



# **Awel y Môr Offshore Wind Farm**

## **Development Consent Order**

### **Explanatory Memorandum**

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# Summary

This memorandum explains the purpose and effect of each article of, and Schedule to, the draft Awel y Môr Offshore Wind Farm Order (the "Order"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009<sup>i</sup> (the "Regulations").

Regulation 5(2)(c) requires explanatory memoranda to explain "*the purpose and effect of provisions in the draft order*".

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<sup>i</sup> S.I. 2009/2264

# 1 Purpose of the Order

- 1 Awel y Môr Offshore Windfarm Limited (incorporated under company number 12270928 and having its registered office at Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, United Kingdom, SN5 6PB) (the "undertaker") is applying to the Secretary of State for a development consent order for the construction, operation and decommissioning of an offshore wind power generating station (the "authorised development").
- 2 In summary the authorised development consists of an offshore energy generating station and electrical connections comprising:
  - ▲ up to 50 offshore wind turbine generators;
  - ▲ other offshore infrastructure including substation platforms, a metrological mast and buoys;
  - ▲ an interlink (by sub-sea cable) to the existing Gwynt y Môr offshore windfarm;
  - ▲ up to two offshore export cable circuits to bring the power generated to shore;
  - ▲ landfall and onshore electrical connections and cabling; and
  - ▲ a new onshore substation to allow transmission of electricity to the National Grid.
- 3 The offshore windfarm array will be located approximately 11km north of the coast of Denbighshire, North Wales to the west of the existing Gwynt y Môr windfarm. The electricity cables will come ashore at landfall to the east of Rhyl and then continue cross-country underground to the new Awel y Môr substation to the north of Glascoed Road, then connecting into the existing National Grid substation at Bodelywyddan.
- 4 A detailed description of the authorised development is included in Chapter 2 of Volume 2 of the Environmental Statement (application ref: 6.2.1).
- 5 The Order also seeks to confer upon the undertaker powers of compulsory acquisition of land or rights over land which are required for the onshore elements of the authorised development or to facilitate them, or that are incidental to them within the meaning of section 122 of the Planning Act 2008 (the "2008 Act").

- 6 As the Order seeks to apply and modify statutory provisions under section 120(5) of the 2008 Act including in relation to drainage, hedgerows and the compulsory acquisition of land, it has been drafted as a statutory instrument as required under section 117(4) of the 2008 Act.

## 1.1 National Significant Infrastructure Project

- 7 The authorised development is a nationally significant infrastructure project ("NSIP") within sections 14(1)(a) and 15(3B) of the 2008 Act. Under section 15(3B) a generating station is an NSIP if:
- ▲ it is in waters adjacent to Wales up to the seaward limits of the territorial sea, or in the Welsh zone; and
  - ▲ its capacity is more than 350 megawatts.
- 8 The authorised development is an offshore generating station within the territorial sea waters adjacent to Wales and its capacity will be more than 350MW. It accordingly falls within section 15(3B).
- 9 As the authorised development is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate, under section 37 of the 2008 Act.

2.10 Schedule 1 (Authorised Development) to the Order contains a list of numbered works comprising the authorised development.

## 1.2 Associated development

- 10 The draft Order specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115(4A) of the 2008 Act, grant consent for development that is associated with the NSIP ("associated development").

- 11 Guidance on associated development has been issued by the Secretary of State<sup>ii</sup>. In this guidance associated development is described as being *“typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project”* (paragraph 6) and requiring *“a direct relationship between associated development and the principal development. Associated development should therefore either support the construction or operation of the principal development, or help address its impacts. Associated development should not be an aim in itself but should be subordinate to the principal development”* (paragraph 5).
- 12 In some cases there may be some overlap between associated development and works which form part of the NSIP. All elements of the proposed development either constitute part of the NSIP or are associated development within the meaning of section 115(4A) of the 2008 Act, and so can properly be authorised by the Order.

