 202[]

Made - - - - 202[]

Coming into force 202[]

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An application under section 37 of the Planning Act 2008(a) (the “2008 Act”) has been made to the Secretary of State for an order granting development consent in accordance with the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009(b).

The application has been examined by the Examining Authority appointed by the Secretary of State pursuant to Chapter 3 of Part 6 of the 2008 Act and carried out in accordance with Chapter 4 of Part 6 of the 2008 Act and the Infrastructure Planning (Examination Procedure) Rules 2010(c). The Examining Authority has submitted a report and recommendation to the Secretary of State under section 83(d) of the 2008 Act.

The Secretary of State has considered the report and recommendation of the Examining Authority, has taken into account the environmental information in accordance with regulation 4(e) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 and has had regard to the documents and matters referred to in section 104(2) of the 2008 Act.

The Secretary of State, having decided the application, has determined to make an order giving effect to the proposals comprised in the application on terms that in the opinion of the Secretary of State are not materially different from those proposed in the application.

In accordance with section 127(f) of the 2008 Act, the Secretary of State has applied the relevant tests and is satisfied that they have been met.

Accordingly, the Secretary of State, in exercise of the powers in sections 114, 115, 120, 122 and 123 of the 2008 Act, makes the following Order—

PART 1

PRELIMINARY

Citation and commencement

1. This Order may be cited as the Boston Alternative Energy Facility Order 202[] and comes into force on [] 202[].

Interpretation

2.—(1) In this Order, unless otherwise stated—

“the 1961 Act” means the Land Compensation Act 1961(g);

“the 1965 Act” means the Compulsory Purchase Act 1965(h);

(a) 2008 c. 29. The relevant provisions of the 2008 Act are amended by Chapter 6 of Part 6 of, and Schedule 13 to, the Localism Act 2011 (c. 20).

(b) S.I. 2009/2264, amended by S.I. 2010/439, S.I. 2010/602, S.I. 2012/635, S.I. 2012/2654, S.I. 2012/2732, S.I. 2013/522, S.I. 2013/755, 2014/469, 2014/2381, 2015/377, 2015/1682, 2017/524, 2017/572 and S.I. 2018/378.

(c) S.I. 2010/103, amended by S.I. 2012/635.

(d) 2008 c. 29. Section 83 was amended by paragraphs 35(2) and 35(3) of Schedule 13(1) and paragraph 1 of Schedule 25(20) to the Localism Act 2011 (c. 20).

(e) S.I. 2017/572.

(f) 2008 c. 29. Section 127 was amended by section 23,(2)(a), 23(2)(b) and 23(2)(c) of the Growth and Infrastructure Act 2013 (c. 27) and by paragraphs 64(2) of Schedule 13(1) to the Localism Act 2011 (c. 20).

(g) 1961 c. 33.

(h) 1965 c. 56.

“the 1980 Act” means the Highways Act 1980(a);

“the 1981 Act” means the Compulsory Purchase (Vesting Declarations) Act 1981(b);

“the 1984 Act” means the Road Traffic Regulation Act 1984(c);

“the 1990 Act” means the Town and Country Planning Act 1990(d);

“the 1991 Act” means the New Roads and Street Works Act 1991(e);

“the 2008 Act” means the Planning Act 2008(f);

“access and rights of way plan” means the plan of that description certified by the Secretary of State as the access and rights of way plan for the purposes of this Order under article 47 (certification of documents, etc.);

“address” includes any number or address used for the purposes of electronic transmission;

“AOD” means above ordnance datum;

“apparatus” has the same meaning as in Part 3 (street works in England and Wales) of the 1991 Act;

“authorised development” means the development described in Schedule 1 (authorised development) and any other development authorised by this Order or any part of it which is development within the meaning of section 32 (meaning of “development”) of the 2008 Act;

“book of reference” means the document of that description certified by the Secretary of State as the book of reference for the purposes of this Order under article 47 (certification of documents, etc.);

“building” includes any structure or erection or any part of a building, structure or erection;

“carriageway” has the same meaning as in the 1980 Act;

“Combined heat and power assessment” means the document of that description certified by the Secretary of State as the combined heat and power assessment for the purposes of this Order under article 47 (certification of documents, etc.);

“commence” means beginning to carry out any material operation, as defined in section 155 of the 2008 Act (which explains when development begins), comprised in or carried out for the purposes of the authorised development other than operations consisting of pre-construction ecological mitigation, archaeological investigations, environmental surveys and monitoring, investigations for the purpose of assessing ground conditions (including the making of trial boreholes), receipt and erection of construction plant and equipment, installation of construction compounds, erection of a footbridge, erection of temporary viewing structure, temporary car parking, erection of construction welfare facilities, erection of any temporary means of enclosure, the temporary display of site notices or contractors’ signage and notices and “commencement” and “commenced” are to be construed accordingly;

“commissioning” means the process of assuring that all systems and components of the authorised development or part of the authorised development (which are installed or installation is near to completion) are tested to verify that they function and are operable in accordance with design objectives, specifications and operational requirements of the undertaker and “commission” and other cognate expressions are to be construed accordingly;

“date of final commissioning” means the date on which the commissioning of Work No. 1A is completed as notified as such by the undertaker to the relevant planning authority pursuant to paragraph 20 of Schedule 2 (requirements);

(a) 1980 c. 66.
(b) 1981 c. 66.
(c) 1984 c. 27.
(d) 1990 c. 8.
(e) 1991 c. 22.
(f) 2008 c. 29.

“design and access statement” means the document of that description certified by the Secretary of State as the design and access statement for the purposes of this Order under article 47 (certification of documents, etc.);

“electronic transmission” means a communication transmitted—

(a) by means of an electronic communications network; or

(b) by other means provided it is in an electronic form;

and in this definition “electronic communications network” has the same meaning as in section 32(1) (meaning of electronic communications networks and services) of the Communications Act 2003^(a);

“environmental statement” means the document of that description certified by the Secretary of State as the environmental statement for the purposes of this Order under article 47 (certification of documents, etc.) as supplemented by the documents set out in Part 2 of Schedule 10;

“flood risk activity” has the same meaning as in the Environmental Permitting (England and Wales) Regulations 2016^(b);

“flood risk assessment” means the document of that description certified by the Secretary of State as the flood risk assessment for the purposes of this Order under article 47 (certification of documents, etc.);

“footpath” and “footway” have the same meaning as in the 1980 Act;

“highway” and “highway authority” have the same meaning as in the 1980 Act;

“indicative generating station plans” means the plans of that description certified by the Secretary of State as the indicative generating station plans for the purposes of this Order under article 47 (certification of documents, etc.);

“indicative wharf plans” means the plans of that description certified by the Secretary of State as the indicative wharf plans for the purposes of this Order under article 47 (certification of documents, etc.);

“land plan and Crown land plan” means the plans of that description certified by the Secretary of State as the land plan and Crown land plan for the purposes of this Order under article 47 (certification of documents, etc.);

“limits of deviation” means the limits of deviation referred to in article 7 (limits of deviation) shown for each numbered work on the works plans;

“maintain” in relation to the authorised development includes inspect, repair, adjust, alter, remove, refurbish, reconstruct, replace and improve to the extent that such works do not give rise to any materially new or materially different environmental effects than those identified in the environmental statement and “maintenance” and “maintaining” are to be construed accordingly;

“MMO” means the Marine Management Organisation;

“Navigation Management Planning Process: Risk to Birds” means the document of that description certified by the Secretary of State as the Navigation Management Planning Process: Risk to Birds for the purposes of this Order under article 47 (certification of documents, etc.);

“navigation management plan template” means the document of that description certified by the Secretary of State as the template navigation management plan for the purposes of this Order under article 47 (certification of documents, etc.);

“navigation risk assessment” means the document of that description certified by the Secretary of State as the navigation risk assessment for the purposes of this Order under article 47 (certification of documents, etc.);

(a) 2003 c. 21.
(b) S.I. 2016/1154.

“operational period” means the period from the date of final commissioning to the permanent cessation of the operation of Work No. 1A;

“Order land” means the land shown on the land plan and Crown land plan which is within the limits of land to be acquired or used permanently or temporarily, and described in the book of reference;

“Order limits” means the limits shown on the works plans within which the authorised development may be carried out;

“OSGR” means Ordinance Survey Grid Reference;

“outline air quality and dust management plan” means the document of that description certified by the Secretary of State as the outline air quality and dust management plan for the purposes of this Order under article 47 (certification of documents, etc.);

“outline air quality deposition monitoring plan” means the document of that description certified by the Secretary of State as the Outline air quality deposition monitoring plan for the purposes of this Order under article 47 (certification of documents, etc.);

“outline code of construction practice” means the document of that description certified by the Secretary of State as the outline code of construction practice for the purposes of this Order under article 47 (certification of documents, etc.);

“outline construction traffic management plan” means the document of that description certified by the Secretary of State as the outline construction traffic management plan for the purposes of this Order under article 47 (certification of documents, etc.);

“outline landscape and ecological mitigation strategy” means the document of that description certified by the Secretary of State as the outline landscape and ecological mitigation strategy for the purposes of this Order under article 47 (certification of documents, etc.);

“outline lighting strategy” means the document of that description certified by the Secretary of State as the outline lighting strategy for the purposes of this Order under article 47 (certification of documents, etc.);

“outline marine mammal mitigation protocol” means the document of that description certified by the Secretary of State as the outline marine mammal mitigation protocol for the purposes of this Order under article 47 (certification of documents, etc.);

“outline surface and foul water drainage strategy” means the document of that description certified by the Secretary of State as the outline surface water drainage strategy for the purposes of this Order under article 47 (certification of documents, etc.);

“outline written scheme of investigation” means the document of that description certified by the Secretary of State as the outline written scheme of investigation for the purposes of this Order under article 47 (certification of documents, etc.);

“owner”, in relation to land, has the same meaning as in section 7(a) (interpretation) of the Acquisition of Land Act 1981;

“register of environmental actions and commitments” means the document of that description certified by the Secretary of State as the register of environmental actions and commitments for the purposes of this Order under article 47 (certification of documents, etc.);

“relevant planning authority” means—

- (a) Lincolnshire County Council for the purposes of article 15 (access to works) and the following requirements in Schedule 2 (requirements) to this Order—
 - (i) requirement 7;
 - (ii) requirement 8;
 - (iii) requirement 9;
 - (iv) requirement 13;

(a) 1981 c. 67. Section 7 was amended by paragraph 9 of Schedule 15 to the Planning and Compensation Act 1991 (c. 34). There are other amendments to this section which are not relevant to this Order.

- (v) requirement 14;
 - (vi) requirement 17;
 - (vii) requirement 18;
 - (viii) requirement 21;
 - (ix) requirement 24; and
 - (x) requirement 25;
- (b) Boston Borough Council for the purposes of the following requirements in Schedule 2 (requirements) to this Order—
- (i) requirement 3;
 - (ii) requirement 4;
 - (iii) requirement 6;
 - (iv) requirement 10;
 - (v) requirement 11;
 - (vi) requirement 12;
 - (vii) requirement 15;
 - (viii) requirement 16;
 - (ix) requirement 19;
 - (x) requirement 22; and
 - (xi) requirement 23;

“relevant planning authorities” means both Lincolnshire County Council and Boston Borough Council;

“requirements” means those matters set out in Schedule 2 to this Order;

“Roman Bank plan” means the plan titled “Roman Bank within the Order limits” certified by the Secretary of State as the Roman Bank plan for the purposes of this Order under article 47 (certification of documents, etc.);

“statutory nature conservation body” means the appropriate nature conservation body as defined in regulation 5 of the Conservation of Habitats and Species Regulations 2017(a);

“statutory undertaker” means any person falling within section 127(8) (statutory undertakers’ land) of the 2008 Act and includes a public communications provider defined by section 151(1)(b) (interpretation of Chapter I) of the Communications Act 2003;

“street” means a street within the meaning of section 48 (streets, street works and undertakers) of the 1991 Act, together with land on the verge of a street or between two carriageways, and includes any footpath and “street” includes any part of a street;

“street authority”, in relation to a street, has the same meaning as in Part 3 of the 1991 Act;

“The Haven” means the part of the River Witham, known as The Haven;

“traffic authority” has the same meaning as in section 121A of the Road Traffic Regulation Act 1984;

“undertaker” means Alternative Use Boston Projects Limited (company number 11013830, whose registered office is at 26 Church Street, Bishop’s Stortford, Hertfordshire, England, CM23 2LY) or any other person who for the time being has the benefit of this Order in accordance with articles 8 and 9 of this Order;

“watercourse” includes all rivers, streams, creeks, ditches, drains, canals, cuts, culverts, dykes, sluices, sewers and passages through which water flows except a public sewer or drain; and

(a) S.I. 2017/1012.

(b) 2003 c. 21.

“works plans” means the plans of that description certified by the Secretary of State as the works plans for the purposes of this Order under article 47 (certification of documents, etc.).

(2) References in this Order to rights over land include references to rights to do or to place and maintain anything in, on or under land or in the airspace above its surface and references in this Order to the imposition of restrictive covenants are references to the creation of rights over land which interfere with the interests or rights of another and are for the benefit of land which is acquired under this Order or is otherwise comprised in this Order land.

(3) All distances, directions and lengths referred to in this Order are approximate and distances between points on a work comprised in the authorised development are taken to be measured along that work.

(4) All areas described in square metres in the book of reference are approximate.

(5) References in this Order to points identified by letters or numbers are to be construed as references to points so lettered or numbered on the plans to which the reference applies.

(6) References in this Order to numbered works are references to the works numbered in Schedule 1 (authorised development).

(7) References to “Schedule” are, unless otherwise stated, references to Schedules to this Order.

(8) The expression “includes” is to be construed without limitation.

(9) References to any statutory body in this Order include that body’s successor in respect of functions which are relevant to this Order.

(10) References in this Order to “part of the authorised development” are to be construed as references to stages, phases or elements of the authorised development.

PART 2

PRINCIPAL POWERS

Development consent granted by the Order

3.—(1) Subject to the provisions of this Order including the requirements in Schedule 2 (requirements), the undertaker is granted development consent for the authorised development to be carried out within the Order limits.

(2) Any enactment applying to land within or adjacent to the Order limits has effect subject to the provisions of this Order.

Maintenance of authorised development

4. The undertaker may at any time maintain the authorised development except to the extent that this Order or an agreement made under this Order provides otherwise.

Maintenance of drainage works

5.—(1) Nothing in this Order, or the construction, maintenance or operation of the authorised development under it, affects any responsibility for the maintenance of any works connected with the drainage of land, whether that responsibility is imposed or allocated by or under any enactment, or otherwise, unless otherwise agreed in writing between the undertaker and the person responsible.

(2) In this article “drainage” has the same meaning as in section 72 (interpretation) of the Land Drainage Act 1991(a).

(a) 1991 c. 59. The definition of “drainage” was substituted by paragraphs 191 and 194 of Schedule 22 to the Environment Act 1995 (c. 25).

Operation of the authorised development

6.—(1) The undertaker is authorised to operate the generating station comprised in the authorised development.

(2) Other than as set out in this Order, this article does not relieve the undertaker of any requirement to obtain any permit or licence or any obligation under any legislation that may be required to authorise the operation of an electricity generating station.

Limits of deviation

7.—(1) The authorised development is to be carried out and maintained within the limits of deviation shown and described on the works plan and in carrying out the authorised development the undertaker may—

- (a) deviate laterally within the limits of deviation for those works shown on the works plans to the extent the undertaker considers to be necessary or convenient;
- (b) to any extent downwards as may be necessary, convenient or expedient;
- (c) in respect of any boundary between the areas of two numbered works deviate laterally by up to 20 metres either side of the boundary as shown on the works plans, with the exception of any boundary with Work No. 1A(iv), any boundary with Work No. 2(d) and any boundary with Work No. 4,

except that these maximum limits of deviation do not apply where it is demonstrated by the undertaker to the Secretary of State's satisfaction and the Secretary of State, following consultation by the undertaker with the relevant planning authority, the relevant statutory nature conservation body and the Environment Agency to the extent that it relates to matters relevant to their functions, certifies accordingly that a deviation in excess of these limits would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.

(2) Part 2 (procedure for discharge of requirements) of Schedule 2 (requirements) applies to an application to the Secretary of State for certification under paragraph (1) as though it were an approval required by a requirement under that Schedule.

Benefit of this Order

8.—(1) Subject to paragraphs (2) and (3) and article 9 (consent to transfer benefit of the Order), the provisions of this Order have effect solely for the benefit of the undertaker.

(2) Paragraph (1) does not apply to the works for which consent is granted by this Order for the express benefit of the owners and occupiers of land, statutory undertakers and other persons affected by the authorised development.

(3) Paragraph (1) does not apply to Work No. 3A for which the provisions of this Order have effect for the benefit of the undertaker and Harlaxton Engineering Services Limited.

(4) Paragraph (1) does not apply to Work No. 3B for which the provisions of this Order have effect for the benefit of the undertaker and Western Power Distribution Plc.

Consent to transfer benefit of the Order

9.—(1) Subject to paragraph (4) the undertaker may—

- (a) transfer to another person (“the transferee”) all or any part of the benefit of the provisions of this Order (including any part of the authorised development) and such related statutory rights as may be agreed in writing between the undertaker and the transferee; or
- (b) grant to another person (“the lessee”), for a period agreed between the undertaker and the lessee, all or any part of the benefit of the provisions of this Order (including any part of the authorised development) and such related statutory rights as may be agreed between the undertaker and the lessee.

(2) Where an agreement has been made in accordance with paragraph (1)(a) or (1)(b) references in this Order to the undertaker, except paragraph (3), include references to the transferee or the lessee.

(3) The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations as would apply under this Order if those benefits or rights were exercised by the undertaker.

(4) The consent of the Secretary of State is required for the exercise of the powers under paragraph (1) except where—

- (a) the transferee or lessee holds a licence under section 6(a) (licences authorising supply, etc.) of the Electricity Act 1989; or
- (b) the time limits for all claims for compensation in respect of the acquisition of land or effects upon land under this Order have elapsed and—
 - (i) no such claims have been made;
 - (ii) any such claims that have been made have all been compromised or withdrawn;
 - (iii) compensation has been paid in final settlement of any claims made;
 - (iv) payment of compensation into court in lieu of settlement of all such claims has taken place; or
 - (v) it has been determined by a tribunal or court of competent jurisdiction in respect of all claims that no compensation is payable.

(5) The Secretary of State must consult the MMO before giving consent under paragraph (1) to the transfer or grant to another person of the benefit of the provisions of the deemed marine licence.

(6) Where the consent of the Secretary of State is not required under paragraph (4), the undertaker must notify the Secretary of State in writing before transferring or granting all or any part of the benefit of the provisions of this Order and such related statutory rights referred to in paragraph (1).

(7) The notification referred to in paragraph (6) must state—

- (a) the name and contact details of the person to whom the benefit of the powers will be transferred or granted;
- (b) subject to paragraph (8), the date on which the transfer will take effect;
- (c) the powers to be transferred or granted;
- (d) pursuant to paragraph (3), the restrictions, liabilities and obligations that will apply to the person exercising the powers transferred or granted; and
- (e) where relevant, a plan showing the works or areas to which the transfer or grant relates.

(8) The date specified under paragraph (7)(b) must not be earlier than the expiry of five working days from the date of the receipt of the notice.

(9) The notice given under paragraph (6) must be signed by the undertaker and the person to whom the benefit of the powers will be transferred or granted as specified in that notice.

PART 3

STREETS

Street works

10.—(1) The undertaker may, for the purposes of the authorised development, enter on so much of any of the streets specified in Schedule 3 (streets subject to street works) and may—

(a) 1989 c. 29.

- (a) break up or open the street, or any sewer, drain or tunnel under it;
- (b) drill, tunnel or bore under the street;
- (c) place apparatus in the street;
- (d) maintain apparatus in the street, change its position or remove it; and
- (e) execute any works required for or incidental to any works referred to in sub-paragraph (a), (b), (c) or (d).

(2) The authority given by paragraph (1) is a statutory right for the purposes of sections 48(3) (streets, street works and undertakers) and 51(1) (prohibition of unauthorised street works) of the 1991 Act.

(3) Where the undertaker is not the street authority, the provisions of sections 54 (notice of certain works) to 106 (index of defined expressions) of the 1991 Act apply to any street works carried out under paragraph (1).

Application of the 1991 Act

11.—(1) Works constructed or maintained under this Order in relation to a highway which consists of or includes a carriageway are to be treated for the purposes of Part 3 (street works in England and Wales) of the 1991 Act as major highway works if—

- (a) they are of a description mentioned in any of paragraphs (a), (c) to (e), (g) and (h) of section 86(3) (highway authorities, highways and related works) of that Act; or
- (b) they are works which, had they been executed by the highway authority, might have been carried out in exercise of the powers conferred by section 64(a) (dual carriageways and roundabouts) of the 1980 Act or section 184(b) (vehicle crossings over footways and verges) of that Act.

(2) In Part 3 (street works in England and Wales) of the 1991 Act, in relation to works which are major highway works by virtue of paragraph (1), references to the highway authority concerned are to be construed as references to the undertaker.

(3) The following provisions of the 1991 Act do not apply in relation to any works executed under the powers conferred by this Order—

- section 56(c) (power to give directions as to timing);
- section 56A(d) (power to give directions as to placing of apparatus);
- section 58(e) (restrictions on works following substantial road works);
- section 58A(f) (restriction on works following substantial street works);
- section 73A(g) (power to require undertaker to re-surface street);
- section 73B(h) (power to specify timing etc. of re-surfacing);
- section 73C(i) (materials, workmanship and standard of re-surfacing);
- section 78A(j) (contributions to costs of re-surfacing by undertaker); and
- Schedule 3A(k) (restrictions on works following substantial street works).

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- (a) Section 64 was amended by section 102 of, and Schedule 17 to, the Local Government Act 1985 (c. 51) and section 168(2) of, and Schedule 9 to, the New Roads and Street Works Act 1991 (c. 22).
 - (b) Section 184 was amended by sections 35, 37, 38 and 46 of the Criminal Justice Act 1982 (c. 48); section 4 of, and paragraph 45(11) of Schedule 2 to, the Planning (Consequential Provisions) Act 1990 (c. 11); and section 168 of, and paragraph 9 of Schedule 8 and Schedule 9 to, the New Roads and Street Works Act 1991.
 - (c) Section 56 was amended by section 43 of, and Schedule 1 to, the Traffic Management Act 2004 (c. 18).
 - (d) Section 56A was inserted by section 44 of the Traffic Management Act 2004.
 - (e) Section 58 was amended by section 51 of, and Schedule 1 to, the Traffic Management Act 2004.
 - (f) Section 58A was inserted by section 52 of the Traffic Management Act 2004.
 - (g) Section 73A was inserted by section 55 of the Traffic Management Act 2004.
 - (h) Section 73B was inserted by section 55 of the Traffic Management Act 2004.
 - (i) Section 73C was inserted by section 55 of the Traffic Management Act 2004.
 - (j) Section 78A was inserted by section 57 of the Traffic Management Act 2004.
 - (k) Schedule 3A was inserted by section 52(2) of, Schedule 4 to, the Traffic Management Act 2004.

(4) The provisions of the 1991 Act mentioned in paragraph (5) (which, together with other provisions of that Act, apply in relation to the execution of street works) and any regulations made, or code of practice issued or approved under, those provisions apply (with the necessary modifications) in relation to any alteration, diversion or restriction of use of a street of a temporary nature by the undertaker under the powers conferred by article 13 (temporary closure, alteration, diversion and restriction of use of streets), whether or not the alteration, diversion or restriction constitutes street works within the meaning of that Act.

(5) The provisions of the 1991 Act^(a) referred to in paragraph (4) are—
section 54^(b) (advance notice of certain works), subject to paragraph (6);
section 55^(c) (notice of starting date of works), subject to paragraph (6);
section 57^(d) (notice of emergency works);
section 59^(e) (general duty of street authority to co-ordinate works);
section 60 (general duty of undertakers to co-operate);
section 68 (facilities to be afforded to street authority);
section 69 (works likely to affect other apparatus in the street);
section 75 (inspection fees);
section 76 (liability for cost of temporary traffic regulation); and
section 77 (liability for cost of use of alternative route),

and all such other provisions as apply for the purposes of the provisions mentioned above.

(6) Sections 54 and 55 of the 1991 Act as applied by paragraph (4) have effect as if references in section 57 of that Act to emergency works were a reference to a closure, alteration, diversion or restriction (as the case may be) required in a case of emergency.

Power to alter layout, etc., of streets

12.—(1) The undertaker may for the purposes of the authorised development permanently or temporarily alter the layout of or carry out any works in the street specified in column (1) of Part 1 or 2 of Schedule 4 (streets subject to alteration of layout) in the manner specified in relation to that street in column (2).

(2) Without prejudice to the specific powers conferred by paragraph (1), but subject to paragraphs (3) and (4), the undertaker may, for the purposes of constructing, operating or maintaining the authorised development alter the layout of any street within the Order limits and, without limiting the scope of this paragraph, the undertaker may—

- (a) alter the level or increase the width of any kerb, footway, cycle track or verge;
- (b) make and maintain passing places.

(3) The undertaker must restore any street that has been temporarily altered under this article to the reasonable satisfaction of the street authority.

(4) The powers conferred by paragraph (2) must not be exercised without the consent of the street authority.

(5) If a street authority which receives an application for consent under paragraph (4) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent.

(a) Sections 54, 55, 57, 60, 68 and 69 were amended by sections 40(1) and (2) of, and Schedule 1 to, the Traffic Management Act 2004.

(b) As also amended by section 49(1) of the Traffic Management Act 2004.

(c) As also amended by section 49(2) and 51(9) of the Traffic Management Act 2004.

(d) As also amended by section 52(3) of the Traffic Management Act 2004.

(e) As amended by section 42 of the Traffic Management Act 2004.

Temporary closure, alteration, diversion and restriction of use of streets

13.—(1) The undertaker may, during and for the purposes of carrying out the authorised development, temporarily close, alter, divert, prohibit the use of or restrict the use of any street and may for any reasonable time—

- (a) divert the traffic from the street; and
- (b) subject to paragraph (3), prevent all persons from passing along the street.

(2) Without prejudice to the scope of paragraph (1), the undertaker may use any street temporarily closed, altered, diverted or restricted under the powers conferred by this article and within the Order limits as a temporary working site.

(3) The undertaker must provide reasonable access for pedestrians going to or from premises abutting a street affected by the temporary closure, alteration, diversion or restriction of a street under this article if there would otherwise be no such access.

(4) Without prejudice to the generality of paragraph (1), the undertaker may temporarily close, alter, divert or restrict the use of the streets specified in column (1) of Schedule 5 (temporary closure, alteration, diversion and restriction of the use of streets) to the extent specified in column (2) of that Schedule.

(5) The undertaker must not temporarily close, alter, divert or restrict the use of—

- (a) any street specified in paragraph (4) without first consulting the street authority; and
- (b) any other street without the consent of the street authority, which may attach reasonable conditions to any consent but such consent must not be unreasonably withheld or delayed.

(6) Any person who suffers loss by the suspension of any private right of way under this article is entitled to compensation to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(7) Where the undertaker provides a temporary diversion under paragraph (4), the new or temporary alternative route is not required to be of a higher standard than the temporarily closed, altered, diverted or restricted street specified in Schedule 5.

(8) If a street authority which receives a valid application for consent under paragraph (5) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent.

Permanent stopping up of streets

14.—(1) Subject to the provisions of this article, the undertaker may, in connection with the construction of the authorised development, stop up the streets specified in column (1) of Schedule 6 (permanent stopping up of streets) to the extent specified and as described in column (2) of that Schedule.

(2) Where a street has been stopped up under this article—

- (a) all rights of way over or along the street so stopped up are extinguished; and
- (b) the undertaker may appropriate and use for the purposes of the authorised development so much of the site of the street as is bounded on both sides by land owned by the undertaker.

(3) Any person who suffers loss by the suspension or extinguishment of any private right of way under this article is entitled to compensation to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(4) This article is subject to article 36 (apparatus and rights of statutory undertakers in stopped up streets).

Access to works

15.—(1) The undertaker may, for the purposes of the authorised development—

- (a) form and layout the permanent means of access, or improve existing means of access in the location specified in Part 1 of Schedule 4 (streets subject to alteration of layout);
- (b) form and layout the temporary means of access in the locations specified in Part 2 of Schedule 4 (streets subject to alteration of layout); and
- (c) with the approval of the relevant planning authority after consultation with the highway authority, form and lay out such other means of access or improve the existing means of access, at such locations within the Order limits as the undertaker reasonably requires for the purposes of the authorised development.

(2) If a relevant planning authority which receives an application for consent under paragraph (1) fails to notify the undertaker of its decision before the end of the period of 28 days beginning with the date on which the application was made, it is deemed to have granted consent.

Use of private roads

16.—(1) The undertaker may use any private road within the Order limits for the passage of persons or vehicles (with or without materials, plant and machinery) for the purposes of, or in connection with, the construction or maintenance of the authorised development.

(2) The undertaker must compensate the person liable for the repair of a road to which paragraph (1) applies for any loss or damage which that person may suffer by reason of the exercise of the power conferred by paragraph (1).

(3) Any dispute as to a person's entitlement to compensation under paragraph (2), or as to the amount of such compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

Agreements with street authorities

17.—(1) A street authority and the undertaker may enter into agreements with respect to—

- (a) the construction of any new street including any structure carrying the street, whether or not over or under any part of the authorised development;
- (b) the strengthening, improvement, repair or reconstruction of any street under the powers conferred by this Order;
- (c) the maintenance of any street or the structure of any bridge or tunnel carrying a street over or under the authorised development;
- (d) any closure, alteration, diversion or restriction in the use of a street authorised by this Order;
- (e) the construction in the street of any of the authorised development; or
- (f) any such works as the parties may agree.

(2) Such an agreement may, without prejudice to the generality of paragraph (1)—

- (a) make provision for the street authority to carry out any function under this Order which relates to the street in question;
- (b) include an agreement between the undertaker and street authority specifying a reasonable time for the completion of the works; and
- (c) contain such terms as to payment and otherwise as the parties consider appropriate.

Traffic regulation measures

18.—(1) Subject to the provisions of this article and the consent of the traffic authority in whose area the road concerned is situated, the undertaker may, in so far as may be expedient or necessary for the purposes of, in connection with, or in consequence of the construction, maintenance and operation of the authorised development—

- (a) permit, prohibit or restrict the stopping, parking, waiting, loading or unloading of vehicles on any road; and

(b) make provision as to the direction or priority of vehicular traffic on any road, either at all times or at times, on days or during such periods as may be specified by the undertaker.

(2) The undertaker must not exercise the powers under paragraph (1) of this article unless it has—

- (a) given not less than four weeks' notice in writing of its intention so to do to the traffic authority in whose area the road is situated; and
- (b) advertised its intention in such manner as the traffic authority may specify in writing within seven days of its receipt of notice of the undertaker's intention in the case of sub-paragraph (a).

(3) Any prohibition, restriction or other provision made by the undertaker under article 13 (temporary closure, alteration, diversion and restriction of use of streets) or paragraph (1) of this article has effect as if duly made by, as the case may be—

- (a) the traffic authority in whose area the road is situated as a traffic regulation order under the 1984 Act; or
- (b) the local authority in whose area the road is situated as an order under section 32 (power of local authorities to provide parking places) of the 1984 Act,

and the instrument by which it is effected is deemed to be a traffic order for the purposes of Schedule 7(a) (road traffic contraventions subject to civil enforcement) to the Traffic Management Act 2004.

(4) In this article—

- (a) subject to sub-paragraph (b), expressions used in this article and in the 1984 Act have the same meaning; and
- (b) a “road” means a road that is a public highway maintained by and at the expense of the traffic authority.

PART 4

SUPPLEMENTARY POWERS

Powers in relation to relevant navigations or watercourses

19.—(1) Subject to Schedule 8 (protective provisions), the undertaker may, for the purpose of or in connection with the carrying out and maintenance of the authorised development, regardless of any interference with any public or private rights—

- (a) temporarily alter, interfere with, occupy and use the banks, bed, foreshores, waters and walls of a relevant navigation or watercourse;
- (b) remove or relocate any moorings so far as may be reasonably necessary for the purposes of carrying out and of maintaining the authorised development;
- (c) temporarily moor or anchor vessels and structures;
- (d) construct, place, maintain and remove temporary works and structures within the banks, bed, foreshores, waters and walls of a relevant navigation or watercourse; and
- (e) interfere with the navigation of the relevant navigation or watercourse,

in such manner and to such extent as may appear to it to be necessary or convenient.

(2) Except in the case of emergency, the undertaker must use reasonable endeavours to notify the owner of any mooring affected by the proposal to exercise the powers conferred by paragraph (1)(b) before the exercise of those powers.

(a) 2004 c. 18. There are amendments to this Act not relevant to this Order.

(3) The undertaker must pay compensation to any person entitled to compensation under the 1961 Act who suffers any loss or damage from the exercise of the powers conferred by paragraph (1)(b).

(4) Any dispute as to a person's entitlement to compensation under paragraph (3), or as to the amount of compensation, is to be determined under Part 1 of the 1961 Act.

(5) In this article "relevant navigation" means the part of the River Witham, known as The Haven.

Discharge of water

20.—(1) Subject to sub-paragraphs (3) and (4), the undertaker may use any watercourse, public sewer or drain for the drainage of water in connection with the construction or maintenance of the authorised development and for that purpose may lay down, take up and alter pipes and may, on any land within the Order limits, make openings into, and connections with, the watercourse, public sewer or drain.

(2) Any dispute arising from the making of connections to or the use of a public sewer or drain by the undertaker pursuant to paragraph (1) is to be determined as if it were a dispute under section 106 (right to communicate with public sewers) of the Water Industry Act 1991(a).

(3) The undertaker must not discharge any water into any watercourse, public sewer or drain except with the consent of the person to whom it belongs, whose consent may be given subject to such terms and conditions as that person may reasonably impose, but must not be unreasonably withheld or delayed.

(4) The undertaker must not make any opening into any public sewer or drain except—

- (a) in accordance with plans approved by the person to whom the sewer or drain belongs, but approval must not be unreasonably withheld or delayed; and
- (b) where that person has been given the opportunity to supervise the making of the opening.

(5) The undertaker must take such steps as are reasonably practicable to secure that any water discharged into a watercourse or public sewer or drain pursuant to this article is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.

(6) Nothing in this article overrides the requirement for an environmental permit under regulation 12(1)(b)(b) of the Environmental Permitting (England and Wales) Regulations 2016.

(7) In this article—

- (a) "public sewer or drain" means a sewer or drain which belongs to Homes England, the Environment Agency, a harbour authority within the meaning of section 57 (interpretation) of the Harbours Act 1964(c), an internal drainage board, a joint planning board, a local authority, a National Park Authority, a sewerage undertaker or an urban development corporation; and
- (b) other expressions, excluding watercourse, used both in this article and in the Water Resources Act 1991(d) have the same meaning as in that Act.

(8) If a person who receives an application for consent under paragraph (3) or approval under paragraph (4)(a) fails to notify the undertaker of a decision within 28 days of receiving an application that person will be deemed to have granted consent or given approval, as the case may be.

(a) 1991 c. 56. Section 106 was amended by sections 43(2) and 35(8)(a) and paragraph 1 of Schedule 2 to the Competition and Service (Utilities) Act 1992 (c. 43) and sections 99(2), (4), (5)(a), (5)(b), (5)(c) and 36(2) of the Water Act 2003 (c. 37) and section 32, Schedule 3, paragraph 16(1) of the Flood and Water Management Act 2010 (c. 29).

(b) S.I. 2016/1154.

(c) 1964 c. 40.

(d) 1991 c. 57.

Authority to survey and investigate the land

21.—(1) The undertaker may for the purposes of this Order enter on any land shown within the Order limits or enter on any land which may be affected by the authorised development and—

- (a) survey or investigate the land (including any watercourses, groundwater, static water bodies or vegetation on the land);
- (b) without limitation to the scope of sub-paragraph (a), make any excavations, trial holes, boreholes and other investigations in such positions on the land as the undertaker thinks fit to investigate the extent or the nature of the surface layer, subsoil, ground water, underground structures, foundations, and plant or apparatus and remove soil and water samples and discharge water from sampling operations on to the land;
- (c) without limitation to the scope of sub-paragraph (a), carry out ecological or archaeological investigations on such land, including making any excavations or trial holes on the land for such purposes; and
- (d) place on, leave on and remove from the land apparatus for use in connection with the survey and investigation of land and making of trial holes and boreholes.

(2) No land may be entered or equipment placed or left on or removed from the land under paragraph (1) unless at least 14 days' notice has been served on every owner and occupier of the land.

(3) Any person entering land under this article on behalf of the undertaker—

- (a) must, if so required before or after entering the land, produce written evidence of their authority to do so; and
- (b) may take onto the land such vehicles and equipment as are necessary to carry out the survey or investigation or to make the trial holes.

(4) No trial holes are to be made under this article—

- (a) in land located within the highway boundary without the consent of the highway authority; or
- (b) in a private street without the consent of the street authority,

but such consent must not be unreasonably withheld or delayed.

(5) The undertaker must compensate the owners and occupiers of the land for any loss or damage arising by reason of the exercise of the authority conferred by this article, such compensation to be determined, in case of dispute, under Part 1(a) (determination of questions of disputed compensation) of the 1961 Act.

(6) If either a highway authority or street authority which receives an application for consent fails to notify the undertaker of its decision within 28 days of receiving the application for consent—

- (a) under paragraph (4)(a) in the case of a highway authority; or
- (b) under paragraph (4)(b) in the case of a street authority,

that authority will be deemed to have granted consent.

(7) Section 13 (refusal to give possession to acquiring authority) of the 1965 Act applies to the entry onto land pursuant to 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.

(a) The functions of the Lands Tribunal under the 1961 Act are transferred to the Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007 (c. 15).

Protective work to buildings

22.—(1) Subject to the following provisions of this article, the undertaker may at its own expense carry out such protective works to any building or structure lying within the Order limits as the undertaker considers necessary or expedient.

(2) Protective works may be carried out—

- (a) at any time before or during the construction of any part of the authorised development in the vicinity of the building or structure; or
- (b) after the completion of that part of the authorised development in the vicinity of the building or structure at any time up to the end of the period of 5 years beginning with the date of final commissioning.

(3) For the purpose of determining how the powers under this article are to be exercised the undertaker may enter and survey any building or structure falling within paragraph (1) and any land within its curtilage and place on, leave on and remove from the land and building any apparatus and equipment for use in connection with the survey.

(4) For the purpose of carrying out protective works under this article to a building or structure the undertaker may (subject to paragraphs (5) and (6))—

- (a) enter the building or structure and any land within its curtilage; and
- (b) where the works cannot be carried out reasonably conveniently without entering land which is adjacent to the building or structure but outside its curtilage, enter the adjacent land (but not any building erected on it) within the Order limits,

and if it is reasonably required, the undertaker may take possession, or exclusive possession, of the building and any land or part thereof for the purpose of carrying out the protective works.

(5) Before exercising—

- (a) a power under paragraph (1) to carry out protective works under this article to a building or structure;
- (b) a power under paragraph (3) to enter a building or structure and land within its curtilage;
- (c) a power under paragraph (4)(a) to enter a building or structure and land within its curtilage; or
- (d) a power under paragraph (4)(b) to enter and take possession of land,

the undertaker must, except in the case of emergency, serve on the owners and occupiers of the building, structure or land not less than 14 days' notice of its intention to exercise that power and, in a case falling within sub-paragraph (a), (c) or (d) specifying the protective works proposed to be carried out.

(6) Where a notice is served under paragraph (5)(a), (5)(b), (5)(c) or (5)(d), the owner or occupier of the building, structure or land concerned may, by serving a counter-notice within the period of 10 days beginning with the day on which the notice was served, require the question of whether it is necessary or expedient to carry out the protective works or to enter the building, structure or land to be referred to arbitration under article 49 (arbitration).

(7) The undertaker must compensate the owners and occupiers of any building, structure or land in relation to which powers under this article have been exercised for any loss or damage arising to them by reason of the exercise of those powers.

(8) Where—

- (a) protective works are carried out to a building or structure under this article; and
- (b) within 5 years beginning with the date of final commissioning for that part of the authorised development in the vicinity of the building or structure it appears that the protective works are inadequate to protect the building or structure against damage caused by the construction, on operation or maintenance of that part of the authorised development,

the undertaker must compensate the owners and occupiers of the building or structure for any loss or damage sustained by them.

(9) Nothing in this article relieves the undertaker from any liability to pay compensation under section 10(2) (further provision as to compensation for injurious affection) of the 1965 Act.

(10) Any compensation payable under paragraph (7) or (8) must be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(11) In this article “protective works” in relation to a building means—

- (a) underpinning, strengthening and any other works the purpose of which is to prevent damage which may be caused to the building or structure by the construction, operation or maintenance of the authorised development; and
- (b) any works the purpose of which is to remedy any damage which has been caused to the building by the construction, operation or maintenance of the authorised development; and
- (c) any works the purpose of which is to secure the safe operation of the authorised development or to prevent or minimise the risk of such operation being disrupted.

(12) Section 13 (refusal to give possession to acquiring authority) of the 1965 Act 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.

Felling or lopping of trees

23.—(1) The undertaker may fell or lop any tree or shrub within or overhanging land within the Order limits, or cut back its roots, if it reasonably believes it to be necessary to do so to prevent the tree or shrub—

- (a) from obstructing or interfering with the construction, maintenance or operation of the authorised development or any apparatus used in connection with the authorised development; or
- (b) from constituting a danger to persons using the authorised development; or
- (c) from obstructing or interfering with the passage of construction vehicles to the extent necessary for the purposes of construction of the authorised development.

(2) In carrying out any activity authorised by paragraph (1) the undertaker must do no unnecessary damage to any tree or shrub and must pay compensation to any person for any loss or damage arising from such activity.

(3) Any dispute as to a person’s entitlement to compensation under paragraph (2), or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

Removal of human remains

24.—(1) In this article “the specified land” means the land within the Order limits.

(2) Before the undertaker carries out any development or works within the Order limits which will or may disturb any human remains in the specified land it must remove those human remains from the specified land, or cause them to be removed, in accordance with the following provisions of this article.

(3) Subject to paragraph (14), before any such remains are removed from the specified land the undertaker must give notice of the intended removal, describing the specified land and stating the general effect of the following provisions of this article, by—

- (a) publishing a notice once in each of two successive weeks in a newspaper circulating in the relevant area of the authorised project; and
- (b) displaying a notice in a conspicuous place on or near to the specified land.

(4) As soon as reasonably practicable after the first publication of a notice under paragraph (3) the undertaker must send a copy of the notice to the local authority.

(5) At any time within 56 days after the first publication of a notice under paragraph (3) any person who is a personal representative or relative of any deceased person whose remains are interred in the specified land may give notice in writing to the undertaker of that person's intention to undertake the removal of the remains.

(6) Where a person has given notice under paragraph (5), and the remains in question can be identified, that person may cause such remains to be—

- (a) removed and re-interred in any burial ground or cemetery in which burials may legally take place; or
- (b) removed to, and cremated in, any crematorium,

and that person must, as soon as reasonably practicable after such re-interment or cremation, provide to the undertaker a certificate for the purpose of enabling compliance with paragraph (11).

(7) The undertaker must pay the reasonable expenses of removing and re-interring or cremating the remains of any deceased person under this article.

(8) If the undertaker is not satisfied that any person giving notice under paragraph (5) is the personal representative or relative as that person claims to be, or that the remains in question can be identified, the question is to be determined on the application of either party in a summary manner by the county court, and the court may make an order specifying who must remove the remains and as to the payment of the costs of the application.

(9) If—

- (a) within the period of 56 days referred to in paragraph (5) no notice under that paragraph has been given to the undertaker in respect of any remains in the specified land; or
- (b) such notice is given and no application is made under paragraph (8) within 56 days after the giving of the notice but the person who gave the notice fails to remove the remains within a further period of 56 days; or
- (c) within 56 days after any order is made by the county court under paragraph (8) any person, other than the undertaker, specified in the order fails to remove the remains; or
- (d) it is determined that the remains to which any such notice relates cannot be identified,

subject to paragraph (10) the undertaker must remove the remains and cause them to be re-interred in such burial ground or cemetery in which burials may legally take place as the undertaker thinks suitable for the purpose; and, so far as possible, remains from individual graves must be reinterred in individual containers which must be identifiable by a record prepared with reference to the original position of burial of the remains that they contain.

(10) If the undertaker is satisfied that any person giving notice under paragraph (5) is the personal representative or relative as that person claims to be and that the remains in question can be identified, but that person does not remove the remains in accordance with the terms of this article, the undertaker must comply with any reasonable request that person may make in relation to the removal and re-interment or cremation of the remains.

(11) On the re-interment or cremation of any remains under this article—

- (a) a certificate of re-interment or cremation is to be sent by the undertaker to the Registrar General by the undertaker giving the date of re-interment or cremation and identifying the place from which the remains were removed and the place in which they were re-interred or cremated; and
- (b) a copy of the certificate of re-interment or cremation and the record mentioned in paragraph (9) is to be sent by the undertaker to the local authority mentioned in paragraph (4).

(12) The removal of the remains of any deceased person under this article must be carried out in accordance with any directions which may be given by the Secretary of State for Justice.

(13) Any jurisdiction or function conferred on the county court by this article may be exercised by the district judge of the court.

(14) No notice is required under paragraph (3) before the removal of any human remains where the undertaker is satisfied—

- (a) that the remains were interred more than 100 years ago; and
 - (b) that no relative or personal representative of the deceased is likely to object to the remains being removed in accordance with this article.
- (15) In the case of remains in relation to which paragraph (14) applies, the undertaker—
- (a) may remove the remains; and
 - (b) must apply for direction from the Secretary of State under paragraph (12) as to their subsequent treatment.
- (16) In this article—
- (a) references to a relative of the deceased are to a person who is a—
 - (i) husband, wife, civil partner, parent, grandparent, child or grandchild of the deceased; or
 - (ii) child of a brother, sister, uncle or aunt of the deceased;
 - (b) references to a personal representative of the deceased are to a person or persons who is the lawful executor of the estate of the deceased or is the lawful administrator of the estate of the deceased.

PART 5

POWERS OF ACQUISITION AND POSSESSION OF LAND

Compulsory acquisition of land

25.—(1) The undertaker may acquire compulsorily so much of the Order land as is required for the authorised development or to facilitate it, or as is incidental to it.

(2) This article is subject to article 27 (time limit for exercise of authority to acquire land compulsorily) and paragraph (9) of article 33 (temporary use of land for carrying out the authorised development).

Compulsory acquisition of land – incorporation of the mineral code

26. Parts 2 and 3 of Schedule 2 (minerals) to the Acquisition of Land Act 1981^(a) is incorporated in this order subject to the modification that for “the acquiring authority” substitute “the undertaker”.

Time limit for exercise of authority to acquire land compulsorily

27.—(1) After the end of the period of five years beginning on the day on which this Order comes into force—

- (a) no notice to treat may be served under Part 1 (compulsory purchase under Acquisition of Land Act of 1946) of the 1965 Act; and
- (b) no declaration may be executed under section 4 (execution of declaration) of the 1981 Act as applied by article 30 (application of the 1981 Act).

(2) The authority conferred by article 33 (temporary use of land for carrying out the authorised development) must cease at the end of the period referred to in paragraph (1), save that nothing in this paragraph prevents the undertaker remaining in possession of land after the end of that period, if the land was entered and possession was taken before the end of that period.

(a) 1981 c. 67.

Private rights

28.—(1) Subject to the provisions of this article, all private rights and restrictive covenants over land subject to compulsory acquisition under this Order are extinguished—

- (a) as from the date of acquisition of the land by the undertaker whether compulsorily or by agreement; or
- (b) on the date of entry on the land by the undertaker under section 11(1) (power of entry) of the 1965 Act,

whichever is the earliest.

(2) Subject to the provisions of this article, all private rights over land owned by the undertaker that are within the Order limits are extinguished on commencement of any activity authorised by this Order which interferes with or breaches those rights.

(3) Subject to the provisions of this article, all private rights or restrictive covenants over land of which the undertaker takes temporary possession under this Order are suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.

(4) Any person who suffers loss by the extinguishment or suspension of any private right or the imposition of a restrictive covenant under this Order is entitled to compensation to be determined, in case of dispute, under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(5) This article does not apply in relation to any right or apparatus to which section 138 (extinguishment of rights, and removal of apparatus, of statutory undertakers etc.) of the 2008 Act or article 35 (statutory undertakers) applies.

(6) Paragraphs (1) to (3) have effect subject to—

- (a) any notice given by the undertaker before—
 - (i) the completion of the acquisition of the land or the acquisition or creation of rights over land or the imposition of restrictive covenants over or affecting the land;
 - (ii) the undertaker's appropriation of it;
 - (iii) the undertaker's entry onto it; or
 - (iv) the undertaker's taking temporary possession of it,that any or all of those paragraphs do not apply to any right specified in the notice; and
- (b) any agreement made at any time between the undertaker and the person in or to whom the right or restriction in question is vested or belongs.

(7) If any such agreement as is referred to in paragraph (6)(b)—

- (a) is made with a person in or to whom the right is vested or belongs; and
- (b) is expressed to have effect also for the benefit of those deriving title from or under that person,

it is effective in respect of the persons so deriving title, whether the title was derived before or after the making of the agreement.

(8) References in this article to private rights over land include any right of way, trust, incident, easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support; and include restrictions as to the use of land arising by virtue of a contract, agreement or undertaking having that effect.

Power to override easements and other rights

29.—(1) Any authorised activity which takes place on land within the Order land (whether the activity is undertaken by the undertaker or by any person deriving title from the undertaker or by any contractors, servants or agents of the undertaker) is authorised by this Order if it is done in accordance with the terms of this Order, notwithstanding that it involves—

- (a) an interference with an interest or right to which this article applies; or

(b) a breach of a restriction as to the user of land arising by virtue of a contract.

(2) In this article “authorised activity” means—

- (a) the erection, construction or maintenance of any part of the authorised development;
- (b) the exercise of any power authorised by this Order; or
- (c) the use of any land within the Order limits (including the temporary use of land).

(3) The interests and rights to which this article applies include any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support and include restrictions as to the user of land arising by the virtue of a contract.

(4) Subject to article 51 (no double recovery), where an interest, right or restriction is overridden by paragraph (1), unless otherwise agreed, compensation—

- (a) is payable under section 7 (measure of compensation in case of severance) or 10 (further provision as to compensation for injurious affection) of the 1965 Act; and
- (b) is to be assessed in the same manner and subject to the same rules as in the case of other compensation under those sections where—
 - (i) the compensation is to be estimated in connection with a purchase under that Act; or
 - (ii) the injury arises from the execution of works on or use of land acquired under that Act.

(5) Where a person deriving title under the undertaker by whom the land in question was acquired—

- (a) is liable to pay compensation by virtue of paragraph (4); and
- (b) fails to discharge that liability,

the liability is enforceable against the undertaker.

(6) Nothing in this article is to be construed as authorising any act or omission on the part of any person which is actionable at the suit of any person on any grounds other than such an interference or breach as is mentioned in paragraph (1) of this article.

Application of the 1981 Act

30.—(1) The 1981 Act applies as if this Order were a compulsory purchase order.

(2) The 1981 Act, as applied by paragraph (1), has effect with the following modifications.

(3) In section 1 (application of Act) for subsection (2) substitute—

“(2) This section applies to any Minister, any local or other public authority or any other body or person authorised to acquire land by means of a compulsory purchase order.”.

(4) In section 5(2) (earliest date for execution of declaration), omit the words from “, and this subsection” to the end.

(5) Omit section 5A(a) (time limit for general vesting declaration).

(6) In section 5B(b) (extension of time limit during challenge) for “section 23 of the Acquisition of Land Act 1981 (application to High Court in respect of compulsory purchase order), the three year period mentioned in section 5A” substitute “section 118 (legal challenges relating to applications for orders granting development consent) of the 2008 Act, the five year period mentioned in article 27 (time limit for exercise of authority to acquire land compulsorily) of the Boston Alternative Energy Facility Order 202[]”.

(7) In section 6 (notices after execution of declaration), in subsection (1)(b) for “section 15 of, or paragraph 6 of Schedule 1 to, the Acquisition of Land Act 1981” substitute “section 134 (notice of authorisation of compulsory acquisition) of the Planning Act 2008”.

(a) Inserted by section 182(2) of the Housing and Planning Act 2016 (c. 22).

(b) Inserted by section 202(2) of the Housing and Planning Act 2016 (c. 22).

(8) In section 7 (constructive notice to treat), in subsection (1)(a), omit the words “(as modified by section 4 of the Acquisition of Land Act 1981)”.

(9) In Schedule A1(a)(counter-notice requiring purchase of land not in general vesting declaration), for paragraph 1(2) substitute—

“(2) But see article 32 (acquisition of subsoil or air-space only) of the Boston Alternative Energy Facility Order 202[], which excludes the acquisition of subsoil only from this Schedule.”.

(10) References to the 1965 Act in the 1981 Act must be construed as references to that Act as applied by section 125 (application of compulsory acquisition provisions) of the 2008 Act (as modified by article 31 (modification of Part 1 of the 1965 Act)) to the compulsory acquisition of land under this Order.

Modification of Part 1 of the 1965 Act

31.—(1) Part 1 (compulsory purchase under Acquisition of Land Act of 1946) of the 1965 Act, as applied to this Order by section 125 (application of compulsory acquisition provisions) of the 2008 Act, is modified as follows.

(2) In section 4A(1)(b) (extension of time limit during challenge) for “section 23 of the Acquisition of Land Act 1981 (application to High Court in respect of compulsory purchase order), the three year period mentioned in section 4” substitute “section 118 (legal challenges relating to applications for orders granting development consent) of the Planning Act 2008, the five year period mentioned in article 27 (time limit for exercise of authority to acquire land compulsorily) of the Boston Alternative Energy Facility Order 202[]”.

(3) In section 11A(c) (powers of entry: further notices of entry)—

(a) in subsection (1)(a) after “land” insert “under that provision”; and

(b) in subsection (2) after “land” insert “under that provision”.

(4) In section 22(2) (interests omitted from purchase), for “section 4 of this Act” substitute “article 27 (time limit for exercise of authority to acquire land compulsorily) of the Boston Alternative Energy Facility Order 202[]”.

(5) In Schedule 2A(d) (counter-notice requiring purchase of land not in notice to treat)—

(a) for paragraphs 1(2) and 14(2) substitute—

“(2) But see article 32(3) (acquisition of subsoil or air-space only) of the Boston Alternative Energy Facility Order 202[], which excludes the acquisition of subsoil only from this Schedule.”; and

(b) after paragraph 29 insert—

“PART 4

INTERPRETATION

30. In this Schedule, references to entering on and taking possession of land do not include doing so under article 22 (protective work to buildings) or article 33 (temporary use of land for carrying out the authorised development) or article 34 (temporary use of land for maintaining the authorised development) of the Boston Alternative Energy Facility Order 202[].”.

(a) Inserted by paragraph 6 of Schedule 18 to the Housing and Planning Act 2016 (c. 22).