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<sup>ii</sup> ‘Guidance on associated development applications for major infrastructure projects’ (Department for Communities and Local Government) (April 2013)

## 2 Ancillary Matters

- 13 3.1 The Order also authorises ancillary works within the Order limits. These are works that do not constitute development but are required to facilitate the construction of the authorised development.
- 14 3.2 In addition to providing for the construction and operation of the authorised development, the Order will, in accordance with section 122, section 120(3) and Schedule 5 of the 2008 Act, authorise the acquisition of land and rights over land, and the extinguishment of, or interference with, interests in or rights over land. The Book of Reference (document 4.3) sets out a description of the land and interests included in the Order. The Order and the Book of Reference should be read together with the Statement of Reasons (application ref: 4.1) which accompanies the Application and sets out the justification for the acquisition of or interference with the Order land.
- 15 3.3 Other ancillary matters include the application and disapplication of legislation, the power to undertake works to streets, and the ability to take temporary possession of land.

### 3 The Draft Order

- 16 The purpose and effect of the provisions of the Order are now explained in sequence. The Order is based on the model provisions set out in Schedule 1 to the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (the “Model Provisions”) as well as relevant precedents. Whilst the Model Provisions have been repealed, Planning Inspectorate Advice Note 13 ‘Preparing the draft Order and Explanatory Memorandum, April 2012’ explains that they were intended as a guide for developers in drafting orders, rather than a rigid structure, but aided consistency and assisted in drafting a comprehensive set of lawful provisions.
- 17 The Order adopts the ‘Rochdale Envelope’ whereby the maximum permitted consent envelope is provided for and assessed, allowing some of the scheme detail to be approved post-consent. The approval of that detail is provided for within the Requirements in Schedule 2 Part 1 of the Order.
- 18 As the authorised development is situated in Welsh waters, a separate marine licence is needed from Natural Resources Wales under the Marine and Coastal Access Act 2009. The DCO therefore does not contain powers or controls which sit within the marine licencing regime. The marine licence will be applied for in parallel with the DCO.

The form of the Order has had regard to recent, comparable precedent orders including the Hornsea Three Offshore Wind Farm Order 2020<sup>iii</sup> (“Hornsea Three”), the Norfolk Vanguard Offshore Wind Farm Order 2020<sup>iv</sup> (“Norfolk Vanguard”) and the Norfolk Boreas Offshore Wind Farm Order 2021<sup>v</sup> (“Norfolk Boreas”).

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<sup>iii</sup> S.I. 2020/1615

<sup>iv</sup> S.I. 2020/706

<sup>v</sup> S.I. 2021/1414

## 3.1 Part 1 – Preliminary

### 3.1.1 Article 1 – Citation and commencement

- 19 Article 1 sets out the name of the Order and the date on which it comes into force.
- 20 This article did not appear in the Model Provisions. However, it is a standard article that is included in all development consent orders.

### 3.1.2 Article 2 – Interpretation

- 21 Article 2(1) defines the terms used in the Order. It is a standard article and was included in the Model Provisions as article 1.
- 22 Definitions to note include:
- ▲ "Commence". The definition of "commence" is based on the wording used in Hornsea Three. This allows certain preliminary works for onshore site preparation to be undertaken with appropriate controls in place.
  - ▲ "Maintain". A definition of "maintain" has been added to make clear what is authorised under article 5, and that this does not permit the undertaker to depart from the description of the authorised development in Schedule 1 or to carry out maintenance operations which would cause different environmental effects to those identified in the Environmental Statement (ES).
  - ▲ "Order limits" which means the red line boundary for authorised development as shown on the works plans and the land plans.
  - ▲ The "undertaker" is defined as Awel y Môr Offshore Wind Farm Limited who has the benefit of the provisions of the Order.
- 23 Article 2(2) expands the definition of rights over land. This was included in the Model Provisions as article 1(2).

- 24 Articles 2(3) and 2(4) define measurements as approximate. The purpose of this is to ensure that if upon construction of the works it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the Order permits the works. Thus this provision allows for a small tolerance, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders; the Model Provisions included similar wording in article 1(3) and similar wording is used in Hornsea Three and Norfolk Boreas.
- 25 Article 2(6) confirms that references to works are to the works numbered in Schedule 1.