(b) Inserted by section 202(1) of the Housing and Planning Act 2016 (c. 22).

(c) Inserted by section 186(3) of the Housing and Planning Act 2016 (c. 22).

(d) Inserted by Schedule 17(1) paragraph 3 to the Housing and Planning Act 2016 (c. 22).

Acquisition of subsoil or air-space only

32.—(1) The undertaker may acquire compulsorily so much of, or such rights in, the subsoil of or air-space over the land referred to in paragraph (1) of article 25 (compulsory acquisition of land) as may be required for any purpose for which that land may be acquired under that provision instead of acquiring the whole of the land.

(2) Where the undertaker acquires any part of, or rights in, the subsoil of or air-space over land under paragraph (1), the undertaker is not required to acquire an interest in any other part of the land.

(3) The following do not apply in connection with the exercise of the power under paragraph (1) in relation to subsoil only—

- (a) Schedule 2A (counter-notice requiring purchase of land not in notice to treat) to the 1965 Act;
- (b) Schedule A1 (counter-notice requiring purchase of land not in general vesting declaration) to the 1981 Act; and
- (c) section 153(4A) (reference of objection to Upper Tribunal: general) of the 1990 Act.

(4) Paragraphs (2) and (3) do not apply where the undertaker acquires a cellar, vault, arch, or other construction forming part of a house, building or manufactory.

Temporary use of land for carrying out the authorised development

33.—(1) The undertaker may, in connection with the construction of the authorised development—

- (a) enter on and take temporary possession of—
 - (i) the land specified in column (1) of the table in Schedule 7 (land of which temporary possession may be taken) for the purpose specified in relation to that land in column (2) of the table in that Schedule;
 - (ii) any other Order land in respect of which no notice of entry has been served under section 11 (powers of entry) of the 1965 Act and no declaration has been made under section 4 (execution of declaration) of the 1981 Act (other than a notice of entry or a declaration in connection with the acquisition of rights and/or the imposition of restrictive covenants only);
- (b) remove any buildings, apparatus, fences, landscaping, debris and vegetation from that land;
- (c) construct temporary works (including the provision of means of access) and buildings on that land; and
- (d) construct any works on that land as are mentioned in Schedule 1 (authorised development).

(2) Not less than 14 days before entering on and taking temporary possession of land under this article the undertaker must serve notice of the intended entry on the owners and occupiers of the land.

(3) The undertaker is not required to serve notice under paragraph (2) where the undertaker has identified a potential risk to the safety of—

- (a) the authorised development or any of its parts;
- (b) the public; and/or
- (c) the surrounding environment,

and in such circumstances, the undertaker may enter the land under paragraph (1) subject to giving such period of notice as is reasonably practical in the circumstances.

(4) The undertaker may not, without the agreement of the owners of the land, remain in possession of any land under this article—

- (a) in the case of land specified in paragraph (1)(a)(i), after the end of the period of one year beginning with the date of final commissioning of the authorised development; or
- (b) in the case of land referred to in paragraph (1)(a)(ii), after the end of the period of one year beginning with the date of final commissioning of the authorised development unless the undertaker has, before the end of that period, served notice of entry under section 11 of the 1965 Act or made a declaration under section 4 of the 1981 Act or has otherwise acquired the land subject to temporary possession.

(5) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker must remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land unless otherwise agreed but the undertaker is not required to—

- (a) replace a building removed under this article;
- (b) restore the land on which any permanent works have been constructed under paragraph (1)(d);
- (c) remove any ground strengthening works which have been placed on the land to facilitate construction of the authorised development; or
- (d) remove any measures installed over or around statutory undertakers' apparatus to protect that apparatus from the authorised development.

(6) The undertaker must pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of the provisions of this article.

(7) Any dispute as to a person's entitlement to compensation under paragraph (6), or as to the amount of compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.

(8) Any dispute as to the satisfactory removal of temporary works and restoration of land under paragraph (5) does not prevent the undertaker giving up possession of the land.

(9) Subject to article 51 (no double recovery) nothing in this article affects any liability to pay compensation under section 152 (compensation in case where no right to claim in nuisance) of the 2008 Act or under any other enactment in respect of loss or damage arising from the carrying out of the authorised development, other than loss or damage for which compensation is payable under paragraph (6).

(10) The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) except that the undertaker is not precluded from acquiring any part of the subsoil of or airspace over (or rights in the subsoil of or airspace over) under article 32 (acquisition of subsoil or air-space only).

(11) Where the undertaker takes possession of land under this article, the undertaker is not to be required to acquire the land or any interest in it.

(12) Section 13 (refusal to give possession to acquiring authority) of the 1965 Act applies to the temporary use of land pursuant to 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.

(13) Nothing in this article prevents the taking of temporary possession more than once in relation to any land under paragraph (1).

Temporary use of land for maintaining the authorised development

34.—(1) Subject to paragraph (2), at any time during the maintenance period (as defined in paragraph (11)) relating to any part of the authorised development, the undertaker may—

- (a) enter on and take temporary possession of any land within the Order land if possession is reasonably required for the purpose of maintaining the authorised development;
- (b) enter on any land within the Order land for the purpose of gaining such access as is reasonably required for the purpose of maintaining the authorised development; and

- (c) construct such temporary works (including the provision of means of access) and buildings on the land as may be reasonably necessary for that purpose.
- (2) Paragraph (1) does not authorise the undertaker to take temporary possession of—
- (a) any house or garden belonging to a house; or
 - (b) any building (other than a house) if it is for the time being occupied.
- (3) Not less than 28 days before entering on and taking temporary possession of land under this article the undertaker must serve notice of the intended entry on the owners and occupiers of the land.
- (4) The undertaker is not required to serve notice under paragraph (3) where the undertaker has identified a potential risk to the safety of—
- (a) the authorised development or any of its parts;
 - (b) the public; and/or
 - (c) the surrounding environment,
- and in such circumstances, the undertaker may enter the land under paragraph (1) subject to giving such period of notice as is reasonably practical in the circumstances.
- (5) The undertaker may only remain in possession of land under this article for so long as may be reasonably necessary to carry out the maintenance of the part of the authorised development for which possession of the land was taken.
- (6) Before giving up possession of land of which temporary possession has been taken under this article, the undertaker must remove all temporary works and restore the land to the reasonable satisfaction of the owners of the land.
- (7) The undertaker must pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of the powers conferred by this article.
- (8) Any dispute as to a person’s entitlement to compensation under paragraph (7), or as to the amount of the compensation, is to be determined under Part 1 (determination of questions of disputed compensation) of the 1961 Act.
- (9) Nothing in this article affects any liability to pay compensation under section 10(2) (further provisions as to compensation for injurious affection) of the 1965 Act or under any other enactment in respect of loss or damage arising from the maintenance of the authorised development, other than loss or damage for which compensation is payable under paragraph (7).
- (10) Where the undertaker takes possession of land under this article, the undertaker is not to be required to acquire the land or any interest in it.
- (11) Section 13 (refusal to give possession to acquiring authority) of the 1965 Act applies to the temporary use of land pursuant to 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.
- (12) In this article “the maintenance period” means the period of 5 years beginning with the date of final commissioning.

Statutory undertakers

- 35.**—(1) Subject to the provisions of Schedule 8 (protective provisions), the undertaker may—
- (a) exercise the powers conferred by article 25 (compulsory acquisition of land) in relation to so much of the Order land belonging to statutory undertakers;
 - (b) extinguish or suspend the rights of or restrictive covenants for the benefit of, and remove or reposition the apparatus belonging to, statutory undertakers on, under, over or within the Order land.
- (2) Paragraph (1)(b) has no effect in relation to apparatus in respect of which article 36 (apparatus and rights of statutory undertakers in stopped up streets) of this Order applies.

Apparatus and rights of statutory undertakers in stopped up streets

36.—(1) Where a street is stopped up under article 14 (permanent stopping up of streets), any statutory utility whose apparatus is under, in, on, along or across the street has the same powers and rights in respect of that apparatus, subject to the provisions of this article, as if this Order had not been made.

(2) Where a street is stopped up under article 13 (temporary closure, alteration, diversion and restriction of use of streets) any statutory utility whose apparatus is under, in, on over, along or across the street may, and if reasonably requested to do so by the undertaker must—

- (a) remove the apparatus and place it or other apparatus provided in substitution for it in such other position as the utility may reasonably determine and have power to place it; or
- (b) provide other apparatus in substitution for the existing apparatus and place it in such position as described in sub-paragraph (a).

(3) Subject to the following provisions of this article, the undertaker must pay to any statutory utility an amount equal to the cost reasonably incurred by the utility in or in connection with—

- (a) the execution of the relocation works required in consequence of the stopping up of the street; and
- (b) the doing of any other work or thing rendered necessary by the execution of the relocation works.

(4) If in the course of the execution of relocation works under paragraph (2)—

- (a) apparatus of a better type, or greater capacity or of greater dimensions is placed in substitution for existing apparatus; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker, or, in default of agreement, is not determined by arbitration to be necessary, then, if it involves cost in the execution of the relocation works exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which, apart from this paragraph, would be payable to the statutory utility by virtue of paragraph (3) is to be reduced by the amount of that excess.

(5) For the purposes of paragraph (4)—

- (a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and
- (b) where the provision of a joint in a cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole is to be treated as if it also had been agreed or had been so determined.

(6) An amount which, apart from this paragraph, would be payable to a statutory utility in respect of works by virtue of paragraph (3) (and having regard, where relevant, to paragraph (4)) must, if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the utility any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, be reduced by the amount which represents that benefit.

(7) Paragraphs (3) to (6) do not apply where the authorised development constitutes major highway works, major bridge works or major transport works for the purposes of Part 3 of the 1991 Act, but instead—

- (a) the allowable costs of the relocation works are to be determined in accordance with section 85 (sharing of cost of necessary measures) of that Act and any regulations for the time being having effect under that section; and
- (b) the allowable costs are to be borne by the undertaker and the statutory utility in such proportions as may be prescribed by any such regulations.

(8) In this article—

“relocation works” means work executed, or apparatus provided, under paragraph (2); and

“statutory utility” means a statutory undertaker for the purposes of the 1980 Act or a public communications provider as defined in this section 151(1) (interpretation) of the Communications Act 2003(a).

Recovery of costs of new connections

37.—(1) Where any apparatus of a public utility undertaker or of a public communications provider is removed under article 35 (statutory undertakers) any person who is the owner or occupier of premises to which a supply was given from that apparatus is entitled to recover from the undertaker compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal, for the purpose of effecting a connection between the premises and any other apparatus from which a supply is given.

(2) Paragraph (1) does not apply in the case of the removal of a public sewer but where such a sewer is removed under article 35 (statutory undertakers) any person who is—

(a) the owner or occupier of premises the drains of which communicated with the sewer; or

(b) the owner of a private sewer which communicated with that sewer,

is to be entitled to recover from the undertaker compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal, for the purpose of making the drain or sewer belonging to that person communicate with any other public sewer or with a private sewerage disposal plant.

(3) This article does not have effect in relation to apparatus to which article 36 (apparatus and rights of statutory undertakers in stopped up streets) or Part 3 (street works in England and Wales) of the 1991 Act applies.

(4) In this article—

“public communications provider” has the same meaning as in section 151(1) of the Communications Act 2003(b); and

“public utility undertaker” has the same meaning as in the 1980 Act.

Disregard of certain improvements, etc.

38.—(1) In assessing the compensation payable to any person on the acquisition from that person of any land or right over any land under this Order, the tribunal must not take into account—

(a) any interest in land; or

(b) any enhancement of the value of any interest in land by reason of any building erected, works carried out or improvement or alteration made on the relevant land,

if the tribunal is satisfied that the creation of the interest, the erection of the building, the carrying out of the works or the making of the improvement or alteration as part of the authorised development was not reasonably necessary and was undertaken with a view to obtaining compensation or increased compensation.

(2) In paragraph (1) “relevant land” means the land acquired from the person concerned or any other land with which that person is, or was at the time when the building was erected, the works constructed or the improvement or alteration made as part of the authorised development, directly or indirectly concerned.

(a) 2003 c. 21.

(b) 2003 c. 21.

Set-off for enhancement in value of retained land

39.—(1) In assessing the compensation payable to any person in respect of the acquisition from that person under this Order of any land (including the subsoil) the tribunal must set off against the value of the land so acquired any increase in value of any contiguous or adjacent land belonging to that person in the same capacity which will accrue to that person by reason of the construction of the authorised development.

(2) The 1961 Act has effect, subject to paragraph (1) as if this Order were a local enactment for the purposes of that Act.

PART 6

MISCELLANEOUS AND GENERAL

Disapplication of legislative provisions, etc.

40.—(1) The following provisions do not apply in relation to the construction of any work or the carrying out of any operation required for the purpose of, or in connection with, the construction, operation or maintenance of the authorised development—

- (a) sections 23 (prohibition of obstructions, etc. in watercourses), 30 (authorisation of drainage works in connection with a ditch) and 32 (variation of awards) of the Land Drainage Act 1991(a);
- (b) the provisions of any byelaws made under section 66 (powers to make byelaws) of the Land Drainage Act 1991;
- (c) the provisions of any byelaws made under, or having effect as if made under, paragraphs 5, 6 or 6A of Schedule 25 (byelaw making powers of the appropriate agency) to the Water Resources Act 1991(b); and
- (d) regulation 12 (requirement for environmental permit) of the Environmental Permitting (England and Wales) Regulations 2016(c) in respect of a flood risk activity only.

(2) The provisions of the Neighbourhood Planning Act 2017(d), insofar as they relate to temporary possession of land under this Order, do not apply in relation to the construction of any work or the carrying out of any operation required for the purpose of, or in connection with, the construction of the authorised development and, within the maintenance period defined in article 34(12) (temporary use of land for maintaining the authorised development) of this Order, any maintenance of any part of the authorised development.

(3) Section 25 of the Burial Act 1857(e) (bodies not to be removed from burial grounds, save under faculty, without licence of Secretary of State) does not apply to a removal carried out in accordance with article 24 (removal of human remains) of this Order.

(4) Despite the provisions of section 208 (liability) of the 2008 Act, for the purposes of regulation 6 of the Community Infrastructure Levy Regulations 2010(f) any building comprised in the authorised development is deemed to be—

- (a) a building into which people do not normally go; or

(a) 1991 c. 59.

(b) 1991 c. 57. Paragraph 5 was amended by section 100(1) and (2) of the Natural Environment and Rural Communities Act 2006 (c. 16), section 84 of, and paragraph 3 of Schedule 11 to, the 2009 Act (c. 23), paragraphs 40 and 49 of Schedule 25 to the Flood and Water Management Act 2010 (c. 29) and S.I. 2013/755. Paragraph 6 was amended by paragraph 26 of Schedule 15 to the Environment Act 1995 (c. 25), section 224 of, and paragraphs 20 and 24 of Schedule 16, and Part 5(B) of Schedule 22, to, the 2009 Act and S.I. 2013/755. Paragraph 6A was inserted by section 103(3) of the Environment Act 1995.

(c) S.I. 2016/1154.

(d) 2017 c. 20.

(e) 1857 c. 81.

(f) S.I. 2010/948, amended by S.I. 2011/987; there are other amending instruments but none are relevant to this Order.

- (b) a building into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery.

Amendment of local legislation

41.—(1) The following local enactments and local byelaws, and any byelaws or other provisions made under any of those enactments or byelaws, are hereby excluded and do not apply insofar as inconsistent with a provision, of or a power conferred by, this Order—

- (a) Boston Port and Harbour Act 1812(a);
- (b) Witham Navigation and Drainage Act 1812(b);
- (c) River Witham Outfall Improvement Act 1880(c);
- (d) Boston Dock Act 1881(d);
- (e) Land Drainage (Black Sluice) Provisional Order Confirmation Act 1925(e);
- (f) The Boston Barrier Order 2017(f);
- (g) Boston Dock Byelaws 1947; and
- (h) Black Sluice Internal Drainage Board Complete Land Drainage Byelaws 1988.

(2) For the purpose of paragraph (1) a provision is inconsistent with the exercise of a power conferred by this Order if and insofar as (in particular)—

- (a) it would make it an offence to take action, or not to take action, in pursuance of a power conferred by this Order;
- (b) action taken in pursuance of a power conferred by this Order would cause the provision to apply so as to enable a person to require the taking of remedial or other action or so as to enable remedial or other action to be taken; or
- (c) action taken in pursuance of a power or duty under the provisions would or might interfere with the exercise of any work authorised by this Order.

(3) Where any person notifies the undertaker in writing that anything done or proposed to be done by the undertaker or by virtue of this Order would amount to a contravention of a statutory provision of local application, the undertaker must as soon as reasonably practicable, and at any rate within 14 days of receipt of the notice, respond in writing setting out—

- (a) whether the undertaker agrees that the action taken or proposed does or would contravene the provision of local application;
- (b) if the undertaker does agree, the grounds (if any) on which the undertaker believes that the provision is excluded by this article; and
- (c) the extent of that exclusion.

Planning permission, etc.

42.—(1) If planning permission is granted under the powers conferred by the 1990 Act for development any part of which is within the Order limits following the coming into force of this Order that is—

- (a) not itself a nationally significant infrastructure project under the 2008 Act or part of such a project; or
- (b) required to complete or enable the use or operation of any part of the development authorised by this Order,

(a) 1812. c. 105.
(b) 1812 c. 108.
(c) 1880 c. cliii.
(d) 1881 c. cxii.
(e) 1925 c. lxxi.
(f) S.I. 2017/1329.

then the construction, maintenance, use or operation of that development under the terms of the planning permission does not constitute a breach of the terms of this Order.

(2) Development consent granted by this Order is to be deemed as specific planning permission for the purposes of section 264(3) (cases in which land is to be treated as operational land for the purposes of that Act) of the 1990 Act.

(3) Development consent granted by this Order is to be treated as planning permission in accordance with Part 3 (control over development) of the 1990 Act for the purposes of Regulation 14 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012^(a) and the Forestry Act 1967^(b).

Application of landlord and tenant law

43.—(1) This article applies to—

- (a) any agreement for leasing to any person the whole or any part of the authorised development or the right to operate the same; and
- (b) any agreement entered into by the undertaker with any person for the construction, maintenance, use or operation of the authorised development, or any part of it,

so far as any such agreement relates to the terms on which any land is the subject of a lease granted by or under that agreement is to be provided for that person's use.

(2) No enactment or rule of law regulating the rights and obligations of landlords and tenants prejudices the operation of any agreement to which this article applies.

(3) No enactment or rule of law to which paragraph (2) applies is to apply in relation to the rights and obligations of the parties to any lease granted by or under any such agreement so as to—

- (a) exclude or in any respect modify any of the rights and obligations of those parties under the terms of the lease, whether with respect to the termination of the tenancy or any other matter;
- (b) confer or impose on any such party any right or obligation arising out of or connected with anything done or omitted on or in relation to land which is the subject of the lease, in addition to any such right or obligation provided for by the terms of the lease; or
- (c) restrict the enforcement (whether by action for damages or otherwise) by any party to the lease of any obligation of any other party under the lease.

Defence to proceedings in respect of statutory nuisance

44.—(1) Where proceedings are brought under section 82(1) (summary proceedings by persons aggrieved by statutory nuisances) of the Environmental Protection Act 1990^(c) in relation to a nuisance falling within paragraphs (c), (d), (e), (fb), (g) or (h) of section 79(1) (statutory nuisances and inspections therefor) of that Act no order is to be made, and no fine may be imposed, under section 82(2) of that Act if—

- (a) the defendant shows that the nuisance—
 - (i) relates to premises used by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and that the nuisance is attributable to the construction of the authorised development in accordance with a notice served under section 60 (control of noise on construction sites), or a consent given under section 61 (prior consent for work on construction sites), of the Control of Pollution Act 1974^(d); or

(a) S.I. 2012/605.

(b) 1967 c. 10.

(c) 1990 c. 43. Section 82 was amended by section 103 of the Clean Neighbourhoods and Environment Act 2005 (c. 16); section 79 was amended by sections 101 and 102 of the same Act. There are other amendments not relevant to this Order.

(d) 1974 c. 40.

- (ii) is a consequence of the construction or maintenance of the authorised development and that it cannot reasonably be avoided; or
- (b) the defendant shows that the nuisance is a consequence of the use of the authorised development and that it cannot reasonably be avoided.

(2) For the purposes of paragraph (1), compliance with the controls and measures described in the Code of Construction Practice approved under paragraph 10 of Schedule 2 to this Order will be sufficient, but not necessary, to show that an alleged nuisance could not reasonably be avoided.

(3) Section 61(9) (consent for work on construction site to include statement that it does not of itself constitute a defence to proceedings under section 82 of the Environmental Protection Act 1990) of the Control of Pollution Act 1974 does not apply where the consent relates to the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development.

Protective provisions

45. Schedule 8 (protective provisions) to the Order has effect.

Deemed marine licence

46. The marine licence set out in Schedule 9 (deemed marine licence) is deemed to have been issued under Part 4 of the 2009 Act for the licensed activities set out in Part 1, and subject to the licence conditions set out in Part 4, of that licence.

Certification of documents, etc.

47.—(1) The undertaker must, as soon as practicable after the making of this Order, submit to the Secretary of State copies of all documents and plans referred to in Schedule 10 (documents and plans to be certified) to this Order for certification that they are true copies of those documents.

(2) Where any plan or document set out in Schedule 10 requires to be amended to reflect the terms of the Secretary of State's decision to make the Order, that plan or document in the form amended to the Secretary of State's satisfaction is the version of the plan or document required to be certified under paragraph (1).

(3) A plan or document so certified is to be admissible in any proceedings as evidence of the contents of the document of which it is a copy.

Service of notices

48.—(1) A notice or other document required or authorised to be served for the purposes of this Order may be served—

- (a) by post;
- (b) by delivering it to the person on whom it is to be served or to whom it is to be given or supplied; or
- (c) with the consent of the recipient and subject to paragraphs (7) to (9), by electronic transmission.

(2) Where the person on whom a notice or other document to be served for the purposes of this Order is a body corporate, the notice or document is duly served if it is served on the secretary or clerk of that body.

(3) For the purposes of section 7 (references to service by post) of the Interpretation Act 1978(a) as it applies for the purposes of this article, the proper address of any person in relation to the

(a) 1978 c. 30.

service on that person of a notice or document under paragraph (1) is, if that person has given an address for service, that address and otherwise—

- (a) in the case of the secretary or clerk of a body corporate, the registered or principal office of that body, and,
- (b) in any other case, the last known address of that person at that time of service.

(4) Where for the purposes of this Order a notice or other document is required or authorised to be served on a person as having an interest in, or as the occupier of, land and the name or address of that person cannot be ascertained after reasonable enquiry, the notice may be served by—

- (a) addressing it to that person by the description of “owner”, or as the case may be “occupier” of the land (describing it); and
- (b) either leaving it in the hands of the person who is or appears to be resident or employed on the land or leaving it conspicuously affixed to some building or object on or near the land.

(5) Where a notice or other document required to be served or sent for the purposes of this Order is served or sent by electronic transmission the requirement is to be taken to be fulfilled only where—

- (a) the recipient of the notice or other document to be transmitted has given consent to the use of electronic transmission in writing or by electronic transmission;
- (b) the notice or document is capable of being accessed by the recipient;
- (c) the notice or document is legible in all material respects; and
- (d) in a form sufficiently permanent to be used for subsequent reference.

(6) Where the recipient of a notice or other document served or sent by electronic transmission notifies the sender within seven days of receipt that the recipient requires a paper copy of all or any part of that notice or other document the sender must provide such a copy as soon as reasonably practicable.

(7) Any consent to the use of an electronic transmission by a person may be revoked by that person in accordance with paragraph (8).

(8) Where a person is no longer willing to accept the use of electronic transmission for any of the purposes of this Order—

- (a) that person must give notice in writing or by electronic transmission revoking any consent given by that person for that purpose; and
- (b) such revocation is final and takes effect on a date specified by the person in the notice but that date must not be less than seven days after the date on which the notice is given.

(9) This article does not exclude the employment of any method of service not expressly provided for by it.

(10) In this article “legible in all material respects” means that the information contained in the notice or document is available to that person to no lesser extent than it would be if served, given or supplied by means of a notice or document in printed form.

Arbitration

49.—(1) Except where otherwise expressly provided for in this Order and unless otherwise agreed in writing between the parties, any difference under any provision of this Order (other than a difference which falls to be determined by the tribunal) must be referred to and settled by a single arbitrator to be agreed between the parties or, failing agreement, to be appointed on the application of either party (after giving notice in writing to the other) by the President of the Institution of Civil Engineers.

(2) For the avoidance of doubt, any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order will not be subject to arbitration.

Procedures in relation to approvals, etc., under Schedule 2

50.—(1) Where an application or request is submitted to the relevant planning authority, a highway authority, a street authority or the owner of a watercourse, sewer or drain for any consent, agreement or approval required or contemplated by any other the provisions of the Order such consent, agreement or approval, if given, must be given in writing, such agreement not to be unreasonably withheld.

(2) Part 2 of Schedule 2 (procedure for discharge of requirements) has effect in relation to all consents, agreements or approvals granted, refused or withheld in relation to the requirements set out in Part 1 of Schedule 2, and any document referred to in any requirement in that Part 1.

(3) The procedure set out in Part 2 of Schedule 2 has effect in relation to any other consent, agreement or approval required under this Order where such consent, agreement or approval is granted subject to any condition to which the undertaker objects or is refused or is withheld.

No double recovery

51. Compensation is not payable in respect of the same matter both under this Order and under any enactment, any contract or any rule of law.

Guarantees in respect of payment of compensation

52.—(1) The undertaker must not begin to exercise the powers conferred by the provisions referred to in paragraph (2) in relation to any Order land unless it has first put in place either—

- (a) a guarantee and the amount of that guarantee approved by the Secretary of State in respect of the liabilities of the undertaker to pay compensation pursuant to the provisions referred to in paragraph (2); or
- (b) an alternative form of security and the amount of that security approved by the Secretary of State in respect of the liabilities of the undertaker to pay compensation pursuant to the provisions referred to in paragraph (2).

(2) The provisions are—

- (a) article 25 (compulsory acquisition of land);
- (b) article 28 (private rights);
- (c) article 33 (temporary use of land for carrying out the authorised development);
- (d) article 34 (temporary use of land for maintaining the authorised development); and
- (e) article 35 (statutory undertakers).

(3) A guarantee or alternative form of security given in respect of any liability of the undertaker to pay compensation pursuant to the provisions referred to in paragraph (2) is to be treated as enforceable against the guarantor or person providing the alternative form of security by any person to whom such compensation is payable and must be in such a form as to be capable of enforcement by such a person.

(4) Nothing in this article requires a guarantee or alternative form of security to be in place for more than 15 years after the date on which the relevant power is exercised.

Crown rights

53.—(1) Nothing in this Order affects prejudicially any estate, right, power, privilege, authority or exemption of the Crown and in particular, nothing in this Order authorises the undertaker or any lessee or licensee to take, use, enter upon or in any manner interfere with any land or rights of any description (including any portion of the shore or bed of the sea or any river, channel, creek, bay or estuary)—

- (a) belonging to Her Majesty in right of the Crown and forming part of The Crown Estate without the consent in writing of the Crown Estate Commissioners;

- (b) belonging to Her Majesty in right of the Crown and not forming part of The Crown Estate without the consent in writing of the government department having the management of that land; or
- (c) belonging to a government department or held in trust for Her Majesty for the purposes of a government department without the consent in writing of that government department.

(2) Paragraph (1) does not apply to the exercise of any right under this Order for the compulsory acquisition of an interest in any Crown land (as defined in section 227 of the 2008 Act) which is for the time being held otherwise than by or on behalf of the Crown.

(3) A consent under paragraph (1) may be given unconditionally or subject to terms and conditions and is deemed to have been given in writing where it is sent electronically.

Offshore ornithology compensation provisions

54. Schedule 11 (ornithology compensation measures) to the Order has effect.

Signed by the authority of the Secretary of State for Business, Energy and Industrial Strategy

	<i>Name</i>
	Head of Energy Infrastructure Planning
Date	Department for Business, Energy and Industrial Strategy

SCHEDULES

SCHEDULE 1

Article 3

AUTHORISED DEVELOPMENT

A nationally significant infrastructure project as defined in section 14(1)(a) (nationally significant infrastructure projects: general) and section 15 (generating stations) of the 2008 Act being a generating station with a capacity of over 50 megawatts but below 300 megawatts and associated development under sections 115(1) and (2) (development for which development consent may be granted) of the 2008 Act comprising all or part of—

In the Borough of Boston, Lincolnshire

Work No 1 — Works to construct a power generation facility—

- (a) **Work No. 1A** — an energy recovery facility with a capacity to process up to 1,200,000 tonnes of waste refuse derived fuel per calendar year including—
 - (i) fuel reception and storage facilities consisting of a bale shredding facility, solid fuel storage bunker, cranes and handling equipment;
 - (ii) up to three waste processing lines, each line including a feed hopper, ram feed, air cooled moving grates, a boiler and steam systems, combustion air systems and flue gas treatment facilities including air pollution control residues and reagent storage silos and tanks;
 - (iii) associated induced fans and emissions control monitoring systems per line;
 - (iv) one emission stack per line;
 - (v) dedicated steam turbine connected to each line;
 - (vi) integrated protection system and uninterruptable power supplies;
 - (vii) air cooled condenser array;
 - (viii) connection from exhaust stacks from lines one and three to Work No. 1C for capture of carbon dioxide and return connection for waste exhaust gases; and
 - (ix) conveyors to transfer bottom ash and boiler ash to ash processing facility (Work No. 1B).
- (b) **Work No. 1B** — an ash processing building with a capacity to process up to 200,000 tonnes of bottom ash and boiler ash per calendar year including—
 - (i) ash storage facilities to receive ash from Work No. 1A;
 - (ii) ash processing facilities to prepare ash for transfer to the lightweight aggregates facility (Work No. 2);
 - (iii) ferrous magnet system and storage for separated ferrous material;
 - (iv) solar photovoltaic panels on all or part of Work No.1B building roof including switchgear, inverters, transformers and permanent equipment for maintenance to deliver power to the authorised development; and
 - (v) conveyor system for transfer of processed ash and air pollution control residues to Work No. 2.
- (c) **Work No. 1C** — two carbon dioxide processing units, consisting of a carbon dioxide processing unit, storage tanks, vehicle connection points, return connection to stack for lines one and three.

Work No. 2 — Works to construct a lightweight aggregate manufacturing facility with a capacity to process up to 300,000 tonnes of aggregate per calendar year including—

- (a) storage silo facilities for lightweight aggregate processing lines;
- (b) four processing lines; each line including a feed hopper, mixer units, trefoil kiln, and flue gas treatment facilities including air pollution control residues and reagent storage silos and tanks;
- (c) associated induced fans and emissions control monitoring systems per line;
- (d) two filter banks and two emission stacks;
- (e) storage silos for storing manufactured lightweight aggregate pellets; and
- (f) sealed storage pits, drainage and sump facilities for storing up to 190,000 tonnes of imported clay per calendar year, and up to 10,000 tonnes of sediment dredged from The Haven during maintenance dredging activities per calendar year for use in the lightweight aggregates manufacturing process.

Work No. 3 — Works to construct an electrical substation—

- (a) **Work No. 3A** — on-site below ground trenches, ducting and jointing pits; and above ground structures including switchgear, and transformer, busbar sections, integrated protection scheme and uninterruptable power supplies; connection from power generation turbine facility (Work No 1A); and
- (b) **Work No. 3B** — construction of a new pylon; and connection to 132kV pylon for export of power from the power generation facility (Work No. 1A); and incoming connection point from the grid.

Work No. 4 — Works to construct a wharf facility with a capacity to receive up to 1,200,000 tonnes of waste refuse derived fuel and imported clay and sediment, and export up to 300,000 tonnes lightweight aggregates per calendar year including—

- (a) 400m long wharf structure forming 7.2m AOD. flood defence line containing up to three berthing points and scour protection;
- (b) cranes and refuse derived fuel bale handling equipment;
- (c) two conveyor lines (both partially open for loading, then covered sections) to transfer waste refuse derived fuel bales to Works No. 1A, including thermal cameras;
- (d) wharf ramp structure;
- (e) bale contingency storage area;
- (f) re-baling facility;
- (g) bale quarantine area;
- (h) conveyor and handling equipment for loading ships with manufactured aggregate;
- (i) shore to ship power facility; and
- (j) storage areas for mobile plant equipment, including mobile cranes and forklift trucks.

Work No. 5 — Works to construct or install supporting buildings and facilities, including—

- (a) diesel storage tanks;
- (b) process effluent storage tank;
- (c) demineralised water treatment plant;
- (d) fire water tank(s), pump room(s) and fire protection facilities;
- (e) control rooms;
- (f) administration block(s) including welfare facilities;
- (g) distributed control system;
- (h) workshop(s) and associated stores;
- (i) machinery storage facilities;
- (j) security gatehouses and barriers;
- (k) weighbridges;

- (l) heavy goods vehicle holding area;
- (m) storage for on-site mobile equipment;
- (n) external fuel container storage area;
- (o) visitor centre;
- (p) 33kv transformers to distribute power from Work No. 3; and
- (q) emergency stand-by generator(s).

Work No. 6 — Works to construct and install supporting infrastructure, including—

- (a) pipework (including flow/return pipework), cables, telecommunications, other services and associated infrastructure;
- (b) site drainage, waste management, water, wastewater, other services and associated infrastructure;
- (c) new or alteration to accesses, a vehicular access road and internal vehicular access road, vehicle turning, waiting and parking areas and site pedestrian access routes;
- (d) a footbridge on Boston Public Footpath 14 between OSGR TF3374542872 to OSGR TF3400742238 and OSGR TF3400742238 to OSGR TF3417242188 to allow safe pedestrian passage over certain site roads; and
- (e) operational vehicle parking.

Work No. 7 — Works to construct temporary construction compounds including—

- (a) hard standing;
- (b) vehicle parking;
- (c) office accommodation block(s) and welfare facilities;
- (d) new or alteration to accesses;
- (e) concrete batching plant, generators, aggregates storage area and temporary aggregates conveyor from the wharf to the concrete batching plant; and
- (f) construction areas.

In connection with and in addition to Work Nos. 1, 2, 3, 4, 5, 6 and 7 to the extent that it does not otherwise form part of those Work Nos., further associated development within the Order limits including—

- (a) lighting infrastructure, including perimeter lighting columns;
- (b) fencing, boundary treatment and other means of enclosure;
- (c) signage;
- (d) CCTV and other security apparatus;
- (e) surface and foul water drainage facilities;
- (f) potable water supply;
- (g) new telecommunications and utilities apparatus and connections;
- (h) hard and soft landscaping;
- (i) biodiversity enhancement measures and environmental mitigation measures;
- (j) works permanently to alter the position of existing telecommunications and utilities apparatus and connections;
- (k) works for the protection of buildings and land; and
- (l) site establishment and preparation works, including site clearance (including temporary fencing and vegetation removal), earthworks (including soil stripping and storage and site levelling) and excavations, the creation of temporary construction access points and the temporary alteration of the position of services and utilities apparatus and connections,

and such other buildings, structures, works or operations, and modifications to, or demolition of, any existing buildings, structures or works as may be necessary or expedient for the purposes of or

in connection with the construction, operation and maintenance of the works in this Schedule 1, but only within the Order limits and insofar as they are unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

SCHEDULE 2 REQUIREMENTS

Article 3

PART 1 REQUIREMENTS

Interpretation

1.—(1) In this Schedule—

“biodiversity units” means the product of the size of an area, and the distinctiveness and condition of the habitat it comprises to provide a measure of ecological value (as assessed using the Defra biodiversity off-setting metric);

“biodiversity off-setting scheme” means a scheme which will deliver biodiversity enhancements which must not be less than the off-setting value;

“Defra” means the Department for Environment, Food and Rural Affairs;

“Defra biodiversity off-setting metric” means the mechanism published by Defra to quantify impacts on biodiversity, which allows biodiversity losses and gains affecting different habitats to be compared and ensures offsets are sufficient to compensate for residual losses of biodiversity;

“habitat mitigation area” means the area shown on Figure 17.9 of the environmental statement;

“heavy commercial vehicle” has the meaning given by section 138 (meaning of “heavy commercial vehicle”) of the Road Traffic Regulation Act 1984(a);

“off-setting value” means the net biodiversity impact of the authorised development, calculated using the Defra biodiversity off-setting metric, measured in biodiversity units; and

“wharf outage” means circumstances caused by factors beyond the undertaker’s control in which waste, clay or sediment has not or could not be received at Work No. 4 for a period in excess of four consecutive days.

(2) References in this Schedule to part of the authorised development are to be construed as references to stages, phases or elements of the authorised development in respect of which an application is made by the undertaker under this Schedule, and references to commencement of part of the authorised development in this Schedule are to be construed accordingly.

(3) References to details or schemes approved under this Schedule are to be construed as references to details or schemes approved in relation to a specified part of the authorised development, as the case may be.

Time limits

2.—(1) The authorised development must not commence after the expiry of five years from the date on which this Order comes into force.

(2) The authorised development must not commence unless the undertaker has given the relevant planning authorities one month’s notice of its intention to commence the authorised development.

(a) 1984 c. 27.

Detailed design approval

3.—(1) The authorised development must be designed in detail and carried out in accordance with the design principles contained in the design and access statement and the preliminary scheme design shown on the indicative generating station plans and indicative wharf plans, unless otherwise agreed in writing by the relevant planning authority, following consultation with the Environment Agency to the extent that it relates to matters relevant to its function, provided that the relevant planning authority is satisfied that any amendments to those documents showing departures from the preliminary scheme design would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.

(2) Where amended details are approved by the relevant planning authority under sub-paragraph (1), those details are deemed to be substituted for the corresponding indicative generating station plans and indicative wharf plans the undertaker must make those amended details available in electronic form for inspection by members of the public.

Detailed design (appearance)

4.—(1) In relation to any part of the authorised development comprised in Work Nos. 1, 2, 3, 4 and 5 no development of that part may commence until details of the external appearance, including the colour, materials and surface finishes, of all new permanent buildings and structures have been submitted to and approved by the relevant planning authority.

(2) The authorised development must be carried out in accordance with the approved details.

Parameters of authorised development

5. The elements of the authorised development listed in column (1) of the table below (design parameters) must not exceed the maximum dimensions and levels and, where applicable, the minimum dimensions, set out in relation to that element in columns (3) to (6) of that table.

(1) <i>Element of authorised development</i>	(2) <i>Work No.</i>	(3) <i>Maximum length (metres)</i>	(4) <i>Maximum width (metres)</i>	(5) <i>Maximum height (metres) from ground level unless stated</i>	(6) <i>Minimum height (metres) from ground level unless stated</i>
Main energy recovery facility buildings (3 No. units, dimensions per unit)	1A	105	35	44	–
Energy recovery stacks (3 No.)	1A(a)(iv)	–	–	80	80
Turbine building	1A(a)(v)	53	40	20	–
Air cooled condenser array	1A(a)(vii)	65	45	30	–
Ash processing building	1B	70	30	32	–
Carbon dioxide recovery building	1C	30	20	12	–
Lightweight aggregates main building	2	75	40	44	–
Lightweight aggregates storage silos	2(a), 2(e)	6	6	25	–
Lightweight aggregates stacks (2 No.)	2(d)	–	–	80	80
Electrical substation	3	95	35	–	–

<i>(1) Element of authorised development</i>	<i>(2) Work No.</i>	<i>(3) Maximum length (metres)</i>	<i>(4) Maximum width (metres)</i>	<i>(5) Maximum height (metres) from ground level unless stated</i>	<i>(6) Minimu m height (metres) from ground level unless stated</i>
Wharf structure	4(a)	400	–	–	7.2 (AOD)
Supporting buildings and facilities (control room, visitor centre, workshops)	5	40	20	15	–

Landscape and ecological mitigation strategy

6.—(1) No part of the authorised development may commence until a landscape and ecological mitigation strategy for that part has been submitted to and approved by the relevant planning authority, following consultation with the Environment Agency, the relevant statutory nature conservation body, Lincolnshire Wildlife Trust and the Royal Society for the Protection of Birds.

(2) The relevant planning authority’s approval of the landscape and ecological mitigation strategy is restricted to those parts of the strategy that relate to the parts of the authorised development that are above MHWS, with the remainder the strategy approved by the MMO under condition 18 of Schedule 9 (deemed marine licence).

(3) The landscape and ecological mitigation strategy approved under sub-paragraph (1) must be substantially in accordance with the outline landscape and ecological landscape mitigation strategy.

(4) The landscape and ecological mitigation strategy approved under sub-paragraph (1) must include details of—

- (a) mitigation measures required to protect protected habitats and species, non–statutory designated sites and other habitats and species of principal importance during the construction of the authorised development;
- (b) mitigation measures required to protect protected habitats and species, non–statutory designated sites and other habitats and species of principal importance during the operation of the authorised development;
- (c) the results of the Defra biodiversity off–setting metric together with the off–setting value required, the nature of such off–setting and evidence that the off–setting value provides for the required biodiversity compensation, risk factors (including temporal lag) and long term management and monitoring;
- (d) the site or sites on which the compensation off–setting required pursuant to (c) will be provided together with evidence demonstrating that the site or sites has/have been chosen in accordance with the prioritisation set out in the outline landscape and ecological mitigation strategy;
- (e) certified copies of the completed legal agreements securing the site or sites identified in (d) to enable enactment of the biodiversity off–setting scheme and the biodiversity off–setting management and monitoring plan as approved in the landscape and ecological mitigation strategy;
- (f) any hard and soft landscaping to be incorporated within Work Nos. 1, 2, 3, 4, 5 and 6 including location, number, species, size of any planting and the management and maintenance regime for such landscaping; and

- (g) an air quality deposition monitoring plan that must be substantially in accordance with the outline air quality deposition monitoring plan and must include the final numbers and locations of deposition monitoring locations, as agreed with the relevant statutory nature conservation body and the Environment Agency.

(5) The landscape and ecological mitigation strategy must be implemented as approved under sub-paragraph (1).

Archaeology

7.—(1) No part of Work Nos. 1, 2, 3, 4, 5 and 6 may commence until for that part a written scheme of investigation, reflecting the relevant mitigation measures set out in the outline written scheme of investigation has been submitted to and approved by the relevant planning authority, following consultation with Historic England.

(2) The scheme approved under sub-paragraph (1) must—

- (a) identify areas where field work or a watching brief are required and the measures to be taken to protect, record or preserve any significant archaeological remains that may be found; and
- (b) detail the measures for post-field work processing, assessment analysis and reporting of the results of archaeological work and the deposition of the archive.

(3) Works Nos. 1, 2, 3, 4, 5 and 6 must be carried out in accordance with the scheme referred to in sub-paragraph (1), unless otherwise agreed by the relevant planning authority.

Highway access

8.—(1) No part of Work No. 7 may commence until written details of the siting, design and layout of any new temporary means of access to a highway in that part, or any alteration to an existing means of access to a highway in that part has been submitted to and approved by the relevant planning authority, following consultation with the relevant highway authority.

(2) The highway accesses must be constructed or altered as approved under sub-paragraph (1).

(3) The undertaker must not exercise the power in article 14(1) (permanent stopping up of streets) unless and until a plan showing the layout for the termination of the street (as specified in columns (1) and (2) of Schedule 6) has been submitted to and approved by the relevant planning authority.

Surface and foul water drainage

9.—(1) No part of the authorised development may commence until for that part a surface and foul water drainage strategy has been submitted to and approved by the relevant planning authority, following consultation with the Environment Agency, lead local flood authority, Anglian Water Services Limited and relevant internal drainage board to the extent that it relates to matters relevant to their functions.

(2) The strategy submitted for approval under sub-paragraph (1) must be substantially in accordance with the outline surface and foul water drainage strategy.

(3) The surface and foul water drainage strategy must be implemented as approved under sub-paragraph (1) and maintained throughout the operation of the authorised development unless otherwise agreed with the relevant planning authority.

Contamination

10.—(1) No part of the authorised development may commence until—

- (a) intrusive ground investigations have been carried out for the purpose of assessing ground conditions; and
- (b) a scheme to deal with the contamination of land, including groundwater, and ground gases which are likely to cause significant harm to persons or pollution of controlled

waters or the environment, has, for that part, been submitted to and approved by the relevant planning authority.

(2) The scheme must include a risk assessment, supported by site investigation data, to identify the extent of any contamination and the remedial measures to be taken to render the land fit for its intended purpose.

(3) With respect to ground gases, the risk assessment required under sub-paragraph (2) must adopt the source-pathway-receptor principle to identify plausible contaminant linkages and take into account potential migration of off-site ground gases.

(4) The authorised development, including any remediation, must be carried out in accordance with the approved scheme unless otherwise agreed with the relevant planning authority.

(5) Should any remediation be required a verification report demonstrating the completion of works set out in the approved scheme and the effectiveness of the remediation must be submitted to, and approved, by the relevant planning authority prior to the date of final commissioning.

(6) The verification report submitted for approval under sub-paragraph (5) must include results of sampling and monitoring carried out in accordance with the remediation strategy to demonstrate that the site remediation criteria have been met along with any long-term post-remediation monitoring requirements.

Code of construction practice

11.—(1) No part of the authorised development may commence until a code of construction practice for that part has been submitted to and approved by the relevant planning authority, following consultation with the Environment Agency and the relevant statutory nature conservation body to the extent that it relates to matters relevant to their functions.

(2) The code of construction practice submitted for approval must be substantially in accordance with the outline code of construction practice to the extent that it is applicable to that part and must reflect the mitigation measures set out in the register of environmental actions and commitments.

(3) The code of construction practice submitted under sub-paragraph (1) must include the following—

- (a) the construction and phasing programme;
- (b) liaison procedures;
- (c) complaints procedures;
- (d) an air quality and dust management plan detailing air quality and dust monitoring and management measures during construction that must be substantially in accordance with the outline air quality and dust management plan;
- (e) construction noise and vibration monitoring and management plan;
- (f) a site waste management plan detailing sustainable site waste management measures;
- (g) a soil management plan detailing measures to ensure the temporary storage of soils and other material of value will be in accordance with best practice;
- (h) details of screening and fencing to be installed during construction;
- (i) a materials management plan detailing measures to ensure the safe storage of excavated materials during construction;
- (j) a pollution prevention and incident response plan detailing measures to prevent and control the spillage of oil, chemicals and other potentially harmful liquids;
- (k) a health and safety plan, including details of how health and safety risks are to be identified and managed during construction;
- (l) a surface and foul water drainage plan including measures for the protection of surface and groundwater during construction;
- (m) an artificial light emissions management plan;

- (n) measures to ensure the restoration of site following completion of construction; and
- (o) appropriate procedures to address any unexploded ordnance that may be encountered.

(4) All construction works must be undertaken in accordance with the approved code of construction practice.

Construction hours

12.—(1) Construction works relating to the authorised development must not take place on Sundays, bank holidays nor otherwise outside the hours of 0800 to 2000 hours on Monday to Saturday (with the option of 0700 to 1900).—

(2) The restrictions in sub-paragraph (1) do not apply to construction works where these—

- (a) are carried out within existing buildings or buildings constructed as part of the authorised development;
- (b) are carried out with the prior approval of the relevant planning authority;
- (c) are associated with an emergency; or
- (d) are associated with slip form working.

(3) In this requirement “emergency” means a situation where, if the relevant action is not taken, there will be adverse health, safety, security or environmental consequences that in the reasonable opinion of the undertaker would outweigh the adverse effects to the public (whether individual classes or generally as the case may be) of taking that action.

Construction traffic management plan

13.—(1) No part of the authorised development may commence until a construction traffic management plan for that part has been submitted to and approved by the relevant planning authority, following consultation with the relevant highway authority, Boston Borough Council and the relevant statutory nature conservation body in relation to any proposals under sub-paragraph (2)(d) only.

(2) A construction traffic management plan must be substantially in accordance with the outline construction traffic management plan and must include the following (as applicable for the part of the authorised development to which the construction traffic management plan relates)—

- (a) construction vehicle routing plans in respect of both workers and deliveries;
- (b) proposals for the scheduling and timing of movements of delivery vehicles including details of abnormal indivisible loads;
- (c) site access plans;
- (d) where practicable, proposals for temporary diversions of any public rights of way;
- (e) measures to ensure the protection of users of any footpath within the Order limits which may be affected by the construction of the authorised development;
- (f) proposals for the management of junctions to and crossings of highways and other public rights of way;
- (g) a construction logistics plan;
- (h) a procedure for reviewing and updating the construction traffic management plan;
- (i) a construction worker travel plan, including details of the likely number of worker vehicle movements and the management of workforce parking; and
- (j) appropriate procedures to provide for a vehicle booking management system.

(3) The construction traffic management plan submitted pursuant to sub-paragraphs (1) and (2) must be accompanied by a statement and associated junction appraisals (as defined in the outline construction traffic management plan) demonstrating how the likely construction traffic impacts identified in the environmental statement are addressed through the measures contained in the construction traffic management plan.

(4) The construction traffic management plan submitted pursuant to sub-paragraphs (1) and (2) that relates to Work Nos. 1, 2, 3, 4, 5, 6 and 7 must be accompanied by a pre-condition highway survey (as defined in the outline construction traffic management plan).

(5) The construction traffic management plan and any updated construction traffic management plan submitted following any review under sub-paragraph (2)(h) must be implemented as approved by the relevant planning authority.

Flood risk emergency plan

14.—(1) No part of the authorised development may commence until a flood risk emergency plan has been submitted to and approved by the relevant planning authority, following consultation with the Environment Agency, Black Sluice Internal Drainage Board and the Lead Local Flood Authority.

(2) The flood risk emergency plan must include—

(a) procedures to receive flood warnings (including communication lines to cover shift patterns and / or staff leave), and closure of or evacuation of the authorised development with sufficient lead time to ensure no personnel or vehicles are left within the Order limits during times of a flood warning; and

(b) identification of areas of emergency refuge to be located above the modelled breach flood depths.

(3) The flood risk emergency plan must be implemented as approved by the relevant planning authority.

Phasing of construction and commissioning of Work Nos. 1 and 2

15.—(1) Subject to sub-paragraph (2), no part of the authorised development may commence until a phasing programme setting out the commencement of construction and the anticipated start of commissioning and the anticipated date of final commissioning for each of Work Nos. 1 and 2 has been submitted to and approved by the relevant planning authority.

(2) The phasing programme must provide for the anticipated date of final commissioning of Work Nos. 1 and 2 as soon as reasonably practicable. The phasing programme must be implemented as approved by the relevant planning authority.

Operational lighting scheme

16.—(1) Prior to the commissioning of any part of Work Nos. 1, 2, 3, 4 and 5 a written scheme for the management and mitigation of operational external artificial light emissions for that part must be submitted to and approved by the relevant planning authority.

(2) The written scheme must be substantially in accordance with the outline lighting strategy.

(3) The scheme for the management and mitigation of operational external artificial light emissions must be implemented as approved under sub-paragraph (1).

Operational vehicle movements

17.—(1) Except in the event of a wharf outage, the number of two-way heavy commercial vehicle movements must not exceed a maximum of 30 two-way vehicle movements per day except in circumstances where, following consultation with the relevant highway authority and Boston Borough Council, the relevant planning authority is satisfied that additional vehicle movements would not give rise to any materially new or materially different highway safety impacts or environmental effects in comparison with those reported in the environmental statement.

(2) Waste must not be delivered by road to Work No. 1A except in the event of a wharf outage or in circumstances where, following consultation with the relevant highway authority and Boston Borough Council, the relevant planning authority is satisfied that such delivery of waste by road

would not give rise to any materially new or materially different highway safety impacts or environmental effects in comparison with those reported in the environmental statement.

(3) Clay and sediment must not be delivered by road to Work No. 2 or lightweight aggregates exported by road from Work No. 2 except in the event of a wharf outage or in circumstances where, following consultation with the relevant highway authority and Boston Borough Council, the relevant planning authority is satisfied that such delivery or export by road would not give rise to any materially new or materially different highway safety impacts or environmental effects in comparison with those reported in the environmental statement.

(4) Prior to the date of final commissioning, an operational traffic management plan for that part must be submitted to and approved by the relevant planning authority, following consultation with the relevant highway authority and Boston Borough Council.

(5) The operational traffic management plan must include—

- (a) an operational worker travel plan that includes measures to encourage the use of sustainable modes of transport by employees;
- (b) measures to manage the routing and number of heavy commercial vehicles during operation;
- (c) measures to manage the routing and number of heavy commercial vehicles in the event of a wharf outage;
- (d) provision as to the responsibility for, and timescales of, the implementation of those measures; and
- (e) a monitoring and review regime.

(6) The operational traffic plan must be implemented as approved under sub-paragraph (1).

Waste hierarchy scheme

18.—(1) Prior to the commissioning of any part of Work No. 1A, the undertaker must submit to the relevant planning authority for approval a scheme, which sets out arrangements for maintenance of the waste hierarchy in priority order and which aims to minimise recyclable and reusable waste received at the authorised development during the commissioning and operational period of the authorised development (the “waste hierarchy scheme”).

(2) The waste hierarchy scheme must include details of—

- (a) the type of information that must be collected and retained on the sources of the residual waste after recyclable and reusable waste has been removed;
- (b) the arrangements that must be put in place for ensuring that as much reusable and recyclable waste as is reasonably possible is removed from waste to be received at the authorised development, including contractual measures to encourage as much reusable and recyclable waste being removed as far as possible;
- (c) the arrangements that must be put in place for ensuring that commercial suppliers of residual waste operate a written environmental management system which includes establishing a baseline for recyclable and reusable waste removed from residual waste and specific targets for improving the percentage of such removed reusable and recyclable waste;
- (d) the arrangements that must be put in place for suspending and/or discontinuing supply arrangements from commercial suppliers who fail to retain or comply with any environmental management systems;
- (e) the arrangements that must be put in place for the provision of an annual waste composition analysis undertaken by the undertaker, with the findings submitted to the relevant planning authority within one month of the sampling being undertaken; and
- (f) the form of records that must be kept for the purpose of demonstrating compliance with (a) to (e) and the arrangements in place for allowing inspection of such records by the relevant planning authority.

(3) The waste hierarchy scheme must be implemented as approved under sub-paragraph (1).

Control of operational noise

19.—(1) Prior to commissioning of any part of Works Nos. 1, 2, 3 and 4 a written noise monitoring scheme must be submitted to and approved by the relevant planning authority, such scheme must specify—

- (a) each location from which noise is to be measured;
- (b) the method of noise measurement, which must be in accordance with British Standard 4142:2014 +A1:2019;
- (c) the maximum permitted levels of noise at each agreed monitoring location which must not exceed the defined limits to demonstrate compliance with government and local policy on noise;
- (d) provision requiring the undertaker to take noise measurements as soon as possible following a reasonable request by the relevant planning authority and to submit the measurements to the relevant planning authority as soon as they are available; and
- (e) a definition of the circumstances that constitute an emergency for the purposes of subparagraphs (2)(a), (3) and (5).