## **3.2 Part 2 Principal Powers**

### **3.2.1 Article 3 – Development consent etc. granted by the Order**

- 26 Article 3 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development.
- 27 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on article 2 of the Model Provisions, with the only substantive difference being that article does not refer to consent being granted for ancillary works. This wording was used in Norfolk Vanguard.

### **3.2.2 Article 4 – Operation of generating station**

- 28 Article 4 provides the principal power to construct the authorised development within the Order limits. Schedule 1 describes the authorised development. Article 4 provides authorisation for the undertaker to operate the authorised development as a generating station.

29 Article 4(2) provides that grant of development consent does not relieve the undertaker of the need to obtain any other necessary consents to operate the authorised development. This clarifies that the operator will still require to obtain, for example, an electricity generation licence under the Electricity Act 1989. A list of the other consents and licences anticipated to be required is set out in the Other Consents and Licences Statement (application ref: 5.4).

### 3.2.3 Article 5 – Power to maintain the authorised development

30 This article provides the undertaker with a general power to maintain the authorised development, subject to any contradictory provisions in the Order. This provision follows Model Provision 3 and article 4 of the Hornsea Three DCO.

### 3.2.4 Article 6 - Benefit of Order

31 Article 6 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker rather than anyone with an interest in the land. As the Order includes powers of compulsory acquisition that need to be backed by assurances regarding the ability of the company to cover any compensation payable this is appropriate and in any event it would be impractical for a variety of landowners to implement the Order.

32 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. This article is necessary to allow the undertaker commercial freedom to sell or lease the authorised development while ensuring that the Secretary of State can control such sale or lease through the need to obtain their consent. Without the ability to transfer the benefit, no party but the undertaker could operate the power station without committing a criminal offence. This article is therefore necessary to ensure that the authorised development is fundable and could be sold or leased in the future.

33 The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were exercised by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to specified categories of person.

- 34 Specifically, consent is not required to transfer the benefit to a holder of an electricity generation licence. As these transfers are restricted to persons holding appropriate licences, such persons will already have been determined to be fit to operate such facilities.
- 35 Paragraphs (1) and (2) are based on article 4 of the Model Provisions, amended to clarify that they are subject to paragraph (3) and that it is the undertaker that benefits from the provisions of the Order, rather than particular articles applying for the benefit of other specified parties as per the Model Provisions. Paragraph (3) was not included in the Model Provisions but has been included in a number of previous orders<sup>vi</sup>.
- 36 Paragraph (3) is based on article 5 of the Model Provisions. It differs in that it allows a transfer or grant to specified licence holders to take place without the Secretary of State's consent, on the basis that it is appropriate for those companies to be able to carry out those works.

### 3.2.5 Article 7 - Application and modification of legislative provisions

- 37 This article provides for the disapplication of certain requirements which would otherwise apply under public general legislation, as well as local legislation as authorised by section 120(5)(a) of the Act (what may be included in order granting development consent). Section 120(5)(a) provides that an order granting development consent may apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the Order.
- 38 Article 7(1)(a) and (b) disapply byelaws where the carrying out of the authorised development would conflict with such byelaws.
- 39 Regulation 12 of the Environmental Permitting (England and Wales) Regulations 2016 is disappplied in order that flood risk activity permits are not required for the construction of the authorised development.

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<sup>vi</sup> Article 5(7) of Hornsea Three, article 6(11) of Norfolk Vanguard

- 40 Article 7(1)(d) provides for the disapplication of consents ordinarily required in respect of the Land Drainage Act 1991. Specifically, these are the requirements for consents for the construction of culverts, together with the requirements for approval under byelaws made under the Land Drainage Act 1991. These are consents for activities which may be a necessary part of constructing the authorised development. To provide certainty that the authorised development can proceed, the Order disapplies the requirement for a separate statutory consent to be obtained in relation to these activities. These provisions were included in Hornsea Three.
- 41 Article 10(1)(e) disapplies the provisions of the Neighbourhood Planning Act 2017 relating to the temporary possession of land. This is on the basis that the temporary possession of land is dealt with by articles 29 and 30 and the wording of those provisions is well established. The 2017 Act provisions differ from those in the Order and are untested, as they are not yet in force, it is therefore necessary to disapply them in case they should come into force in the future. This disapplication was included in Norfolk Vanguard as article 6(2).