(2) The level of noise at each monitoring location must not exceed the maximum permitted level specified for that location in the scheme, except—

- (a) in the case of an emergency (as defined in the noise monitoring scheme);
- (b) with the prior approval of the relevant planning authority; or
- (c) as a result of steam purging or the operation of emergency pressure relief valves or similar equipment of which the undertaker has given notice in accordance with subparagraph (3).

(3) Except in the case of an emergency, the undertaker must give the relevant planning authority 48 hours' notice of any proposed steam purging or operation of emergency pressure relief valves or similar equipment.

(4) So far as reasonably practicable, steam purging and the operation of emergency pressure relief valves or similar equipment may only take place—

- (a) between 0900 and 1700 hours on weekdays (excluding bank holidays); and
- (b) between 0900 and 1300 hours on Saturdays (excluding bank holidays).

(5) Where the level of noise at a monitoring location exceeds the maximum permitted level specified for that location in the approved scheme because of an emergency—

- (a) the undertaker must, as soon as possible and in any event within two business days of the beginning of the emergency, submit to the relevant planning authority a statement detailing—
 - (i) the nature of the emergency;
 - (ii) why it is necessary for the level of noise to have exceeded the maximum permitted level;
- (b) if the undertaker expects the emergency to last for more than 24 hours, it must inform local residents and businesses affected by the level of noise at that location of—
 - (i) the reasons for the emergency; and
 - (ii) how long it expects the emergency to last.

Notice of start of commissioning and notice of date of final commissioning

20.—(1) Where practicable, notice of the intended start of commissioning of Work No. 1A must be given to the relevant planning authorities prior to such start and in any event within seven days from the date that commissioning is started.

(2) Within seven days of completing final commissioning of Work No. 1A, the undertaker must provide the relevant planning authorities with notice of the date upon which such commissioning was duly completed.

Combined heat and power

21.—(1) On the date that is 12 months after the date of final commissioning for Work No. 1A, the undertaker must submit to the relevant planning authority for its approval, following consultation with Boston Borough Council, a report (“the CHP review”) updating the combined heat and power assessment.

(2) The CHP review submitted and approved must—

- (a) consider whether opportunities reasonably exist for the export of heat from numbered Work 1A; and
- (b) include a list of actions (if any) that the undertaker is reasonably required to take (without material additional cost to the undertaker) to increase the potential for the export of heat from Work No. 1A.

(3) The undertaker must take such actions as are included, within the timescales specified, in the approved CHP review.

(4) On each date during the operation of Work No. 1A that is five years after the date on which it last submitted the CHP review or a revised CHP review to the relevant planning authority, a revised CHP review must be submitted to and approved by the relevant planning authority, following consultation with Boston Borough Council.

(5) Sub-paragraphs (2) and (3) apply in relation to a revised CHP review submitted under sub-paragraph (4) in the same way as they apply in relation to the CHP review submitted under sub-paragraph (1).

Decommissioning

22.—(1) Within 24 months of the permanent cessation of the operation of Work Nos. 1 and 2 details of a scheme for the restoration and aftercare of the land for Work Nos. 1, 2, 3, 4 (excluding any parts of Work No. 4 that are covered by the decommissioning scheme approved under the deemed marine licence), 5 and 6 must be submitted to and approved by the relevant planning authority.

(2) The scheme must include details of structures and buildings to be demolished or retained, details of the means of removal of materials following demolition, phasing of demolition and removal, details of restoration works and phasing thereof.

(3) The scheme as approved under sub-paragraph (1) must be implemented in accordance with the phasing set out therein.

Amendments to approved details

23.—(1) With respect to the documents certified under article 47 (certification of documents, etc.), the parameters specified in the table in paragraph 4 of this Schedule and any other plans, details or schemes which require approval by the relevant planning authority pursuant to any requirement (together “Approved Documents, Plans, Parameters, Details or Schemes”), the undertaker may submit to the relevant planning authority for approval, following consultation by the undertaker with Lincolnshire County Council, any amendments to the Approved Documents, Plans, Parameters, Details or Schemes and following any such approval by the relevant planning authority the Approved Documents, Plans, Parameters, Details or Schemes are to be taken to include the amendments approved by the relevant planning authority in accordance with this paragraph.

(2) Approval under sub-paragraph (1) for the amendments to Approved Documents, Plans, Parameters, Details or Schemes must not be given except where it has been demonstrated to the satisfaction of the relevant planning authority that the subject matter of the approval sought is unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

Electricity generation cap

24.—(1) The authorised development must not generate more than 300 megawatts unless otherwise agreed by the relevant planning authority provided that the relevant planning authority is satisfied, following consultation with the relevant statutory nature conservation body to the extent that it relates to matters relevant to its functions, that any increase would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.

(2) The undertaker must keep records for the purpose of demonstrating compliance with sub-paragraph (1) and must submit them to the relevant planning authority on an annual basis.

(3) On receipt of a written request to view the records by the relevant planning authority these records must be made available for inspection within seven days of such a request.

(4) References in Schedule 1 (authorised development) to 300 megawatts are to be construed as references to any electricity cap approved under sub-paragraph (1).

Tonnage caps

25.—(1) The total amount of—

- (a) waste derived fuel received at Work No. 1A and Work No. 4 must not exceed 1,200,000 tonnes per calendar year;
- (b) bottom ash and boiler ash processed at Work No. 1B must not exceed 200,000 tonnes per calendar year; and
- (c) aggregate to be processed at Work No. 2 and received at Work No. 4 must not exceed 300,000 tonnes per calendar year,

unless otherwise agreed by the relevant planning authority provided that the relevant planning authority is satisfied, following consultation with the relevant statutory nature conservation body to the extent that it relates to matters relevant to its functions, that any increase would not give rise to any materially new or materially different environmental effects in comparison with those reported in the environmental statement.

(2) The undertaker must keep records for the purpose of demonstrating compliance with sub-paragraph (1) and must submit them to the relevant planning authority on an annual basis.

(3) On receipt of a written request to view the records by the relevant planning authority these records must be made available for inspection within seven days of such a request.

(4) References in Schedule 1 (authorised development) to any tonnage amount are to be construed as references to any tonnage amount approved under sub-paragraph (1).

PART 2

PROCEDURE FOR DISCHARGE OF REQUIREMENTS

Applications made under Part 1

26.—(1) Where an application has been made to a relevant planning authority for any consent, agreement or approval required by a requirement (including consent, agreement or approval in respect of part of a requirement) included in this Order, the relevant planning authority must give notice to the undertaker of its decision on the application within a period of eight weeks beginning with—

- (a) the day immediately following that on which the application is received by the relevant planning authority;
- (b) the day immediately following that on which further information has been supplied by the undertaker under paragraph 27 (further information); or
- (c) such longer period as may be agreed between the parties.

(2) Subject to sub-paragraph (3), in the event that the relevant planning authority does not determine an application within the period set out in sub-paragraph (1), the relevant planning authority is taken to have granted all parts of the application (without any condition or qualification) at the end of that period.

(3) In determining any application made to the relevant planning authority for any consent, agreement or approval required by a requirement contained in Part 1 of this Schedule, the relevant planning authority may—

- (a) give or refuse its consent, agreement or approval; or
- (b) give its consent, agreement or approval subject to reasonable conditions,

and where consent, agreement or approval is refused or granted subject to conditions the relevant planning authority must provide its reasons for that decision with the notice of its decision.

Further information

27.—(1) In relation to any part of an application made under this Schedule, the relevant planning authority has the right to request such further information from the undertaker as it considers necessary to enable it to consider the application.

(2) If the relevant planning authority considers that further information is necessary and the requirement concerned contained in Part 2 of this Schedule does not specify that consultation with a consultee is required, the relevant planning authority must, within ten business days of receipt of the application, notify the undertaker in writing specifying the further information required.

(3) If the requirement concerned contained in Part 1 of this Schedule specifies that consultation with a consultee is required, the relevant planning authority must issue the application to the consultee within five business days of receipt of the application, and notify the undertaker in writing specifying any further information requested by the consultee within five business days of receipt of such a request.

(4) If the relevant planning authority does not give the notification within the period specified in sub-paragraph (2) or (3) it (and the consultee, as the case may be) is deemed to have sufficient information to consider the application and is not entitled to request further information without the prior agreement of the undertaker.

Fees

28.—(1) Where an application is made to the relevant planning authority for written consent, agreement or approval in respect of a requirement, the fee prescribed under regulation 16(1)(b) of the Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) Regulations 2012^(a) (as may be amended or replaced from time to time) is to apply and must be paid to the relevant planning authority for each application.

(2) Any fee paid under this Schedule must be refunded to the undertaker within four weeks of—

- (a) the application being rejected as invalidly made; or
- (b) the relevant planning authority failing to determine the application within the decision period as determined under paragraph 26(1),

unless within that period the undertaker agrees, in writing, that the fee is to be retained by the relevant planning authority and credited in respect of a future application.

Register of requirements

29.—(1) The undertaker must, as soon as practicable following the making of this Order, establish and maintain in an electronic form suitable for inspection by members of the public a register of those requirements contained in Part 1 of this Schedule that provide for further approvals to be given by the relevant planning authority.

(a) S.I. 2012/2920.

(2) The register must set out in relation to each such requirement the status of the requirement, in terms of whether any approval to be given by the relevant planning authority has been applied for or given, providing an electronic link to any document containing any approved details.

(3) The register must be maintained by the undertaker for a period of 3 years following completion of the authorised development.

Appeals to the Secretary of State

30.—(1) The undertaker may appeal to the Secretary of State if—

- (a) the relevant planning authority refuses an application for any consent, agreement or approval required by—
 - (i) a requirement and any document referred to in any requirement in Part 1 of this Schedule; or
 - (ii) any other consent, agreement or approval required under this Order, or grants it subject to conditions to which the undertaker objects;
- (b) the relevant authority does not give notice of its decision to the undertaker within the period specified in paragraph 26(1) or grants it subject to conditions;
- (c) having received a request for further information under paragraph 27(1) the undertaker considers that either the whole or part of the specified information requested by the relevant planning authority is not necessary for consideration of the application;
- (d) having received any further information requested, the relevant authority notifies the undertaker that the information provided is inadequate and requests additional information which the undertaker considers is not necessary for consideration of the application; or
- (e) the relevant planning authority issues a notice further to sections 60 or 61 of the Control of Pollution Act 1974(a).

(2) The appeal process applicable under sub-paragraph (1) is as follows—

- (a) any appeal by the undertaker must be made within 42 days of the date of the notice of the decision or determination, or (where no determination has been made) the expiry of the decision period as determined under paragraph 26;
- (b) the undertaker must submit to the Secretary of State a copy of the application submitted to the relevant planning authority and any supporting documents which the undertaker may wish to provide (“the appeal documents”);
- (c) the undertaker must on the same day provide copies of the appeal documents to the relevant planning authority and the requirement consultee (if applicable);
- (d) as soon as is practicable after receiving the appeal documentation, the Secretary of State must appoint a person to consider the appeal (“the appointed person”) and must notify the appeal parties of the identity of the appointed person and the address to which all correspondence for their attention should be sent;
- (e) the relevant planning authority and the requirement consultee (if applicable) must submit any written representations in respect of the appeal to the appointed person within 10 business days beginning with the first day immediately following the date on which the appeal parties are notified of the appointment of the appointed person and must ensure that copies of their written representations are sent to each other and to the undertaker on the day on which they are submitted to the appointed person;
- (f) the appeal parties must make any counter-submissions to the appointed person within 10 business days beginning with the first day immediately following the date of receipt of written representations pursuant to sub-paragraph (d); and

(a) 1974 c. 40.

(g) the appointed person must make a decision and notify it to the appeal parties, with reasons, as soon as reasonably practicable.

(3) In the event that the appointed person considers that further information is necessary to enable the appointed person to consider the appeal, the appointed person must as soon as practicable notify the appeal parties in writing specifying the further information required, the appeal party from whom the information is sought, and the date by which the information is to be submitted.

(4) Any further information required under sub-paragraph (3) must be provided by the party from whom the information is sought to the appointed person and to other appeal parties by the date specified by the appointed person.

(5) The appeal parties may submit written representations to the appointed person concerning matters contained in the further information.

(6) Any such representations must be submitted to the appointed person and made available to all appeal parties within 10 business days of the date mentioned in sub-paragraph (3).

(7) On an appeal under this paragraph, the appointed person may—

(a) allow or dismiss the appeal; or

(b) reverse or vary any part of the decision of the relevant planning authority (whether the appeal relates to that part of it or not) and may deal with the application as if it had been made to the appointed person in the first instance.

(8) The appointed person may proceed to a decision on an appeal taking into account such written representations as have been sent within the relevant time limits and in the sole discretion of the appointed person such written representations as have been sent outside the relevant time limits.

(9) The appointed person may proceed to a decision even though no written representations have been made within the relevant time limits, if it appears to the appointed person that there is sufficient material to enable a decision to be made on the merits of the case.

(10) The decision of the appointed person on an appeal is final and binding on the parties, and a court may entertain proceedings for questioning the decision only if the proceedings are brought by a claim for judicial review.

(11) Any consent, agreement or approval given by the appointed person pursuant to this paragraph is deemed to be an approval for the purpose of Part 1 of this Schedule as if it had been given by the relevant planning authority.

(12) The relevant planning authority may confirm any determination given by the appointed person in identical form in writing but a failure to give such confirmation (or a failure to give it in identical form) does not affect or invalidate the effect of the appointed person's determination.

(13) Except where a direction is given under sub-paragraph (14) requiring some or all of the costs of the appointed person to be paid by the relevant authority, the reasonable costs of the appointed person must be met by the undertaker.

(14) On application by the relevant authority or undertaker, the appointed person may give directions as to the costs of the appeal and as to the parties by whom such costs are to be paid.

(15) In considering whether to make any such direction as to the costs of the appeal parties and the terms on which it is to be made, the appointed person must have regard to the relevant Planning Practice Guidance published by the Ministry for Housing, Communities and Local Government or such guidance as may from time to time replace it.

Anticipatory steps towards compliance with any requirement

31. If before the coming into force of this Order the undertaker or any other person has taken any steps that were intended to be steps towards compliance with any provision of Part 1 of this Schedule, those steps may be taken into account for the purpose of determining compliance with that provision if they would have been valid steps for that purpose had they been taken after this Order came into force.

Interpretation of Part 2 of Schedule 2

32. In Part 2 of Schedule 2—

“the appeal parties” means the relevant planning authority, the requirement consultee and the undertaker;

“business day” means a day other than a Saturday or Sunday which is not Christmas Day, Good Friday or a bank holiday under section 1 (bank holidays) of the Banking and Financial Dealings Act 1971^(a); and

“requirement consultee” means any body named in a requirement which is the subject of an appeal as a body to be consulted by the relevant authority in discharging that requirement.

^(a) 1971 c.80.

SCHEDULE 3

Article 10

STREETS SUBJECT TO STREET WORKS

<i>(1)</i> <i>Authority</i>	<i>(2)</i> <i>Streets subject to street works</i>
Lincolnshire County Council	Nursery Road (private road)
	Callen Road (private road)
	Bittern Way (private road)

SCHEDULE 4

Article 12

STREETS SUBJECT TO ALTERATION OF LAYOUT

PART 1

PERMANENT ALTERATION OF LAYOUT

<i>(1)</i> <i>Street subject to alteration of layout</i>	<i>(2)</i> <i>Description of alteration</i>
Bittern Way (private road)	Secure site exit for HGV only – left turn only (works forming part of Work No. 5(j)) between points A and B on the access and rights of way plan.
New section of public footpath from Boston Public Footpath 14/4 to Boston Public Footpath 14/11	A new section of footpath (110m approximately) from a point approximately 200 m from the point marked ST1 (OSGR TF3374542872) on the access and rights of way plan which would join BOST/14/11.

PART 2

TEMPORARY ALTERATION OF LAYOUT

<i>(1)</i> <i>Street subject to alteration of layout</i>	<i>(2)</i> <i>Description of alteration</i>
Marsh Lane	Works for the provision of temporary accesses (works forming part of Work No. 7) at the point marked Construction Access Point 2 on the access and rights of way plan.

SCHEDULE 5

Article 13

TEMPORARY CLOSURE, ALTERATION, DIVERSION AND RESTRICTION OF THE USE OF STREETS

<p>(1) <i>Street subject to temporary prohibition or restriction of use</i></p>	<p>(2) <i>Extent of temporary prohibition or restriction of use of streets</i></p>
<p>Boston Public Footpath 14</p>	<p>Length of footpath to be temporarily closed between the points marked TC2 (OSGR TF3400742238) to TC3 (OSGR TF3417242188) on the access and rights of way plan to install and facilitate the construction of Work No. 6(d).</p>
<p>Boston Public Footpath 14</p>	<p>Length of footpath to be temporarily closed between the points marked TC1 (OSGR TF3374542872) to TC2 (OSGR TF3400742238) on the access and rights of way plan to install and facilitate the construction of Work No. 6(d).</p>

SCHEDULE 6

Article 14

PERMANENT STOPPING UP OF STREETS AND PUBLIC RIGHTS OF WAY

<i>(1)</i> <i>Street to be stopped up</i>	<i>(2)</i> <i>Extent of stopping up</i>
Boston Public Footpath 14/4	Footpath to be stopped up between a point approximately 200 m from the point marked ST1 (OSGR TF3374542872) to ST3 (OSGR TF3411942384) on the access and rights of way plan.
Boston Public Footpath 14	Footpath to be stopped up between the points marked ST3 (OSGR TF3411942384) to ST4 (OSGR TF3400742238) on the access and rights of way plan.
Boston Public Footpath 14	Footpath to be stopped up between the points marked ST3 (OSGR TF3411942384) to ST2 (OSGR TF3417242188) on the access and rights of way plan.

SCHEDULE 7

Article 33

LAND OF WHICH TEMPORARY POSSESSION MAY BE TAKEN

<i>(1)</i> <i>Number of plot shown on land plan and Crown land plan</i>	<i>(2)</i> <i>Purpose for which temporary possession may be taken</i>
3	Temporary use to facilitate construction for Work No. 7 and other development necessary for the authorised development that takes place within the Order limits.

PROTECTIVE PROVISIONS

PART 1

FOR THE PROTECTION OF ELECTRICITY, GAS, WATER AND SEWERAGE UNDERTAKERS

1. For the protection of the utility undertakers referred to in this Part of this Schedule the following provisions have effect, unless otherwise agreed in writing between the undertaker and the utility undertaker concerned.

2. In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable the utility undertaker in question to fulfil its statutory functions in a manner no less efficient than previously;

“apparatus” means—

- (a) in the case of an electricity undertaker, electric lines or electrical plant (as defined in the Electricity Act 1989(a)), belonging to or maintained by that undertaker;
- (b) in the case of a gas undertaker, any mains, pipes or other apparatus belonging to or maintained by a gas transporter within the meaning of Part 1 of the Gas Act 1986(b) for the purposes of gas supply;
- (c) in the case of a water undertaker, mains, pipes or other apparatus belonging to or maintained by that undertaker for the purposes of water supply; and
- (d) in the case of a sewerage undertaker—
 - (i) any drain or works vested in the undertaker under the Water Industry Act 1991(c); and
 - (ii) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4)(d) (adoption of sewers and disposal works) of that Act or an agreement to adopt made under section 104 (agreement to adopt sewers, drains or sewage disposal works at a future date) of that Act,

and includes a sludge main, disposal main (within the meaning of section 219 (general interpretation) of that Act) or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any such sewer, drain or works, and includes any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

“functions” includes powers and duties;

“in”, in a context referring to apparatus or alternative apparatus in land, includes a reference to apparatus or alternative apparatus under, over or upon land;

“plan” includes all designs, drawings, specifications, method statements, soil reports, programmes, calculations, risk assessments and other documents that are reasonably necessary properly and sufficiently to describe the works to be executed;

“utility undertaker” means—

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- (a) 1989 c. 29.
 - (b) 1986 c. 44. A new section 7 was substituted by section 5 of the Gas Act 1995 (c. 45), and was further amended by section 76 of the Utilities Act 2000 (c. 27).
 - (c) 1991 c. 56.
 - (d) Section 102(4) was amended by section 96(1)(c) of the Water Act 2003 (c. 37). Section 104 was amended by sections 96(4) and 101(2) of, and Part 3 of Schedule 9 to, the Water Act 2003 and section 42(3) of the Flood and Water Management Act 2010 (c. 29) and section 11(1) and (2) of, and paragraphs 2 and 91 of Schedule 7 to the Water Act 2014 (c. 21).

- (a) any licence holder within the meaning of Part 1 of the Electricity Act 1989;
 - (b) a gas transporter within the meaning of Part 1 of the Gas Act 1986;
 - (c) a water undertaker within the meaning of the Water Industry Act 1991; and
 - (d) a sewerage undertaker within the meaning of Part 1 of the Water Industry Act 1991,
- for the area of the authorised development, and in relation to any apparatus, means the utility undertaker to whom it belongs or by whom it is maintained.

On street apparatus

3. This Part of this Schedule does not apply to apparatus in respect of which the relations between the undertaker and the utility undertaker are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

Apparatus in stopped up streets

4.—(1) Where any street is stopped up under article 14 (permanent stopping up of streets), any utility undertaker whose apparatus is in the street has the same powers and rights in respect of that apparatus as it enjoyed immediately before the stopping up and the undertaker must grant to the utility undertaker legal easements reasonably satisfactory to the utility undertaker in respect of such apparatus and access to it, but nothing in this paragraph affects any right of the undertaker or of the utility undertaker to require the removal of that apparatus under paragraph 7 or the power of the undertaker to carry out works under paragraph 9.

(2) Regardless of the temporary stopping up or diversion of any highway under the powers conferred by article 13 (temporary closure, alteration, diversion and restriction of use of streets), a utility undertaker is at liberty at all times to take all necessary access across any such stopped up highway and to execute and do all such works and things in, upon or under any such highway as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the stopping up or diversion was in that highway.

Protective works to buildings

5. The undertaker, in the case of the powers conferred by article 22 (protective work to buildings), must exercise those powers so as not to obstruct or render less convenient the access to any apparatus.

Acquisition of land

6. Regardless of any provision in this Order or anything shown on the land plan and Crown land plan, the undertaker must not acquire any apparatus otherwise than by agreement.

Removal of apparatus

7.—(1) If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any apparatus is placed or requires that the utility undertaker's apparatus is relocated or diverted, that apparatus must not be removed under this Part of this Schedule, and any right of a utility undertaker to maintain that apparatus in that land must not be extinguished, until alternative apparatus has been constructed and is in operation to the reasonable satisfaction of the utility undertaker in question in accordance with sub-paragraphs (2) to (6).

(2) If, for the purpose of executing any works in, on or under any land purchased, held, appropriated or used under this Order, the undertaker requires the removal of any apparatus placed in that land, the undertaker must give to the utility undertaker in question 28 days' written notice of that requirement, together with a plan of the work proposed, and of the proposed position of the alternative apparatus to be provided or constructed and in that case (or if in consequence of the exercise of any of the powers conferred by this Order a utility undertaker reasonably needs to remove any of its apparatus) the undertaker must, subject to sub-paragraph (3), afford to the utility

undertaker the necessary facilities and rights for the construction of alternative apparatus in other land of the undertaker and subsequently for the maintenance of that apparatus.

(3) If alternative apparatus or any part of such apparatus is to be constructed elsewhere than in other land of the undertaker, or the undertaker is unable to afford such facilities and rights as are mentioned in sub-paragraph (2) in the land in which the alternative apparatus or part of such apparatus is to be constructed the utility undertaker must, on receipt of a written notice to that effect from the undertaker, as soon as reasonably possible use its best endeavours to obtain the necessary facilities and rights in the land in which the alternative apparatus is to be constructed.

(4) Any alternative apparatus to be constructed in land of the undertaker under this Part of this Schedule must be constructed in such manner and in such line or situation as may be agreed between the utility undertaker in question and the undertaker or in default of agreement settled by arbitration in accordance with article 49 (arbitration).

(5) The utility undertaker in question must, after the alternative apparatus to be provided or constructed has been agreed or settled by arbitration in accordance with article 49 (arbitration), and after the grant to the utility undertaker of any such facilities and rights as are referred to in sub-paragraphs (2) or (3), proceed without unnecessary delay to construct and bring into operation the alternative apparatus and subsequently to remove any apparatus required by the undertaker to be removed under the provisions of this Part of this Schedule.

(6) Regardless of anything in sub-paragraph (5), if the undertaker gives notice in writing to the utility undertaker in question that the undertaker desires itself to execute any work, or part of any work in connection with the construction or removal of apparatus in any land of the undertaker, that work, instead of being executed by the utility undertaker, must be executed by the undertaker without unnecessary delay under the superintendence, if given, and to the reasonable satisfaction of the utility undertaker.

(7) If the utility undertaker in question fails either reasonably to approve, or to provide reasons for its failure to approve along with an indication of what would be required to make acceptable, any proposed details relating to required removal works under sub-paragraph (2) within 28 days of receiving a notice of the required works from the undertaker, then such details are deemed to have been approved.

(8) For the avoidance of doubt, any such “deemed consent” under sub-paragraph (7) does not extend to the actual undertaking of the removal works, which remains the sole responsibility of the utility undertaker or its contractors.

Facilities and rights for alternative apparatus

8.—(1) Where, in accordance with the provisions of this Part of this Schedule, the undertaker affords to a utility undertaker facilities and rights for the construction and maintenance in land of the undertaker of alternative apparatus in substitution for apparatus to be removed, those facilities and rights are to be granted upon such terms and conditions as may be agreed between the undertaker and the utility undertaker in question or in default of agreement settled by arbitration in accordance with article 49 (arbitration).

(2) If the facilities and rights to be afforded by the undertaker in respect of any alternative apparatus, and the terms and conditions subject to which those facilities and rights are to be granted, are in the opinion of the arbitrator less favourable on the whole to the utility undertaker in question than the facilities and rights enjoyed by it in respect of the apparatus to be removed and the terms and conditions to which those facilities and rights are subject, the arbitrator must make such provision for the payment of compensation by the undertaker to that utility undertaker as appears to the arbitrator to be reasonable having regard to all the circumstances of the particular case.

Retained apparatus

9.—(1) Not less than 28 days before starting the execution of any works in, on or under any land purchased, held, appropriated or used under this Order that are near to, or will or may affect, any

apparatus the removal of which has not been required by the undertaker under paragraph 7(2), the undertaker must submit to the utility undertaker in question a plan of the works to be executed.

(2) Those works must be executed only in accordance with the plan submitted under sub-paragraph (1) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (3) by the utility undertaker for the alteration or otherwise for the protection of the apparatus, or for securing access to it, and the utility undertaker is entitled to watch and inspect the execution of those works.

(3) Any requirements made by a utility undertaker under sub-paragraph (2) must be made within a period of 21 days beginning with the date on which a plan under sub-paragraph (1) is submitted to it.

(4) If a utility undertaker in accordance with sub-paragraph (3) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker of that requirement, paragraphs 1 to 3 and 6 to 8 apply as if the removal of the apparatus had been required by the undertaker under paragraph 7(2).

(5) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 28 days before commencing the execution of any works, a new plan instead of the plan previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan.

(6) The undertaker is not required to comply with sub-paragraph (1) in a case of emergency but in that case must give to the utility undertaker in question notice as soon as is reasonably practicable and a plan of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph (3) in so far as is reasonably practicable in the circumstances.

Expenses and costs

10.—(1) Subject to the following provisions of this paragraph, the undertaker must repay to a utility undertaker all expenses reasonably incurred by that utility undertaker in, or in connection with, the inspection, removal, alteration or protection of any apparatus or the construction of any new apparatus which may be required in consequence of the execution of any such works as are referred to in paragraph 7(2).

(2) There must be deducted from any sum payable under sub-paragraph (1) the value of any apparatus removed under the provisions of this Part of this Schedule that value being calculated after removal.

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

- (a) apparatus of better type, of greater capacity or of greater dimensions is placed in substitution for existing apparatus of worse type, of smaller capacity or of smaller dimensions; or
- (b) apparatus (whether existing apparatus or apparatus substituted for existing apparatus) is placed at a depth greater than the depth at which the existing apparatus was situated,

and the placing of apparatus of that type or capacity or of those dimensions or the placing of apparatus at that depth, as the case may be, is not agreed by the undertaker or, in default of agreement, is not determined by arbitration in accordance with article 49 (arbitration) to be necessary, then, if such placing involves cost in the construction of works under this Part of this Schedule exceeding that which would have been involved if the apparatus placed had been of the existing type, capacity or dimensions, or at the existing depth, as the case may be, the amount which apart from this sub-paragraph would be payable to the utility undertaker in question by virtue of sub-paragraph (1) must be reduced by the amount of that excess.

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

- (a) an extension of apparatus to a length greater than the length of existing apparatus is not to be treated as a placing of apparatus of greater dimensions than those of the existing apparatus; and

- (b) where the provision of a joint in a pipe or cable is agreed, or is determined to be necessary, the consequential provision of a jointing chamber or of a manhole is to be treated as if it also had been agreed or had been so determined.

(5) An amount which apart from this sub-paragraph would be payable to a utility undertaker in respect of works by virtue of sub-paragraph (1), if the works include the placing of apparatus provided in substitution for apparatus placed more than 7 years and 6 months earlier so as to confer on the utility undertaker any financial benefit by deferment of the time for renewal of the apparatus in the ordinary course, is to be reduced by the amount which represents that benefit.

11.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works referred to in paragraphs 5 or 7(2), or by reason of any subsidence resulting from such development or works, any damage is caused to any apparatus or alternative apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of a utility undertaker, or there is any interruption in any service provided, or in the supply of any goods, by any utility undertaker, the undertaker must—

- (a) bear and pay the cost reasonably incurred by that utility undertaker in making good such damage or restoring the supply; and
- (b) make reasonable compensation to that utility undertaker for any other expenses, loss, damages, penalty or costs incurred by the undertaker,
- (c) by reason or in consequence of any such damage or interruption.

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

(3) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of a utility undertaker, its officers, servants, contractors or agents.

(4) A utility undertaker must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

Cooperation

12. Where in consequence of the proposed construction of any part of the authorised development, the undertaker or a utility undertaker requires the removal of apparatus under paragraph 7(2) or a utility undertaker makes requirements for the protection or alteration of apparatus under paragraph 9, the undertaker must use best endeavours to co-ordinate the execution of the works in the interests of safety and the efficient and economic execution of the authorised development and taking into account the need to ensure the safe and efficient operation of the utility undertaker's undertaking and each utility undertaker must use its best endeavours to co-operate with the undertaker for that purpose.

13. Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and a utility undertaker in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

PART 2

FOR THE PROTECTION OF OPERATORS OF ELECTRONIC COMMUNICATIONS CODE NETWORKS

14. For the protection of any operator, the following provisions have effect, unless otherwise agreed in writing between the undertaker and the operator.

15. In this Part of this Schedule—

“the 2003 Act” means the Communications Act 2003(a);

“electronic communications apparatus” has the same meaning as in the electronic communications code;

“the electronic communications code” has the same meaning as in Chapter 1 of Part 2 of the 2003 Act(b);

“electronic communications code network” means—

(a) so much of an electronic communications network or infrastructure system provided by an electronic communications code operator as is not excluded from the application of the electronic communications code by a direction under section 106 (application of the electronic communications code) of the 2003 Act; and

(b) an electronic communications network which the undertaker is providing or proposing to provide;

“electronic communications code operator” means a person in whose case the electronic communications code is applied by a direction under section 106 of the 2003 Act;

“infrastructure system” has the same meaning as in the electronic communications code and references to providing an infrastructure system are to be construed in accordance with paragraph 7(2) of that code; and

“operator” means the operator of an electronic communications code network.

16. The exercise of the powers conferred by article 35 (statutory undertakers) is subject to Part 10 (undertaker’s works affecting electronic communications apparatus) to the electronic communications code.

17.—(1) Subject to sub-paragraphs (2) to (4), if as the result of the authorised development or its construction, or of any subsidence resulting from any of those works—

(a) any damage is caused to any electronic communications apparatus belonging to an operator (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works), or other property of an operator; or

(b) there is any interruption in the supply of the service provided by an operator,

the undertaker must bear and pay the cost reasonably incurred by the operator in making good such damage or restoring the supply and make reasonable compensation to that operator for any other reasonable expenses, loss, damages, penalty or costs incurred by it, by reason, or in consequence of, any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of an operator, its officers, servants, contractors or agents.

(3) The operator must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of the claim or demand is to be made without the consent of the undertaker who, if withholding such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

(a) 2003 c. 21.

(b) See section 106. Section 106 was amended by section 4(3) to (9) of the Digital Economy Act 2017 (c. 30).

(4) Any difference arising between the undertaker and the operator under this Part of this Schedule must be referred to and settled by arbitration under article 49 (arbitration).

(5) This Part of this Schedule does not apply to—

(a) any apparatus in respect of which the relations between the undertaker and an operator are regulated by the provisions of Part 3 of the 1991 Act; or

(b) any damages, or any interruptions, caused by electro-magnetic interference arising from the construction or use of the authorised development.

(6) Nothing in this Part of this Schedule affects the provisions of any enactment or agreement regulating the relations between the undertaker and an operator in respect of any apparatus laid or erected in land belonging to the undertaker on the date on which this Order is made.

PART 3

FOR THE PROTECTION OF HIGHWAYS AND TRAFFIC UNDERTAKERS

18.—(1) The provisions of this Part of this Schedule have effect unless otherwise agreed in writing between the undertaker and the relevant highway authority.

(2) In this Part of this Schedule—

“highway” means any highway of which the relevant highway authority is the highway authority;

“plans” includes sections, designs, drawings, specifications, soil reports, staging proposals, programmes, calculations, methods of construction, risk assessments and details of the extent, timing and duration of any proposed occupation of any highway and “approved plans” means plans approved or deemed to be approved or settled by arbitration in accordance with the provisions of this Part of this Schedule;

“property of the relevant highway authority” means any apparatus or street furniture of the relevant highway authority affixed to or placed under any highway; and

“the relevant highway authority” means the highway authority for the area in which the highway to which the provisions of this Part of this Schedule is situated.

(3) Wherever in this Part of this Schedule provision is made with respect to the approval or consent of the relevant highway authority, that approval or consent must be in writing and subject to such reasonable terms and conditions as the relevant highway authority may require.

(4) In exercising the powers conferred by this Order in relation to any highway the undertaker must have regard to the potential disruption of traffic which may be caused and must seek to minimise such disruption so far as is reasonably practicable.

(5) The undertaker must not, without the consent of the relevant highway authority, construct any part of the works authorised by this Order under and within 50 metres of the surface of any highway which comprises a carriageway except in accordance with plans submitted to, and approved by, the relevant highway authority; and if within 28 days after such plans have been submitted the relevant highway authority has not approved or disapproved them, it is deemed to have approved the plans as submitted.

(6) In the construction of any part of the said works under a highway no part of it shall, except with the consent of the relevant highway authority, be so constructed as to interfere with the provision of proper means of drainage of the surface of the highway or be nearer than two metres to the surface of the highway.

(7) The undertaker must not under the powers conferred by or under this Order without the consent of the relevant highway authority, acquire or enter upon, take or use whether temporarily or permanently or acquire any new rights over any part of any highway, including subsoil beneath the surface of any highway.

19.—(1) Before commencing the construction of, or the carrying out of any work which involves interference with a highway, the undertaker must submit to the relevant highway

authority for its approval plans, drawings and particulars (in this paragraph referred to as “plans”) relating thereto, and the works must not be carried out except in accordance with the plans submitted to, and approved by, the relevant highway authority.

(2) If within 28 days after the plans have been submitted the highway authority has not approved or disapproved them, it is deemed to have approved the plans as submitted.

(3) Any officer of the relevant highway authority duly appointed for the purpose may at all reasonable times, on giving to the undertaker such notice as may in the circumstances be reasonable, enter upon and inspect any part of the works authorised by this Order which—

(a) is in, over or under any highway, or

(b) which may affect any highway or any property of the relevant highway authority,

during the carrying out of the work, and the undertaker must give to such officer all reasonable facilities for such inspection and, if the officer is of the opinion that the construction of the work is attended with danger to any highway or to any property of the relevant highway authority on or under any highway, the undertaker must adopt such measures and precautions as may be reasonably practicable for the purpose of preventing any damage or injury to the highway.

20.—(1) The undertaker must not alter, disturb or in any way interfere with any property of the relevant highway authority on or under any highway, or the access thereto, without the consent of the relevant highway authority, and any alteration, diversion, replacement or reconstruction of any such property which may be necessary may be made by the relevant highway authority or the undertaker as the relevant highway authority thinks fit, and the expense reasonably incurred by the relevant highway authority in so doing must be repaid to the relevant highway authority by the undertaker.

(2) If within 28 days after a request for consent has been submitted the relevant highway authority has not given or refused such consent, it is deemed to have consented to the request as submitted.

21. The undertaker must not remove any soil or material from any highway except so much as must be excavated in the carrying out of the works authorised by this Order.

22.—(1) If the relevant highway authority, after giving to the undertaker not less than 28 days’ notice (or, in case of emergency, such notice as is reasonably practicable) of its intention to do so, incurs any additional expense in the signposting of traffic diversions, in the diversion of footpaths, in the taking of other measures in relation thereto, or in the repair of any highway by reason of the diversion thereto of traffic from a road of a higher standard, in consequence of the construction of the works authorised by this Order, the undertaker must repay to the relevant highway authority the amount of any such expense reasonably so incurred.

(2) An amount which apart from this sub-paragraph would be payable to the relevant highway authority by virtue of this paragraph in respect of the repair of any highway must, if the highway fell or would have fallen due for repair as part of the maintenance programme of the relevant highway authority at any time within ten years of the repair being carried out by the undertaker, so as to confer on the relevant highway authority financial benefit (whether by securing the completion of overdue maintenance work for which the relevant highway authority is liable or by deferment of the time for such work in the ordinary course), be reduced by the amount which represents that benefit.

23.—(1) The undertaker shall not, except with the consent of the relevant highway authority, deposit any soil or materials, or stand any plant, on or over any highway so as to obstruct or render less safe the use of the highway by any person, or, except with the like consent, deposit any soil or materials on any highway outside a hoarding, but if within 28 days after request for it any such consent is neither given nor refused it is deemed to have been given.

(2) The expense reasonably incurred by the relevant highway authority in removing any soil or materials deposited on any highway in contravention of this paragraph must be repaid to the relevant highway authority by the undertaker.

24. The undertaker must not, except with the consent of the relevant highway authority, erect or retain on or over a highway to which the public continues to have access any scaffolding or other structure which obstructs the highway.

25. The undertaker must, if reasonably so required by the relevant highway authority, provide and maintain to the reasonable satisfaction of the relevant highway authority, during such time as the undertaker may occupy any part of a highway for the purpose of the construction of any part of the works authorised by this Order, temporary bridges and temporary ramps for vehicular or pedestrian traffic over any part of the works or in such other position as may be necessary to prevent undue interference with the flow of traffic in the highway.

26.—(1) Where any part of any highway has been broken up or disturbed by the undertaker and not permanently stopped up or diverted, the undertaker must make good the subsoil, foundations and surface of that part of the highway to the reasonable satisfaction of the relevant highway authority, and must maintain the same to the reasonable satisfaction of the relevant highway authority for such time as may reasonably be required for the permanent reinstatement of the highway.

(2) The reinstatement of that part of the highway must be carried out by the undertaker to the reasonable satisfaction of the relevant highway authority in accordance with such requirements as to specification of material and standards of workmanship as may be prescribed for equivalent reinstatement work by regulations made under section 71 of the New Roads and Street Works Act 1991(a).

27. If any damage to any highway or any property of the relevant highway authority on or under any highway is caused by, or results from, the construction of any work authorised by this Order or any order or omission of the undertaker, its contractors, agents or employees whilst engaged upon such work, the undertaker may, in the case of damage to a highway, make good such damage to the reasonable satisfaction of the relevant highway authority and, where the undertaker does not make good, or in the case of damage to property of the relevant highway authority, the undertaker must make compensation to the relevant highway authority.

28. The fact that any act or thing may have been done in accordance with plans approved by the relevant highway authority does not (if it was not attributable to the act, neglect or default of the relevant highway authority or of any person in its employ or its contractors or agents) exonerate the undertaker from any liability, or affect any claim for damages, under this Part or otherwise.

29. Any difference arising between the undertaker and the relevant highway authority under this Part of this Schedule (other than in difference as to the meaning or construction of this Part of this Schedule) shall be resolved by arbitration under article 49 (arbitration).

PART 4

FOR THE PROTECTION OF THE ENVIRONMENT AGENCY

30. The following provisions apply for the protection of the Agency unless otherwise agreed in writing between the undertaker and the Agency.

31. In this Part of this Schedule—

“the Agency” means the Environment Agency;

“construction” includes execution, placing, altering, replacing, relaying and removal and excavation and “construct” and “constructed” is to be construed accordingly;

“drainage work” means any main river and includes any land which provides or is expected to provide flood storage capacity for any main river and any bank, wall, embankment or other

(a) 1991 c. 22.

structure, or any appliance, constructed or used for land drainage, flood defence or tidal monitoring;

“the fishery” means any waters containing fish and fish in, or migrating to or from, such waters and the spawn, spawning ground, habitat or food of such fish;

“main river” means all watercourses shown as such on the statutory main river maps held by the Agency and the Department for Environment Food and Rural Affairs including any structure or appliance for controlling or regulating the flow of water in or out of the channel;

“plans” includes sections, drawings, specifications, calculations and method statements;

“Roman Bank” means the sea defence known as the Roman Bank as shown on the Roman Bank plan;

“Roman Bank plan” means the plan titled “Roman Bank within the Order limits” certified by the Secretary of State as the Roman Bank plan for the purposes of this Order under article 47 (certification of documents, etc.);

“sea defence” means any bank, wall, embankment (and any berm, counterwall or cross-wall connected to any such bank, wall or embankment), barrier, tidal sluice and other defence, whether natural or artificial, against the inundation of land by sea water or tidal water, including natural or artificial high ground which forms part of or makes a contribution to the efficiency of the defences of the Agency’s area against flooding, but excludes any sea defence works which are for the time being maintained by a coast protection authority under the provisions of the Coast Protection Act 1949(a) or by any local authority or any navigation, harbour or conservancy authority;

“specified work” means so much of any work or operation authorised by this Order or otherwise as is for the purpose of or in connection with, the construction or maintenance of the authorised development—

- (a) in, on, under, over or within 16 metres of a drainage work or is otherwise likely to—
 - (i) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;
 - (ii) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;
 - (iii) cause obstruction to the free passage of fish or damage to any fishery;
 - (iv) affect the conservation, distribution or use of water resources; or
 - (v) affect the conservation value of the main river and habitats in its immediate vicinity;
- (b) in, on, under, over or within 16 metres of the base of a sea defence which is likely to—
 - (i) endanger the stability of, cause damage to or reduce the effectiveness of that defence; or
 - (ii) interfere with the Agency’s access to or along that defence;
- (c) an activity that includes any dredging, raising or taking of any sand, silt, ballast, clay, gravel or other materials from or off the bed or banks of a drainage work (or causing such materials to be dredged, raised or taken), including hydrodynamic dredging or desilting;
- (d) any quarrying or excavation within 16 metres of a drainage work which is likely to cause damage to or endanger the stability of the banks or structure of that drainage work; and

“watercourse” includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, basins, sewers and passages through which water flows except a public sewer.

(a) 1949 c. 74.

Submission and approval of plans

32.—(1) Before beginning to construct any specified work, the undertaker must submit to the Agency plans of the specified work and such further particulars available to it as the Agency may within 28 days of the receipt of the plans reasonably request.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the Agency, or determined under paragraph 42.

(3) Any approval of the Agency required under this paragraph—

- (a) must not be unreasonably withheld or delayed;
- (b) is deemed to have been refused if it is neither given nor refused within 2 months of the submission of the plans or receipt of further particulars if such particulars have been requested by the Agency for approval;
- (c) in the case of a refusal, accompanied by a statement of the grounds of refusal; and
- (d) may be given subject to such reasonable requirements as the Agency may have for the protection of any drainage work or the fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

(4) The Agency must use its reasonable endeavours to respond to the submission of any plans before the expiration of the period mentioned in sub-paragraph (3)(b).

Construction of protective works

33. Without limiting paragraph 32, the requirements which the Agency may have under that paragraph include conditions requiring the undertaker, at its own expense, to construct such protective works, whether temporary or permanent, before or during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work against damage; or
- (b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased,

by reason of any specified work.

Timing of works and service of notices

34.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 33, must be constructed—

- (a) without unreasonable delay in accordance with the plans approved under this Part of this Schedule; and
- (b) to the reasonable satisfaction of the Agency,

and the Agency is entitled by its officer to watch and inspect the construction of such works.

(2) The undertaker must give to the Agency not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days after the date on which it is completed.

(3) If the Agency reasonably requires, the undertaker must construct all or part of the protective works so that they are in place prior to the construction of the specified work to which the protective works relate.

(4) If any part of a specified work or any protective work required by the Agency is constructed otherwise than in accordance with the requirements of this Schedule, the Agency may by notice in writing require the undertaker at the undertaker's own expense to comply with the requirements of this part of this Schedule or (if the undertaker so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and,

where removal is required, to restore the site to its former condition to such extent and within such limits as the Agency reasonably requires.

(5) Subject to sub-paragraph (6) and paragraph 39, if, within a reasonable period, being not less than 28 days beginning with the date when a notice under sub-paragraph (4) is served upon the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice and any reasonable expenditure incurred by the Agency in so doing is recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the Agency must not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 41.

Maintenance of drainage works

35.—(1) Subject to sub-paragraph (5) the undertaker must from the commencement of the construction of the specified works maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by the Applicant for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any such drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the undertaker to repair the drainage work, or any part of such drainage work, or (if the undertaker so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed), to remove the specified work and restore the site to its former condition, to such extent and within such limits as the Agency reasonably requires.

(3) Subject to sub-paragraph (4) and paragraph 39, if, within a reasonable period, being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is reasonably necessary for such compliance and any expenditure reasonably incurred by the Agency in so doing is recoverable from the undertaker.

(4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the Agency will not, except in the case of an emergency, exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined in accordance with paragraph 41.

(5) This paragraph does not apply to—

- (a) drainage works which are vested in the Agency, or which the Agency or another person is liable to maintain and is not proscribed by the powers of the Order from doing so; and
- (b) any obstruction of a drainage work expressly authorised in the approval of specified works plans and carried out in accordance with the provisions of this Part provided that any obstruction is removed as soon as reasonably practicable.

Impairment of drainage works

36. Subject to paragraph 39, if by reason of the construction of any specified work or of the failure of any such work, the efficiency of any drainage work for flood defence purposes is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by the undertaker to the reasonable satisfaction of the Agency and if the undertaker fails to do so, the Agency may make good the impairment or damage and recover any expenditure reasonably incurred by the Agency in so doing from the undertaker.

Agency access

37. If by reason of construction of the specified work the Agency's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the undertaker must provide such alternative means of access that will allow the Agency to maintain the flood defence or use the equipment no less effectively than was possible before the obstruction as soon as reasonably practicable and within 24 hours of the undertaker becoming aware of such obstruction unless a longer period of time has been agreed in writing by the Agency.

Free passage of fish

38.—(1) The undertaker must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in the fishery during the construction of any specified work.

(2) If by reason of—

- (a) the construction of any specified work; or
- (b) the failure of any such work,

damage to the fishery is caused, or the Agency has reason to expect that such damage may be caused, the Agency may serve notice on the undertaker requiring it to take such steps as may be reasonably practicable to make good the damage, or, as the case may be, to protect the fishery against such damage.

(3) Subject to paragraph 39, if within such time as may be reasonably practicable for that purpose after the receipt of written notice from the Agency of any damage or expected damage to a fishery, the undertaker fails to take such steps as are described in sub-paragraph (2), the Agency may take those steps and any expenditure reasonably incurred by the Agency in so doing is recoverable from the undertaker.

(4) Subject to paragraph 39, in any case where immediate action by the Agency is reasonably required in order to secure that the risk of damage to the fishery is avoided or reduced, the Agency may take such steps as are reasonable for the purpose, and may recover from the undertaker any reasonable expenditure incurred in so doing provided that notice specifying those steps is served on the undertaker as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

39. The undertaker must indemnify the Agency in respect of all direct reasonable costs, charges and expenses which the Agency may reasonably incur —

- (a) in the examination or approval of plans under this Part of this Schedule;
- (b) in the inspection of the construction of the specified works or any protective works required by the Agency under this Part of this Schedule; and
- (c) in the carrying out of any surveys or tests by the Agency which are reasonably required in connection with the construction of the specified works.

Indemnity

40.—(1) The undertaker is responsible for and indemnifies the Agency for all costs and direct losses which may be reasonably incurred or suffered by the Agency by reason of—

- (a) the construction, operation or maintenance of any specified works comprised within the authorised works or the failure of such works comprised within them; or
- (b) any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged upon the construction, operation or maintenance of the authorised works or dealing with any failure of the authorised works,

except in so far as such costs or losses in relation to the operation or maintenance of the authorised works are properly covered and payable under separate agreement made between the Agency and the undertaker.

(2) For the avoidance of doubt, in sub-paragraph (1)—

“costs” includes reasonably incurred—

- (a) expenses and charges;
- (b) staff costs and overheads;
- (c) legal costs; and

“losses” includes physical damage.

(3) The undertaker must indemnify the Agency against all liabilities, claims and demands arising out of or in connection with the authorised works or otherwise out of the matters referred to in sub-paragraph (1)(a) and (b).

(4) For the avoidance of doubt, in sub-paragraph (3)—

“claims” and “demands” include as applicable—

- (a) costs (within the meaning of sub-paragraph (2)) incurred in connection with any claim or demand;
- (b) any interest element of sums claims or demanded;

“liabilities” includes—

- (a) contractual liabilities;
- (b) tortious liabilities (including liabilities for negligence or nuisance);
- (c) liabilities to pay statutory compensation or for breach of statutory duty;
- (d) liabilities to pay statutory penalties imposed on the basis of strict liability (but does not include liabilities to pay other statutory penalties).

(5) The Agency must give to the undertaker reasonable notice of any such claim or demand without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.

(6) The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved by the Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, will not relieve the undertaker from any liability under the provisions of this Part of this Schedule.

Disputes

41. Any dispute arising between the undertaker and the Agency under this part of this Schedule must, if the parties agree, be determined by arbitration under article 49 (arbitration), but will otherwise be determined by the Secretary of State for Environment, Food and Rural Affairs or its successor and the Secretary of State for Business, Energy and Industrial Strategy or its successor acting jointly on a reference to them by the undertaker or the Agency, after notice in writing by one to the other.

Roman Bank

42.—(1) The undertaker must at its own cost engage the services of a suitably experienced chartered civil engineer to carry out an initial condition survey of the Roman Bank prior to carrying out the authorised development in, on, under, over or within 16 metres of the base of the Roman Bank.

(2) The inspection must be undertaken on foot with information recorded on both sides of the bank as well as the crest.

43. The undertaker must at its own cost engage the services of a suitably qualified surveyor to carry out a topographical survey of the parts of the Roman Bank within the Order limits to establish the continuous height of the Roman Bank prior to carrying out any authorised development in, on, under, over or within 16 metres of the base of the Roman Bank.

44. The initial condition survey in accordance with paragraph 42 must report on—

- (a) the height of the Roman Bank (based on the topographical survey undertaken under paragraph 43);
- (b) the structural condition of the Roman Bank including taking measurements and recording the location of any existing defects, such as cracks, holes, slumping burrows, scour; and
- (c) a photographic record of the inspection of the Roman Bank identifying the above elements using geo-referenced photographs or marked on maps with grid references.

45. The undertaker must provide to the Agency a copy of—

- (a) the initial condition survey; and
- (b) the topographical survey,

as soon as reasonably practicable following the undertaker’s receipt of those documents.

46. The undertaker at its own costs will inspect, maintain and repair Roman Bank subject to the provisions in paragraph 47.

47. In respect of the Roman Bank only, this Part of Schedule 8 applies subject to the following variations—

- (a) the definition of “specified work” in paragraph 31(b) is to be read as—

“Prior to carrying out any works in, on, under, over or within 16 metres of the base of the Roman Bank which is likely to—

- (i) endanger the stability of, cause damage to or reduce the effectiveness of the Roman Bank (in light of the condition assessed in the initial condition survey subject to any changes of condition or impacts on the effectiveness of the Roman Bank approved by the Agency); or
- (ii) interfere with the Agency’s access to or along that defence.”;

- (b) paragraph 33 is subject to the following—

“Provided that the undertaker is not required to take any step which results in the Roman Bank exceeding the standards, efficiency for flood defence purposes, or otherwise reducing the risk of flooding based on the condition of the Roman Bank as assessed in the initial condition survey subject to any changes to condition as a result of specified works approved by the Agency.”;

- (c) paragraph 35(1) is subject to the following—

“Provided that the undertaker is not required to maintain or repair the Roman Bank or to keep it free from obstruction, to a standard greater than its condition as assessed in the initial condition survey subject to any changes to condition as a result of specified works approved by the Agency.”; and

- (d) paragraph 36 is subject to the following—

“Provided that the undertaker is not required to restore efficiency, damage or other impairments at the Roman Bank to a standard greater than its condition as assessed in the initial condition survey subject to any changes to condition as a result of specified works approved by the Agency.”.

PART 5

FOR THE PROTECTION OF DRAINAGE AUTHORITIES

48. The provisions of this Part have effect for the protection of the drainage authority unless otherwise agreed in writing between the undertaker and the drainage authority.

49. In this Part of this Schedule—

“construction includes execution, placing, altering, replacing, relaying and removal; and “construct” and “constructed” must be construed accordingly;

“drainage authority” means in relation to an ordinary watercourse, the drainage board concerned within the meaning of section 23 (prohibition on obstructions etc. in watercourses) of the Land Drainage Act 1991(a);

“drainage work” means any ordinary watercourse and includes any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage or flood defence in connection with an ordinary watercourse which is the responsibility of the drainage authority;

“ordinary watercourse” has the meaning given by section 72 (interpretation) of the Land Drainage Act 1991;

“plans” includes any information reasonably required by the drainage authority including location details, grid references, sections, drawings, specifications, assessments and method statements;

“specified work” means any of the following works carried out in relation to any ordinary watercourse—

- (a) erecting any mill dam, weir or other similar obstruction to the flow of the watercourse, or raising or otherwise altering any such obstruction;
- (b) the construction or alteration of a bridge or other structure;
- (c) erecting a culvert in the watercourse; or
- (d) altering a culvert in a manner that would be likely to affect the flow of the watercourse.

50.—(1) Before commencing construction of a specified work, the undertaker must submit to the drainage authority plans of the specified work and such further particulars available to it as the drainage authority may within 14 days of the submission of the plans reasonably request.

(2) The undertaker must not commence construction of the specified work until approval, unconditionally or conditionally, has been given as provided in this paragraph.

(3) A specified work must not be constructed except in accordance with such plans as may be approved in writing by the drainage authority or determined under paragraph 58.