### 3.2.6 Article 8 - Defence to proceedings in respect of statutory nuisance

- 42 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under section 82(1) of the Environmental Protection Act 1990 (the "1990 Act") in relation to certain nuisances set out in paragraph 79(1) of that Act. The paragraphs included are:

(d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;

(fb) artificial light emitted from premises so as to be prejudicial to health or a nuisance;

(g) noise emitted from premises so as to be prejudicial to health or a nuisance; and

(ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street or in Scotland, road.

- 43 A broad defence to civil and criminal proceedings for nuisance is provided by section 158 of the 2008 Act. However, the view taken under the NSIP regime is that section 158 does not extend to the relatively rare situation by which if, somebody considers that the local authority ought to be tackling a nuisance using its statutory nuisance powers, but it is not, that person may apply to the magistrates' court under section 82 of the 1990 Act. Accordingly, this article is seeking to fill in a legislative gap by extending the effect of section 158.
- 44 As section 158 does not distinguish between different types of nuisance, the logical position is that this article should apply to all categories of nuisance. However, as a matter of practice other projects have been more discriminating and have asked whether there is any possibility of a statutory nuisance occurring, leading to specific types of nuisance being referred to. The undertaker has followed this approach by seeking to restrict the application of this article so that it only applies to nuisances that have been identified as potentially resulting from the authorised development, as set out in the Statutory Nuisance Statement (document 5.3) accompanying the application. This ensures that this article is focused only on those nuisances that may be of relevance, whilst also reflecting the logic and correct interpretation of section 158.
- 45 The defence is available if the nuisance 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 and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or
  - ▲ the construction, maintenance or use of the authorised development and cannot reasonably be avoided.

46 This article is based on article 7 of the Model Provisions and recent orders<sup>vii</sup>. The references to section 65 of the Control of Pollution Act 1974 are omitted because that section has been repealed.

### 3.3 Part 3 Streets

#### 3.3.1 Article 9 – Street works

47 Article 9 allows the undertaker to interfere with and execute works in or under the streets within the Order limits for the purposes of the authorised development. The authority given by this article is a statutory right for the purposes of sections 48(3) and 51(1) of the New Roads and Street Works Act 1991 (the “1991 Act”). Certain provisions of the 1991 Act apply to works carried out under this article, subject to the provisions of article 12 (application of the 1991 Act).

48 Article 9 is based on article 8 of the Model Provisions.

#### 3.3.2 Article 10 – Application of the 1991 Act

49 Article 10 provides for the application of the 1991 Act. Although not included in the Model Provisions, there is precedent for these provisions in previous orders<sup>viii</sup>.

50 Paragraph (4) provides that certain provisions of the 1991 Act listed in that paragraph will not apply. The disapplication of these provisions (which are designed primarily to regulate the carrying out of street works by utility companies in respect of their apparatus) is appropriate given the scale of works proposed under the Order, the specific authorisation given for those works by the Order and the specific provisions in the Order which regulate the carrying out of the Order works.

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<sup>vii</sup> See for example article 7 Hornsea Three.

<sup>viii</sup> See for example article 9 of the Port of Tilbury (Expansion) Order 2019, and article 9 of Hornsea Three.

### 3.3.3 Article 11 – Temporary stopping up of public rights of way

51 This article allows the undertaker, where it is in connection with the carrying out of the authorised development, to temporarily stop up a public right of way where it is specified in Schedule 4 of the Order to the extent stipulated in the same schedule. This article is not a model provision, but it is preceded in the East Anglia Three Offshore Wind Farm Order 2017, article 10 of Norfolk Vanguard and article 11 of Hornsea Three.