(4) Any approval of the drainage authority required under this paragraph—

- (a) must not be unreasonably withheld or delayed;
- (b) is deemed to have been given if it is neither given nor refused within 28 days of the submission of the plans for approval, or submission of further particulars (where required by the drainage authority under sub-paragraph (1)) whichever is the later; and
- (c) may be given subject to such reasonable requirements as the drainage authority may make for the protection of any drainage work, ordinary watercourse or for the prevention of flooding.

(5) Any refusal under this paragraph must be accompanied by a statement of the reasons for refusal.

51. Without limiting paragraph 50, the requirements which the drainage authority may make under that paragraph include conditions requiring the undertaker at its own expense to construct such protective works, whether temporary or permanent, during the construction of the specified work (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work against damage by reason of any specified work; or
- (b) to secure that the efficiency of any drainage work for flood defence and land drainage purposes is not impaired, and that the risk of flooding is not otherwise increased, by reason of any specified work.

(a) 1991 c. 59.

52.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the drainage authority under paragraph 50, must be constructed—

- (a) without unreasonable delay in accordance with the plans approved or deemed to have been approved or settled under this Part of this Schedule; and
- (b) to the reasonable satisfaction of the drainage authority, and an officer of the drainage authority is entitled to watch and inspect the construction of such works at all reasonable times and on reasonable notice.

(2) The undertaker must give to the drainage authority—

- (a) not less than 14 days' notice in writing of its intention to commence construction of any specified work; and
- (b) notice in writing of its completion not later than 7 days after the date of completion.

(3) If the drainage authority reasonably requires, the undertaker must construct all or part of the protective works so that they are in place before the construction of the specified work to which the protective works relate.

(4) If any part of a specified work or any protective work required by the drainage authority is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the drainage authority may by notice in writing require the undertaker at the undertaker's expense to comply with the requirements of this Part of this Schedule or (if the undertaker so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is agreed, to restore the site to its former condition to such extent and within such limits as the drainage authority reasonably requires.

(5) Subject to sub-paragraph (6), if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (4) is served on the undertaker, the undertaker has failed to begin taking steps to comply with the requirements of the notice and subsequently to make reasonably expeditious progress towards their implementation, the drainage authority may execute the works specified in the notice and any reasonable expenditure incurred by it in so doing is recoverable from the undertaker.

(6) In the event of any dispute as to whether sub-paragraph (4) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the drainage authority must not except in an emergency exercise the powers conferred by sub-paragraph (5) until the dispute has been finally determined in accordance with paragraph 58.

53.—(1) Subject to sub-paragraph (5), the undertaker must from the commencement of the construction of the specified work until the date falling 12 months from the date of completion of the specified work maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation on land held by the undertaker for the purpose of or in connection with the specified work, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any drainage work which the undertaker is liable to maintain is not maintained to the reasonable satisfaction of the drainage authority, the drainage authority may by notice in writing require the undertaker to repair and restore the work, or any part of the work, or (if the undertaker so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the specified work and restore the site to its former condition, to such extent and within such limits as the drainage authority reasonably requires.

(3) Subject to sub-paragraph (4) and paragraphs 55 and 56 if, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the undertaker, the undertaker has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the drainage authority may do what is reasonably necessary for such compliance and may recover any reasonable expenditure reasonably incurred by it in so doing from the undertaker.

(4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the drainage authority must not except in a case of emergency exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined in accordance with paragraph 58.

(5) This paragraph does not apply to—

- (a) drainage works which are vested in the drainage authority, or which the drainage authority or another person is liable to maintain and is not prevented by this Order from so doing; and
- (b) any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule provided that any obstruction is removed as soon as reasonably practicable.

54. Subject to paragraphs 55 and 56 and sub-paragraph 53(5)(b), if, by reason of the construction of a specified work or of the failure of any such work the efficiency of any drainage work for flood defence purposes or land drainage is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by the undertaker as soon as reasonably practicable to the reasonable satisfaction of the drainage authority and, if the undertaker fails to do so, the drainage authority may make good the impairment or damage and recover from the undertaker the expense reasonably incurred by it in doing so.

55. The undertaker must make reasonable compensation for costs, charges and expenses which the drainage authority may reasonably incur in—

- (a) the examination or approval of plans under this Part of this Schedule; and
- (b) inspecting the construction of the specified work or any protective works required by the drainage authority under this Part of this Schedule; and
- (c) subject at all times to receiving the prior written approval of the undertaker, in carrying out any surveys or tests by the drainage authority which are reasonably required in connection with the construction of the specified work.

56.—(1) Without limiting the other provisions of this Part, the undertaker must make reasonable compensation to the drainage authority from all claims, demands, proceedings, costs, damages, expenses or loss, which may be made or taken against, recovered from, or incurred by, the drainage authority by reason of—

- (a) any damage to any drainage work;
- (b) any raising or lowering of the water table in land adjoining the authorised project or any sewers, drains and watercourses; or
- (c) any flooding or increased flooding of any such lands,

caused by the construction of any specified work or any act or omission of the undertaker, its contractors, agents or employees whilst engaged on the specified work.

(2) The drainage authority must give to the undertaker reasonable notice of any such claim or demand, and no settlement or compromise may be made without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.

(3) The fact that any act or thing may have been done by the drainage authority on behalf of the undertaker or in accordance with a plan approved or deemed to have been approved by the drainage authority or in accordance with any requirement of the drainage authority or under its supervision does not, subject to sub-paragraph (4), excuse the undertaker from liability under the provisions of sub-paragraph (1) unless the drainage authority fails to carry out and execute the works properly with due care and attention and in a skilful and professional like manner or in a manner that does not accord with the approved plan.

(4) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or loss to the extent that it is attributable to the act, neglect or default of the drainage authority, its officers, servants, contractors or agents.

57. The fact that any work or thing has been executed or done by the undertaker in accordance with a plan approved or deemed to be approved by the drainage authority or to its satisfaction does not (in the absence of negligence on the part of the drainage authority, its officers, contractors or agents), relieve the undertaker from any liability under this Part.

58. Any dispute arising between the undertaker and the drainage authority under this Part is to be determined by arbitration under article 49 (arbitration).

PART 6

FOR THE PROTECTION OF ANGLIAN WATER

59. For the protection of Anglian Water, the following provisions have effect, unless otherwise agreed in writing between the undertaker and Anglian Water.

60. In this Part of this Schedule—

“alternative apparatus” means alternative apparatus adequate to enable Anglian Water to fulfil its statutory functions in not less efficient a manner than previously;

“apparatus” means any works, mains, pipes or other apparatus belonging to or maintained by Anglian Water for the purposes of water supply and sewerage and—

- (a) any drain or works vested in Anglian Water under the Water Industry Act 1991(a); and
- (b) any sewer which is so vested or is the subject of a notice of intention to adopt given under section 102(4) of the Water Industry Act 1991 or an agreement to adopt made under section 104 of that Act,

and includes a sludge main, disposal main or sewer outfall and any manholes, ventilating shafts, pumps or other accessories forming part of any sewer, drain, or works (within the meaning of section 219 of that Act) and any structure in which apparatus is or is to be lodged or which gives or will give access to apparatus;

“functions” includes powers and duties;

“in” in a context referring to apparatus or alternative apparatus in land includes a reference to apparatus or alternative apparatus under, over or upon land; and

“plan” includes sections, drawings, specifications and method statements.

61. The undertaker will not interfere with, build over or near to any apparatus within the Order land or execute the placing, installation, bedding, packing, removal, connection or disconnection of any apparatus, or execute any filling around the apparatus (where the apparatus is laid in a trench) within the standard protection strips which are the strips of land falling the following distances to either side of the medial line of any relevant pipe or apparatus—

- (a) 2.25 metres where the diameter of the pipe is less than 150 millimetres;
- (b) 3 metres where the diameter of the pipe is between 150 and 450 millimetres;
- (c) 4.5 metres where the diameter of the pipe is between 451 and 750 millimetres; and
- (d) 6 metres where the diameter of the pipe exceeds 750 millimetres,

unless otherwise agreed in writing with Anglian Water, such agreement not to be unreasonably withheld or delayed, and such provision being brought to the attention of any agent or contractor responsible for carrying out any work on behalf of the undertaker.

62. The alteration, extension, removal or re-location of any apparatus must not be implemented until—

- (a) any requirement for any permits under the Environmental Permitting (England and Wales) Regulations 2016(b) or other legislations and any other associated consents are

(a) 1991 c. 56.

(b) S.I. 2016/1154.

obtained, and any approval or agreement required from Anglian Water on alternative outfall locations as a result of such re-location are approved, such approvals from Anglian Water not to be unreasonably withheld or delayed; and

- (b) the undertaker has made the appropriate application required under the Water Industry Act 1991 together with a plan and section of the works proposed and Anglian Water has agreed all of the contractual documentation required under the Water Industry Act 1991, such agreement not to be unreasonably withheld or delayed, and such works to be executed only in accordance with the plan, section and description submitted and in accordance with such reasonable requirements as may be made by Anglian Water for the alteration or otherwise for the protection of the apparatus, or for securing access to it.

63. In the situation, where in exercise of the powers conferred by the Order, the undertaker acquires any interest in any land in which apparatus is placed and such apparatus is to be relocated, extended, removed or altered in any way, no alteration or extension must take place until Anglian Water has established to its reasonable satisfaction, contingency arrangements in order to conduct its functions for the duration of the works to relocate, extend, remove or alter the apparatus.

64. Regardless of any provision in this Order or anything shown on any plan, the undertaker must not acquire any apparatus otherwise than by agreement, and before extinguishing any existing rights for Anglian Water to use, keep, inspect, renew and maintain its apparatus in the Order land, the undertaker will, with the agreement of Anglian Water, create a new right to use, keep, inspect, renew and maintain the apparatus that is reasonably convenient for Anglian Water such agreement not to be unreasonably withheld or delayed, and to be subject to arbitration under article 49 (arbitration).

65. If in consequence of the exercise of the powers conferred by the Order the access to any apparatus is materially obstructed the undertaker must provide such alternative means of access to such apparatus as will enable Anglian Water to maintain or use the apparatus no less effectively than was possible before such obstruction.

66. If in consequence of the exercise of the powers conferred by the Order, previously unmapped sewers, lateral drains or other apparatus are identified by the undertaker, notification of the location of such assets will immediately be given to Anglian Water and afforded the same protection of other Anglian Water assets.

67. If for any reason or in consequence of the construction of any of the works referred to in paragraphs 62 to 64 and 66 any damage is caused to any apparatus (other than apparatus the repair of which is not reasonably necessary in view of its intended removal for the purposes of those works) or property of Anglian Water, or there is any interruption in any service provided, or in the supply of any goods, by Anglian Water, the undertaker will—

- (a) bear and pay the cost reasonably incurred by Anglian Water in making good any damage or restoring the supply; and
- (b) make reasonable compensation to Anglian Water for any other expenses, loss, damages, penalty or costs incurred by Anglian Water,

by reason or in consequence of any such damage or interruption.

68. Any agreement or approval of Anglian Water required under this Part of this Schedule is deemed to have been given if it is neither given nor refused within 28 days (or such other period as may be agreed between the parties acting reasonably) of the date of submission of a request for such agreement or approval, or, in the case of a refusal, if it is not accompanied by a statement of the grounds of refusal.

69. Any dispute arising between the undertaker and Anglian Water under this Part of this Schedule or the Order must be referred to and settled by arbitration under article 49 (arbitration) unless otherwise agreed in writing between the undertaker and Anglian Water.

DEEMED MARINE LICENCE

PART 1

INTRODUCTION

*Interpretation***1.—(1)** In this licence—

“the 2009 Act” means the Marine and Coastal Access Act 2009(a);

“AOD” means above ordnance datum;

“authorised development” has the meaning given in paragraph 4;

“biodiversity units” means the product of the size of an area, and the distinctiveness and condition of the habitat it comprises to provide a measure of ecological value (as assessed using the Defra biodiversity off-setting metric);

“biodiversity off-setting scheme” means a scheme which will deliver biodiversity enhancements which must not be less than the off-setting value;

“business day” means a day other than a Saturday or Sunday, which is not Christmas Day, Good Friday or a bank holiday under section 1 (bank holidays) of the Banking and Financial Dealings Act 1971(b);

“capital dredging” means dredging which comprises the excavation of the seabed, in an area or down to a level (relative to ordnance datum) not previously dredged during the preceding 10 years;

“CEMP” means construction and environmental management plan;

“commence” means beginning to carry out any part of a licensed activity comprised in or carried out for the purposes of the authorised development other than operations consisting of pre-construction ecological mitigation, archaeological investigations, environmental surveys and monitoring, investigations for the purpose of assessing ground conditions (including the making of trial boreholes), receipt and erection of construction plant and equipment, erection of any temporary means of enclosure, the temporary display of site notices or contractors’ signage and notices and “commenced” and “commencement” are to be construed accordingly;

“Defra” means the Department for Environment, Food and Rural Affairs;

“Defra biodiversity off-setting metric” means the mechanism published by Defra to quantify impacts on biodiversity, which allows biodiversity losses and gains affecting different habitats to be compared and ensures offsets are sufficient to compensate for residual losses of biodiversity;

“designated bird species” means any species which is a constituent named part of The Wash Special Protection Area/Ramsar/Site of Special Scientific Interest (“Protected Sites”) non-breeding waterbird assemblage feature, or any species constituting a site feature in its own right on The Haven above Hobhole Drain; expanded to include any wader, gull, duck, goose, swan, or other waterbird species when monitoring downstream of Hobhole Drain confluence and into The Wash (i.e. inside Protected Sites boundaries);

“environmental statement” means the document of that description certified by the Secretary of State as the environmental statement for the purposes of this Order under article 47

(a) 2009 c. 23.

(b) 1971 c. 80.

(certification of documents, etc.) as supplemented by the document set out in Part 2 of Schedule 10;

“Forward Look” and “Close Out” requirements are as set out in the UK Marine Noise Registry Information Document Version 1 (July 2015) as amended, updated or superseded from time to time;

“harbour authority” means the Port of Boston Limited;

“licensed activity” means any activity described in Part 2 of this licence;

“maintain” in relation to the authorised development includes inspect, repair, adjust, alter, remove, refurbish, reconstruct, replace and improve to the extent that such works do not give rise to any materially new or materially different environmental effects than those identified in the environmental statement and “maintenance” and “maintaining” are to be construed accordingly;

“maintenance dredging” means any activity which comprises the removal of recently accumulated sediments such as mud, sand and gravel in order to keep channels, berths and other areas at their designed depths and which takes place in circumstances where—

- (a) the level of the seabed to be restored by the dredging is not lower than it has been at any time during the past 10 years; and
- (b) there is evidence that dredging has previously been undertaken to that level (or lower) during that period;

“the marine area” has the meaning given to ‘UK marine area’ in section 42 of the 2009 Act;

“Marine Case Management System” or “MCMS” means the Marine Management Organisation’s online case management system;

“Marine Noise Registry” means the database developed and maintained by the Joint Nature Conservation Committee on behalf of Defra to record the spatial and temporal distribution of impulsive noise generating activities in UK seas;

“Maritime and Coastguard Agency” means the executive agency of the Department for Transport;

“Mean High Water Springs” or “MHWS” means the highest level which spring tides reach on average over a period of time;

“MMO” means the Marine Management Organisation;

“navigation management plan” means the navigation management plan to be produced in accordance with condition 14 and which may be approved by the MMO in accordance with the procedure in Part 4;

“Navigation Management Planning Process: Risk to Birds” means the document of that description certified by the Secretary of State as the Navigation Management Planning Process: Risk to Birds for the purposes of this Order under article 47 (certification of documents, etc.);

“navigation management plan template” means the document of that description certified by the Secretary of State as the template navigation management plan for the purposes of this Order under article 47 (certification of documents, etc.);

“navigation risk assessment” means the document of that description certified by the Secretary of State as the navigation risk assessment for the purposes of this Order under article 47 (certification of documents, etc.);

“office hours” means the period from 09:00 until 17:00 on any business day;

“off-setting value” means the net biodiversity impact of the authorised development, calculated using the Defra biodiversity off-setting metric, measured in biodiversity units;

“the Order” means the Boston Alternative Energy Facility Development Consent Order 202[];

“other navigation risk assessment” means any assessment of navigation risk required by the harbour authority or the MMO from time to time;

“outline air quality deposition monitoring plan” means the document of that description certified by the Secretary of State as the outline air quality deposition monitoring plan for the purposes of this Order under article 47 (certification of documents, etc.);

“outline landscape and ecological mitigation strategy” means the document of that description certified by the Secretary of State as the outline landscape and ecological mitigation strategy for the purposes of this Order under article 47 (certification of documents, etc.);

“outline marine mammal mitigation protocol” means the document of that description certified by the Secretary of State as the outline marine mammal mitigation protocol for the purposes of this Order under article 47 (certification of documents, etc.);

“The Haven” means the part of the River Witham, known as The Haven; and

“undertaker” means Alternative Use Boston Projects Limited (company number 11013830, whose registered office is at 26 Church Street, Bishop’s Stortford, Hertfordshire, England, CM23 2LY) or any transferee under article 9 (consent to transfer of benefit of Order) of the Order.

(2) Unless otherwise specified, all geographical co-ordinates given in this licence are in latitude and longitude degrees and minutes to two decimal places.

2.—(1) Except where otherwise indicated, the main point of contact with the MMO and the address for email and postal returns and correspondence are as follows—

(a) Marine Management Organisation, Marine Licensing Team, Lancaster House, Hampshire Court, Newcastle upon Tyne, NE4 7YH; Tel. – 0300 123 1032, Email – marine.consents@marinemanagement.org.uk or such replacement contact details as are notified to the undertaker in writing by the MMO;

(b) The MMO Local Office – Marine Management Organisation, MMO Lowestoft Office, Pakefield Road, Lowestoft, Suffolk, NR33 0HT; Tel. – 01502 573 149, Email – lowestoft@marinemanagement.org.uk or such replacement contact details as are notified to the undertaker in writing by the MMO.

(2) The contact details for the MMO Marine Pollution Response Team are Tel. (during office hours) – 0300 200 2024, Tel. (outside office hours) – 07770 977 825 or 0845 051 8486 and Email – dispersants@marinemanagement.org.uk, or such replacement contact details notified to the undertaker in writing by the MMO.

(3) Unless otherwise stated in writing by the MMO, all notifications required by this licence must be sent by the undertaker to the MMO using the MCMS.

PART 2

LICENSED ACTIVITIES

3. Subject to the licence conditions in Part 3 of this licence, this licence authorises the undertaker (and any agent, contractor or subcontractor acting on its behalf) to carry out any licensable marine activities under section 66(1) (licensable marine activities) of the 2009 Act which—

(a) form part of, or are related to, the authorised development; and

(b) are not exempt from requiring a marine licence by virtue of any provision made under section 74 (exemption specified by order) of the 2009 Act.

4.—(1) In this licence, “authorised development” means the construction, maintenance and operation of the following activities authorised in relation to the construction, maintenance and operation of Work No. 4—

(a) the construction of a suspended deck wharf structure, forming 7.2m AOD flood defence line wall, containing three berthing points and tie-in to the existing flood defence;

(b) the creation by capital dredging, use and maintenance of a berthing pocket within the following parameters—

Table 1

<i>Dimension</i>	<i>Parameter</i>
Length	570m ±5%
Width	110m ±5%
Depth	-3.5m OD ±5%
Area to be dredged	62,700 m ² ±10%
Volume of material to be removed	225,000m ³ ±10%

- (c) the construction and maintenance of scour protection;
- (d) the construction of piles and pile caps within The Haven supporting piers and fendering;
- (e) the construction of fendering within The Haven;
- (f) the construction of a mooring within The Haven;
- (g) the implementation of appropriate lighting to ensure safe operation of the wharf;
- (h) the construction of a drainage system for the wharf;
- (i) the implementation of shore to ship power;
- (j) the powers conferred by article 19(1) (powers in relation to relevant navigations or watercourses) of this Order;
- (k) for the purposes of, or in connection with, the construction, operation or maintenance of any of the works and other development mentioned above, ancillary or related development which does not give rise to any materially new or materially different effects than those assessed in the environmental statement, consisting of—
 - (i) activities within The Haven and within the Order limits to—
 - (aa) carry out excavations and clearance, deepening, scouring, cleansing, dumping and pumping operations;
 - (bb) use, appropriate, sell, deposit or otherwise dispose of any materials (including liquids but excluding any wreck within the meaning of the Merchant Shipping Act 1995(a)) obtained in carrying out any such operations;
 - (cc) remove and relocate any vessel or structure sunk, stranded, abandoned, moored or left (whether lawfully or not);
 - (dd) temporarily remove, alter, strengthen, interfere with, occupy and use the banks, bed, foreshore, waters and walls of The Haven;
 - (ee) construct, place and maintain works and structures; and
 - (ff) provide lighting, signage and aids to navigation,
 - (ii) other works and development—
 - (aa) to provide or alter embankments, foundations, retaining walls, drainage works, outfalls, pollution control devices, pumping stations, culverts, wing walls, fire suppression system water tanks and associated plant and equipment, lighting and fencing;
 - (bb) to alter the course of, or otherwise interfere with, navigable or non-navigable watercourses; and
 - (cc) to provide works associated with the provision of ecological mitigation and other works to mitigate any adverse effects of the construction, operation or maintenance of the authorised development;
 - (iii) such other works as may be necessary or convenient for the purposes of, or in connection with or in consequence of, the construction, maintenance, operation or use of the authorised development, including—
 - (aa) maintenance dredging; and

(a) 1995 c. 21.

- (bb) other works associated with the provision of ecological mitigation, or to mitigate any adverse effect of the construction, maintenance and operation of the works or to benefit or protect any person or premises affected by the construction, maintenance and operation of the works;
- (iv) activities to carry out works and development of whatever nature, as may be necessary or expedient for the purposes of, or for purposes associated with or ancillary to, the operation and maintenance of the authorised development; and
- (l) any other development within the meaning of section 32 (meaning of “development”) of the 2008 Act that is authorised by the Order;

but does not include the removal, relocation or detonation of ordinance.

(2) The undertaker (and any agent, contractor or subcontractor acting on its behalf) may engage in the licensed activities in the area bounded by the coordinates set out in Table 2 in this paragraph and more particularly shown on the works plans, to the extent that they fall below MHWS at the time the licensed activities are carried out.

Table 2

<i>Point Reference</i>	<i>Easting</i>	<i>Northing</i>
P01	534289.711000	342260.128000
P02	534168.677241	342181.781948
P03	534186.659851	342242.491799
P04	533845.617735	342661.592680
P05	533947.150000	342716.200000

(3) The undertaker (and any agent, contractor or subcontractor acting on its behalf) may engage in works associated with the provision of ecological mitigation in the area bounded by the coordinates set out in Table 3 in this paragraph and more particularly shown on the works plans, to the extent that they fall below MHWS at the time the works are carried out.

Table 3

<i>Point Reference</i>	<i>Easting</i>	<i>Northing</i>
MP01	534347.890096	342095.811837
MP02	534341.169854	342093.522370
MP03	534338.522725	342044.386572
MP04	534531.722964	341792.122480
MP05	534565.378031	341825.936298

PART 3 CONDITIONS

General conditions

5. The undertaker must notify the MMO at the earliest opportunity of any change to the information upon which the granting of this licence was based.

6.—(1) The undertaker must notify the HM Coastguard (mail to: nmoccontroller@hmcg.gov.uk) prior to commencement of any licensed activities.

(2) A copy of the notification must be provided to the MMO via MCMS within 24 hours of issue of the notification in sub-paragraph (1).

7.—(1) The undertaker must ensure that local mariners and fishermen’s organisations are made fully aware of all licensed activities through a local notice to mariners issued at least 5 days before the commencement of the works.

(2) The notice to mariners must be updated and re-issued at fortnightly intervals during construction activities and within 5 days of any planned operations.

(3) A copy of the notice must be provided to the MMO via MCMS within 24 hours of issue of a notice under sub-paragraphs (1) or (2).

Vessels

8.—(1) The MMO must be notified in writing of any vessel being used to carry on any licensed activity on behalf of the undertaker.

(2) Such notification must be received by the MMO in writing not less than 24 hours before the commencement of the licensed activity.

(3) Notification must include the master’s name, vessel type, vessel IMO number and vessel owner or operating company.

9. The undertaker must ensure that a copy of this licence and any subsequent revisions or amendments are provided to, read and understood by the masters of any vessel being used to carry on any licensed activity, and that a copy of this licence and subsequent revisions or amendments must be held on board any such vessel.

Agents/contractors/sub-contractors

10.—(1) The undertaker must provide the name, address and function in writing of any agents, contractors or sub-contractors that will carry on any licensed activity on behalf of the undertaker.

(2) Such notification must be received by the MMO in writing not less than 24 hours before the commencement of the licensed activity.

11.—(1) The undertaker must ensure that a copy of this licence and any subsequent revisions or amendments has been provided to, read and understood by any agents, contractors and sub-contractors that will be carrying out any licensed activity on behalf of the undertaker.

(2) The undertaker must keep a copy of this license and any subsequent revisions or amendments available for inspection at its registered address and any site office location at or adjacent to a construction site.

Construction environmental management plan

12.—(1) The undertaker must submit a CEMP in writing to the MMO for written approval in accordance with the procedure in Part 4, following consultation with the harbour authority, the relevant statutory nature conservation body and the Environment Agency, at least 13 weeks prior to the commencement of any licensed activity.

(2) Unless otherwise agreed by the MMO in writing, the CEMP must include the following details (where relevant to the particular licensed activity)—

- (a) the detailed construction methodology to be employed by the undertaker in carrying out the licensed activity;
- (b) a construction programme including—
 - (i) a planned timetable for each licensed activity including timings for mobilisation of plant and delivery by sea;
 - (ii) method of delivery of material to site;
 - (iii) a plan for notifying the MMO of the commencement and cessation of licensed activities and phases of activities;
 - (iv) a plan for notifying the MMO of changes to the construction programme;

- (c) the detailed methodology for the excavation and subsequent management of any dredged material removed in the construction and maintenance of the berthing pocket including—
 - (i) the volume of material to be dredged;
 - (ii) sediment sample analysis results, which must not exceed three years in age and which must be completed by a laboratory validated by the MMO and undertaken in accordance with the sample plan approved under condition 25;
 - (iii) where contamination is identified by the sediment sample analysis results, a monitoring and action plan to address the potential release of contaminants from dredged material into the watercourse;
 - (iv) provision that dredging activities must only be undertaken from 1 July to 28 February inclusive and the details on the timing of dredging activities throughout those months;
 - (v) provision that no dredged materials are to be disposed of at sea or in other waters otherwise than in accordance with a marine licence;
 - (d) a chemical risk assessment to include information regarding how and when chemicals are to be used, stored and transported in accordance with recognised best practice guidance;
 - (e) a waste management and disposal plan;
 - (f) plans and sections;
 - (g) details of where the licensed activity was assessed in the environmental statement;
 - (h) for any materials to be placed in or removed from the marine area, information on the volume and size of materials, methods of placement and removal of materials, types of materials, source of materials and methods of disposal of materials;
 - (i) environmental mitigation measures, which must be substantially in accordance with the measures set out in chapter 17 (marine and coastal ecology) of the environmental statement; and
 - (j) monitoring measures.
- (3) The undertaker must not commence the licensed activity until the MMO has approved in writing the submitted CEMP.
- (4) Unless otherwise agreed by the MMO in writing, the CEMP must be implemented as approved by the MMO.

Piling

13.—(1) The undertaker must submit a piling method statement in writing to the MMO for written approval in accordance with the procedure in Part 4, following consultation with the Environment Agency, the relevant statutory nature conservation body, Lincolnshire Wildlife Trust and the Royal Society for the Protection of Birds, at least 13 weeks prior to the commencement of any licensed activities consisting of piling.

(2) Unless otherwise agreed by the MMO, the piling method statement must include the following—

- (a) the use of pile pads and pile shrouds at all times;
- (b) measures for managing potential risks to marine mammals in accordance with the marine mammal mitigation protocol approved under condition 17;
- (c) provision that piling activities must only be undertaken between 1 June and 30 September (inclusive) and details on the timing of piling activities throughout those months;
- (d) details of the anticipated spread of piling activity throughout a working day with piling permitted between the hours of 0800 to 2000 hours on Monday to Saturday (with the option of 0700 to 1900);
- (e) provision that no planned simultaneous piling will be carried out; and
- (f) monitoring measures.

(3) The undertaker must not commence any licensed activities consisting of piling until the MMO has approved in writing the submitted piling method statement.

(4) Unless otherwise agreed by the MMO in writing, percussive piling must only be carried out in accordance with the relevant piling method statement as approved in writing by the MMO.

Navigation management plan

14.—(1) The undertaker must submit a navigation management plan in writing to the MMO for written approval in accordance with the procedure in Part 4, following consultation with the harbour authority, the relevant statutory nature conservation body and the Environment Agency to the extent that it relates to matters relevant to their functions, at least 13 weeks prior to the commencement of any licensed activity.

(2) The navigation management plan submitted for approval under sub-paragraph (1) must be informed by the assessment of risks to navigational safety in the navigation risk assessment or in any other navigation risk assessment and be substantially in accordance with the recommendations as to the management of vessel movements on The Haven as set out in the navigation risk assessment or in any other navigation risk assessment.

(3) The navigation management plan submitted for approval under sub-paragraph (1) must be substantially in accordance with the navigation management plan template.

(4) The navigation management plan must include details of—

- (a) the construction timelines;
- (b) the potential risks to navigation;
- (c) communication measures;
- (d) measures for managing potential risks to marine mammals in accordance with the marine mammal mitigation protocol approved under condition 17;
- (e) measures for managing disturbance to designated bird species developed in accordance with the process in the Navigation Management Planning Process: Risk to Birds;
- (f) measures for managing potential biosecurity risks; and
- (g) how each stage of the construction process and the operation of the authorised development will be managed to ensure a minimal impact on the safety of navigation in The Haven and ensure that any delay or interference that may be caused to vessels which may be using The Haven is minimised as far as reasonably practicable.

(5) The undertaker must not commence the licensed activities until the MMO has approved in writing the submitted navigation management plan.

(6) Unless otherwise agreed by the MMO in writing, the navigation management plan must be implemented as approved by the MMO.

(7) Following approval of the navigation management plan in accordance with the procedure in Part 4 the undertaker may from time to time submit revised navigation management plans to the MMO following consultation with the harbour authority, the relevant statutory nature conservation body and the Environment Agency to the extent that it relates to matters relevant to their functions.

(8) A revised navigation management plan submitted to the MMO in accordance with sub-paragraph (7) and approved by the MMO in accordance with Part 4 supersedes any other navigation management plan in effect on the date of approval.

Marine archaeology

15.—(1) The undertaker must submit an archaeological written scheme of investigation (WSI) and protocol for archaeological discoveries (PAD) in writing to the MMO for written approval in accordance with the procedure in Part 4, following consultation with Historic England and the relevant planning authority, at least 6 weeks prior to the commencement of any licensed activity with the potential to affect buried archaeological assets.

(2) The undertaker must not commence the licensed activities until the MMO has approved in writing the submitted WSI and PAD.

(3) Unless otherwise agreed by the MMO in writing, all licensed activities must adhere to the terms of the WSI and PAD as approved by the MMO.

Marine pollution contingency plan

16.—(1) The undertaker must submit a marine pollution contingency plan in writing to the MMO for written approval in accordance with the procedure in Part 4, following consultation with the relevant statutory nature conservation body, the Environment Agency and the harbour authority, at least 13 weeks prior to the commencement of any licensed activity.

(2) The marine pollution contingency plan must—

- (a) set out the undertaker’s assessment of the likely risks which could arise as a result of a spill or collision during construction and maintenance of the authorised development and the methods and procedures the undertaker intends to put in place to address those risks; and
- (b) set out the undertaker’s assessment of the potential for litter derived from either vessels or from land based sources within the authorised development to enter the marine area and identify the management measures to be put in place.

(3) The undertaker must not commence the licensed activities until the MMO has approved in writing the submitted marine pollution contingency plan.

(4) Unless otherwise agreed by the MMO in writing, the marine pollution contingency plan must be implemented as approved by the MMO.

Marine mammal mitigation protocol

17.—(1) The undertaker must submit a marine mammal mitigation protocol in writing to the MMO for approval in accordance with the procedure in Part 4, following consultation with the relevant statutory nature conservation body and Lincolnshire Wildlife Trust, at least 13 weeks prior to the commencement of any of licensed activity.

(2) The marine mammal mitigation protocol submitted for approval under sub-paragraph (1) must be substantially in accordance with the outline marine mammal mitigation protocol.

(3) The undertaker must not commence the licensed activities until the MMO has approved in writing the submitted marine management protocol.

(4) Unless otherwise agreed by the MMO in writing, the marine mammal mitigation protocol must be implemented as approved by the MMO.

Landscape and ecological mitigation strategy

18.—(1) The undertaker must submit a landscape and ecological mitigation strategy in writing to the MMO for approval in accordance with the procedure in Part 4, following consultation with Boston Borough Council, the Environment Agency, the relevant statutory nature conservation body, Lincolnshire Wildlife Trust and the Royal Society for the Protection of Birds, at least 13 weeks prior to the commencement of any of licensed activity.

(2) The MMO’s approval of the landscape and ecological mitigation strategy is restricted to the parts of that strategy that relate to any activities below MHWS, with the remainder approved by the relevant planning authority under requirement 6 of Schedule 2 (requirements).

(3) The landscape and ecological mitigation strategy submitted for approval under sub-paragraph (1) must be substantially in accordance with the outline landscape and ecological landscape mitigation strategy.

(4) The landscape and ecological mitigation strategy approved under sub-paragraph (1) must include details of—

- (a) mitigation measures required to protect protected habitats and species, non-statutory designated sites and other habitats and species of principal importance during the construction of the authorised development;
 - (b) mitigation measures required to protect protected habitats and species, non-statutory designated sites and other habitats and species of principal importance during the operation of the authorised development;
 - (c) the results of the Defra biodiversity off-setting metric together with the off-setting value required, the nature of such off-setting and evidence that the off-setting value provides for the required biodiversity compensation, risk factors (including temporal lag) and long term management and monitoring;
 - (d) the site or sites on which the compensation off-setting required pursuant to sub-paragraph (c) will be provided together with evidence demonstrating that the site or sites has/have been chosen in accordance with the prioritisation set out in the outline landscape and ecological mitigation strategy;
 - (e) certified copies of the completed legal agreements securing the site or sites identified in sub-paragraph (d) to enable enactment of the biodiversity off-setting scheme and the biodiversity off-setting management and monitoring plan as approved in the landscape and ecological mitigation strategy;
 - (f) any hard and soft landscaping to be incorporated within Work No. 4 including location, number, species, size of any planting and the management and maintenance regime for such landscaping; and
 - (g) an air quality deposition monitoring plan that must be substantially in accordance with the outline air quality deposition monitoring plan and must include the final numbers and locations of deposition monitoring locations, as agreed with the relevant statutory nature conservation body and the Environment Agency.
- (5) The undertaker must not commence the licensed activities until the MMO has approved in writing the submitted landscape and ecological mitigation strategy.
- (6) Unless otherwise agreed by the MMO in writing, the landscape and ecological mitigation strategy must be implemented as approved by the MMO.

Concrete and cement

- 19.**—(1) Waste concrete, slurry or wash water from concrete or cement activities must not be discharged, intentionally or unintentionally, into the marine environment.
- (2) Concrete and cement mixing and washing areas must be contained and sited at least 10 metres from any watercourse or surface water drain to minimize the risk of run off entering a watercourse.
- (3) The containment required under sub-paragraph (2) must be appropriate to the material and include bunding of 110% of the total volume of all reservoirs and containers.

Coatings and treatment

20. The undertaker must ensure that any coatings and any treatments are suitable for use in the marine environment and are used in accordance with either guidelines approved by the Health and Safety Executive or the Environment Agency.

Spills, etc.

- 21.**—(1) The undertaker must—
- (a) store, handle, transport and use fuels, lubricants, chemicals and other substances so as to prevent releases into the marine area, including bunding of 110% of the total volume of all reservoirs and containers;

- (b) report any spill of oil, fuel or chemicals into the marine area to the MMO Marine Pollution Response Team, the harbour master and the Maritime and Coastguard Agency within 12 hours of the spill occurring; and
 - (c) store all waste in designated areas that are contained and sited at least 10 metres from any watercourse or surface water drain to minimise the risk of runoff entering a watercourse.
- (2) The containment required under sub-paragraph (1)(c) must be appropriate to the material and include bunding of 110% of the total volume of all reservoirs and containers.

Removal of temporary structures etc.

22. The undertaker must remove all equipment, temporary structures, waste and debris associated with the licensed activities within 10 business days of the completion of those activities, unless otherwise agreed in writing by the MMO.

Dropped objects

23.—(1) All dropped objects must be reported to the harbour authority using the Dropped Object Procedure Form within six hours of the undertaker becoming aware of an incident.

(2) The MMO Marine Licensing Team require a copy of the Dropped Object Procedure Form to be submitted no later than 24 hours after reporting to the harbour authority under sub-paragraph (1).

(3) On receipt of the Dropped Object Procedure Form, the harbour authority or the MMO Marine Licensing Team may require relevant surveys to be carried out by the undertaker (such as side scan sonar), and the MMO or the harbour authority may require obstructions to be removed from the seabed at the undertaker's expense, if it is reasonable to do so.

Bathymetric surveys

24.—(1) Pre and post dredge bathymetrical surveys must be undertaken for each dredge campaign, and a report containing the survey results submitted in writing to the MMO within 4 weeks of completion of each dredge campaign.

(2) The pre-dredge bathymetrical survey must be undertaken within a 3 month period prior to each dredging campaign, and the post-dredge bathymetrical survey must be undertaken as soon as reasonably practicable and in any event within 1 week of completion of each dredging campaign.

(3) The report containing the survey results must include—

- (a) an interpretation of the difference between the pre and post dredge survey results and a volume calculation; and
- (b) the survey results on a chart showing the licensed dredge area and dredge depth.

Sediment sampling

25.—(1) The undertaker must submit a sample plan in writing to the MMO for written approval in accordance with the procedure in Part 4, following consultation with the Environment Agency.

(2) The sample plan must be made—

- (a) for capital dredging, at least 6 months prior to the commencement of any capital dredging; or
- (b) for maintenance dredging, at least six months prior to the end of every third year from the date of the previous sediment sample analysis.

(3) The sample plan must include details of—

- (a) the volume of material to be dredged;
- (b) the location of the area to be dredged;
- (c) details of the material type proposed for dredging;

- (d) the type and dredging methodology (including whether it is a capital or maintenance dredge, depth of material to be dredged and proposed programme for the dredging activities); and
- (e) the location and depth of any supporting samples.

(4) Unless otherwise agreed by the MMO in writing, the undertaker must undertake the sampling in accordance with the approved sample plan.

(5) For capital dredging, the undertaker must submit sediment sample analysis results as part of the CEMP in accordance with condition 12 and the undertaker must not undertake the dredging activities until the MMO has approved the CEMP.

(6) For maintenance dredging, the undertaker must submit sediment sample analysis results completed by a laboratory validated by the MMO at least 6 weeks prior to undertaking any maintenance dredging and the undertaker must not undertake any dredging until the MMO has approved the sediment sample analysis results.

Reporting of impact sound to the Marine Noise Registry

26.—(1) Only when impact driven or part-driven pile foundations or detonation of explosives are proposed to be used as part of the foundation installation the undertaker must provide the following information to the Marine Noise Registry (MNR)—

- (a) prior to the commencement of the licensed activities, information on the expected location, start and end dates of impact pile driving/detonation of explosives to satisfy the Marine Noise Registry's Forward Look requirements; and
- (b) within 12 weeks of completion of impact pile driving/detonation of explosives, information on the exact locations and specific dates of impact pile driving/detonation of explosives to satisfy the Marine Noise Registry's Close Out requirements.

(2) The undertaker must notify the MMO of the successful submission of Forward Look or Close Out data pursuant to sub-paragraph (1) above within 7 days of the submission.

Decommissioning

27.—(1) Within 24 months of the permanent cessation of the operation of Work No. 4, the undertaker must submit details of a decommissioning scheme for the restoration and aftercare of the land for Work No. 4 (with the exception of the flood defence line wall which will remain in situ) to the MMO for approval in writing in accordance with the procedure in Part 4.

(2) The scheme must include details of structures and buildings to be demolished or retained, details of the means of removal of materials following demolition, phasing of demolition and removal, details of restoration works (including any monitoring) and phasing thereof.

(3) Unless otherwise agreed by the MMO in writing, the mitigation measures in place for habitat loss as a result of the construction of Work No. 4 must be maintained following the decommissioning of Work No. 4 and any routine maintenance and adaptive management measures and monitoring must continue whilst the measures are in place.

(4) Sub-paragraph (3) does not apply where the MMO, in consultation with the relevant statutory nature conservation body, determines based on monitoring data submitted by the undertaker that the intertidal habitat lost as a result of the construction of Work No. 4 has been restored following the decommissioning of Work No. 4 to provide a similar habitat as was present prior to the works being carried out that has the potential to be used by roosting and foraging birds.

(5) Unless otherwise agreed by the MMO in writing the decommissioning scheme must be implemented in accordance with the phasing set out therein as approved by the MMO.

Notice of completion of licensed activity

28. The undertaker must inform the MMO local office and MMO Marine Licensing Team of completion of the licensed activities, in writing no more than 10 business days following the completion of the last licensed activity.

PART 4

PROCEDURE FOR THE DISCHARGE OF CONDITIONS

Meaning of “return”

29. In this Part, “return” means a submission by the undertaker for approval of—

- (a) a CEMP under condition 12;
- (b) a piling method statement under condition 13;
- (c) a navigation management plan under condition 14;
- (d) a WSI and PAD under condition 15;
- (e) a marine pollution contingency plan under condition 16;
- (f) a marine mammal mitigation protocol under condition 17;
- (g) a landscape and ecological mitigation strategy under condition 18;
- (h) a sample plan under condition 25; and
- (i) a decommissioning scheme under condition 27.

Further information regarding return

30.—(1) The MMO may request in writing such further information to be provided in writing from the undertaker as is necessary to enable the MMO to consider the return.

(2) If the MMO does not make a request under sub-paragraph (1) within 30 business days of the day immediately following that on which the return is received by the MMO, it is deemed to have sufficient information to consider the return and is not entitled to request further information after this date without the prior agreement of the undertaker.

Determination of returns

31.—(1) In determining the return the MMO may have regard to—

- (a) the return and any supporting information or documentation;
- (b) any further information provided by the undertaker in accordance with paragraph 30; and
- (c) such matters as the MMO reasonably thinks are relevant.

(2) Having considered the return the MMO must—

- (a) grant the return unconditionally;
- (b) grant the return subject to conditions as the MMO thinks fit; or
- (c) refuse the return.

(3) In determining a return, the MMO may discharge its obligations under sub-paragraph (2)(a), (b) or (c) separately in respect of a part of the return only, where it is reasonable to do so.

Notice of determination

32.—(1) Subject to sub-paragraph (2) or (3), the MMO must give notice to the undertaker of the determination of the return within 13 weeks from the day immediately following that on which the return is received by the MMO, or as soon as reasonably practicable after that date.

(2) Where the MMO has made a request under paragraph 30, the MMO must give notice to the undertaker of the determination of the return within 13 weeks from the day immediately following that on which the further information is received by the MMO, or as soon as reasonably practicable after that date.

(3) Where the MMO determines it is not reasonably practicable to make a determination in accordance with sub-paragraphs (1) and (2) in 13 weeks, it must notify the undertaker as soon as reasonably practicable and provide confirmation in writing of the intended determination date.

(4) Where the MMO refuses the return the refusal notice must state the reasons for the refusal.

PART 5

CHANGES TO THE LICENCE

33.—(1) In the event that the undertaker wishes to undertake the licensed activity contrary to the conditions of this licence, it must inform the MMO at the earliest opportunity and request a variation to the conditions of this licence.

(2) The undertaker must not carry out any licensed activity contrary to the conditions of this licence until a variation to the licence has been approved in writing by the MMO pursuant to its powers under section 72(3) of the 2009 Act.

(3) The MMO must give notice of the determination of the variation to this licence within 13 weeks from the day immediately following that on which the variation was requested, or as soon as reasonably practicable after that date, subject to the undertaker providing an updated CEMP in accordance with condition 12 and adequately justifying the requested variation to the reasonable satisfaction of the MMO.

(4) Where the MMO determines it is not reasonably practicable to make a determination in accordance with sub-paragraph (3) in 13 weeks, it must notify the undertaker as soon as reasonably practicable and provide confirmation in writing of the intended determination date.

SCHEDULE 10

Article 47

DOCUMENTS AND PLANS TO BE CERTIFIED

PART 1

DOCUMENTS AND PLANS TO BE CERTIFIED

<i>(1)</i> <i>Document name</i>	<i>(2)</i> <i>Document reference</i>	<i>(3)</i> <i>Revision number</i>
Access and rights of way plans	4.5	0.0
Book of reference	3.3	2.0
Combined heat and power assessment	5.7	0.0
Compensation measures document	9.30	2.0
Design and access statement	5.3	0.0
Environmental statement	Volume 1, 6.2 Volume 2, 6.3 Volume 3, 6.4	1.0
Flood risk assessment	6.4.13	0.0
Indicative generating station plans	4.9	2.0
Indicative wharf plans	4.11	0.0
Land plan and Crown land plan	4.2	0.0
Navigation Management Planning Process: Risk to Birds	9.70	0.0
Navigation management plan template	9.80	1.0
Navigation risk assessment	9.27	1.0
Outline air quality and dust management plan	9.39	0.0
Outline air quality deposition monitoring plan	9.51	1.0
Outline code of construction practice	7.1	0.0
Outline construction traffic management plan	7.2	0.0
Outline landscape and ecological mitigation strategy	7.4	3.0
Outline lighting strategy	7.5	0.0
Outline marine mammal mitigation protocol	9.12	1.0
Outline ornithology compensation implementation and monitoring plan	9.81	1.0
Outline surface and foul water drainage strategy	9.4	2.0
Outline written scheme of investigation	7.3	2.0
Register of environmental actions and commitments	7.6	2.0
Roman Bank plan	4.12	0.0
Works plans	4.3	2.0

PART 2
ENVIRONMENTAL STATEMENT SUPPLEMENTS

<i>(1)</i> <i>Document name</i>	<i>(2)</i> <i>Document reference</i>	<i>(3)</i> <i>Revision number</i>
Addendum to Chapter 17 and Appendix 17.1 – Benthic Ecology, Fish and Habitats	9.15	0.0
Addendum to Environmental Statement Chapter 17 and Appendix 17.1 – Marine Mammals	9.14	1.0
Appendix 14.4 – Analysis of SO ₂ and O ₃ Concentrations to Justify Adoption of the Less Stringent Daily Mean NO _x Critical Level for Protection of Vegetation	9.8	0.0
Appendix 14.5 – Human Health Risk Assessment	9.9	0.0
Appendix 14.6 – Abnormal Emissions Assessment	9.10	0.0
Chapter 17 Marine and Coastal Ecology and Appendix 17.1 – Habitats Regulations Assessment – Ornithology Addendum	9.13	0.0
Chapter 17 Marine and Coastal Ecology and Appendix 17.1 - Habitats Regulations Assessment Update	9.59	0.0
Habitats Regulations Assessment (HRA) Screening and Integrity Matrices	9.42	1.0
Indicative Construction Programme	9.18	0.0
Noise Modelling and Mapping Relating to Bird Disturbance at the Principal Application Site	9.50	0.0
Response to Environment Agency’s queries on Estuarine Processes	9.44	1.0
Updated Piling Noise Assessment	9.16	0.0
Wharf Construction Outline Methodology	9.17	0.0

ORNITHOLOGY COMPENSATION MEASURES

1. In this Schedule—

“compensation measures document” means the document “Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures” certified by the Secretary of State as the compensation measures document for the purposes of this Order under article 47 (certification of documents, etc.);

“hot commissioning of line 2 of Work No. 1A” means the first date on which waste is combusted to produce steam for more than 8 hours continuously in the second waste processing line of Work No. 1A during the commissioning phase of that line;

“OCIMP” means the ornithology compensation implementation and monitoring plan for the delivery of measures to compensate for the roosting and foraging habitat loss as a result of the construction of Work No. 4 and the predicted disturbance to roosting, bathing and loafing waterbirds from The Wash SPA and Ramsar Site (and functionally linked habitat) as a result of the authorised development;

“OEG” means the Ornithology Engagement Group, which will include, as a minimum, the relevant statutory nature conservation body and the Royal Society for the Protection of Birds;

“outline ornithology compensation implementation and monitoring plan” means the document certified by the Secretary of State as the outline ornithology compensation implementation and monitoring plan for the purposes of this Order under article 47 (certification of documents, etc.); and

“The Wash SPA and Ramsar Site” means the site designated as The Wash Special Protection Area and The Wash Ramsar Site.

2. The authorised development may not be commenced until a plan for the work of the OEG has been submitted to and approved by the Secretary of State, following consultation with the members of the OEG. Such plan must include—

- (a) terms of reference of the OEG;
- (b) details of the membership of the OEG;
- (c) details of the schedule of meetings, timetable for preparation of the OCIMP and reporting and review periods;
- (d) the dispute resolution mechanism; and
- (e) minutes from all consultations with the members of the OEG and copies of any written consultation responses from the OEG.

3. Following consultation with the OEG, the OCIMP must be submitted to and approved by the Secretary of State, in consultation with the local planning authority or authorities for the land containing the compensation measures, and the relevant statutory nature conservation body. The OEG must be consulted further as required during the approval process.

4. The OCIMP submitted for approval must be substantially in accordance with the outline ornithology compensation implementation and monitoring plan.

5. The OCIMP must include measures to compensate for the roosting and foraging habitat loss as a result of the construction of Work No. 4 and the predicted disturbance to roosting, bathing and loafing waterbirds from The Wash SPA and Ramsar Site (and functionally linked habitat), must be based on the criteria set out in paragraph 3.5.5 of the compensation measures document, must contain the relevant matters set out in paragraph 4.10.4 of the compensation measures document and must include in particular—

- (a) details of location(s) where compensation measures will be delivered and the suitability of the site(s) to deliver the measures (including why the location is appropriate ecologically and likely to support successful compensation);
- (b) details of landowner agreements demonstrating how the land will be bought or leased and assurances that the land management will deliver the ecology objectives of the OCIMP;
- (c) details of designs of the compensation measures and how risks from avian or mammalian predation and unauthorised human access will be mitigated;
- (d) an implementation timetable for delivery of the compensation measures that ensures all compensation measures are in place prior to the impact occurring (for habitat loss as a result of the construction of Work No. 4, the measures will be in place prior to any dredging or construction works on the intertidal habitat and for the compensation for disturbance by the increased number of vessels, the measures will be in place for at least two years prior to the hot commissioning of line 2 of Work No. 1A);
- (e) criteria for assessing the effectiveness of the compensation measures;
- (f) details of the proposed ongoing monitoring and reporting on the effectiveness of the measures, including: survey methods; success criteria; adaptive management measures; timescales for the monitoring and monitoring reports to be delivered; and details of the factors used to trigger alternative compensation measures and/or adaptive management measures;
- (g) details of any adaptive management measures;
- (h) provision for annual reporting to the Secretary of State, to include details of the use of each site by waterbirds (split into species accounts) to identify barriers to success and target the adaptive management measures. This would include the number of birds using the site; evidence of birds roosting, foraging and bathing around high tide periods and any evidence of continued disturbance from vessels at the authorised development and at the mouth of The Haven;
- (i) details of the management and maintenance prescriptions and a maintenance schedule appropriate to the habitats to be created at each compensation location; and
- (j) minutes from all consultations with the OEG and copies of any written consultation responses from the OEG on matters relating to the development of the OCIMP.

6. The undertaker must implement the measures as set out in the OCIMP approved by the Secretary of State, unless otherwise agreed in writing by the Secretary of State in consultation with the relevant statutory nature conservation body. For habitat loss as a result of the construction of Work No. 4, the relevant measures must be in place prior to any dredging or construction works on the intertidal habitat. For the compensation for disturbance by the increased number of vessels, the relevant measures must be in place for at least two years prior to the hot commissioning of line 2 of Work No. 1A.

7. The undertaker must notify the Secretary of State of completion of implementation of the measures set out in the OCIMP.

8. Results from the monitoring scheme must be submitted at least annually to the Secretary of State and the relevant statutory nature conservation body and made publicly available. This must include details of any finding that the measures have been ineffective in creating suitable roosting site(s) to support any birds that have been displaced through the habitat loss as a result of the construction of Work No. 4 or disturbance by the increased numbers of vessels using The Haven as a result of the authorised development and, in such case, proposals to address this. Any proposals to address effectiveness must thereafter be implemented by the undertaker as approved in writing by the Secretary of State in consultation with the relevant statutory nature conservation body.

9. Unless otherwise agreed in writing by the Secretary of State or unless the measures set out in the OCIMP have already been delivered, the undertaker must not commence construction of Work No. 1 until it has first—

- (a) provided a reasonable estimate of the cost of delivery of the compensation measures; and
- (b) put in place either—
 - (i) a guarantee in respect of the reasonable estimate of costs associated with the delivery of the compensation measures; or
 - (ii) an alternative form of security for that purpose, that has been approved by the Secretary of State.

10. The compensation measures delivered under this Schedule must not be decommissioned without the written approval of the Secretary of State, in consultation with the relevant statutory nature conservation body.

11.—(1) Unless otherwise agreed by the Secretary of State in writing, the compensation measures in place for habitat loss as a result of the construction of Work No. 4 must be maintained following the decommissioning of Work No. 4 and any routine maintenance and adaptive management measures and monitoring must continue whilst the measures are in place.

(2) Sub-paragraph (1) does not apply where the Secretary of State, in consultation with the relevant statutory nature conservation body, determines based on monitoring data submitted by the undertaker that the intertidal habitat lost as a result of the construction of Work No. 4 has been restored following the decommissioning of Work No. 4 to provide a similar habitat as was present prior to the works being carried out that has the potential to be used by roosting and foraging birds.

12. The OCIMP approved under this Schedule includes any amendments that may subsequently be agreed in writing by the Secretary of State, in consultation with the relevant statutory nature conservation body. Any amendments to or variations of the approved OCIMP must be in accordance with the information set out in the compensation measures document and may only be approved where it has been demonstrated to the satisfaction of the Secretary of State that it is unlikely to give rise to any new or materially different environmental effects from those considered in the compensation measures document.

13. In the event of any conflict or inconsistency between the terms of the compensation measures document and the provisions of this Order, the provisions of this Order prevails.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order grants development consent for, and authorises Alternative Use Boston Projects Ltd (“AUBP”) (referred to in this Order as the undertaker) to construct, operate and maintain a generating station with a capacity of over 50 megawatts but below 300 megawatts.

The Order also permits the undertaker to acquire, compulsorily or by agreement, land and rights in land and to use land for this purpose.

A copy of the documents referred to in Schedule 10 (documents and plans to be certified) to this Order and certified in accordance with article 47 of the Order (certification of documents, etc.) may be inspected free of charge during working hours at the offices of AUBP, 25 Priestgate, Peterborough PE1 1JL.