### 3.3.4 Article 12 – Temporary restriction of use of streets

52 This article allows for the temporary alteration, diversion or restriction of streets for the purposes of authorised development, whilst ensuring that essential pedestrian access to and from premises along that street is maintained if necessary (paragraph (3)). This power is required because it is necessary to be able to restrict the use of the street in order to allow installation of the cables. Closures and traffic management will also be required to facilitate the creation or improvement of junctions. Where possible and safe, closures for access junction works will be partial only and not close the full width of the carriageway.

53 Paragraph (2) confers a power on the undertaker where a street has been temporarily stopped up under this article to use it as a temporary working site. It is not anticipated that any street would be used as a working site except when undertaking works affecting the carriageway itself.

54 Paragraph (6) provides a right to compensation for any person suffering loss due to the suspension of a private right of way under this article. The undertaker is not aware of any private rights of way in streets however this article is retained as precautionary in the case that unidentified, extant title rights to take exist along the same lines as the current public highway.

55 Paragraph (7) states that where the street authority fails to notify the undertaker of its decision in respect of an application for consent within 28 days of the application being made is deemed to have given its consent. This time limit is considered necessary to remove the possibility for delay and provide certainty that the authorised development can be delivered by the undertaker in a timely fashion. As a nationally significant infrastructure project, the authorised development should not be at risk of being held up due to a failure to respond to an application for consent.

56 This provision has been included in numerous previous orders<sup>ix</sup>.

### 3.3.5 Article 13 - Access to works

57 This article allows accesses to be created within the Order limits. It is anticipated that this article will be relied on by the undertaker to provide temporary accesses as required during the construction period, with all permanent means of access (including private means of access) forming part of the authorised development.

58 The inclusion of this article is considered to be appropriate as it will help to ensure that the authorised development can be carried out expeditiously by allowing the undertaker to create new temporary accesses as and where required, particularly in response to requests from landowners, occupiers and other affected parties.

## 3.4 Part 4 – Supplemental powers

### 3.4.1 Article 14 - Discharge of water

59 This article sets out the circumstances in which the undertaker is entitled to discharge water into a watercourse, public sewer or drain, and its purpose is to establish statutory authority for doing so.

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<sup>ix</sup> See for example article 14(6) of the M20 Junction 10a Development Consent Order 2017 and article 14(6) of the A14 Cambridge to Huntingdon Improvement Scheme Development Consent Order 2016.

- 60 The effect of paragraph (3) is that this can only be done with the consent of the owner. Consent can be given subject to reasonable terms and conditions, but cannot be unreasonably withheld.
- 61 Paragraph (5) requires the undertaker to take reasonably practicable steps to ensure that any water that is discharged is as free as may be practicable from gravel, soil or other solid substance, oil or matter in suspension.
- 62 This article is the same as that set out in previous DCOs<sup>x</sup>.

### 3.4.2 Article 15 - Authority to survey and investigate the land

- 63 This article gives the undertaker the power to enter land for the purpose of surveying and investigating. It provides that the undertaker must give 14 days' notice before exercising the powers of entry. Compensation is payable for any loss or damage caused. Paragraphs (1) to (5) were included in the Model Provisions as article 16.
- 64 Paragraph (7) applies section 13 of the Compulsory Purchase Act 1965, thereby providing an enforcement mechanism (by way of a warrant) where entry onto land under the article is refused. This paragraph was included in the Silvertown Tunnel DCO<sup>xi</sup> and Port of Tilbury DCO<sup>xii</sup> as well as article 17 of Hornsea Three and article 16 of Norfolk Vanguard.

### 3.4.3 Article 16 – Protective work to buildings

- 65 4.51 The purpose of this article is to allow the undertaker to undertake protective works to buildings affected by the authorised development. It was included in the Model Provisions as article 15.

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<sup>x</sup> Article 15 of Norfolk Vanguard, Article 15 of Hornsea Three

<sup>xi</sup> Article 16 of The Silvertown Tunnel Order 2018

<sup>xii</sup> Article 19 of The Port of Tilbury (Expansion) Order 2019.

### 3.4.4 Article 17 - Removal of human remains

66 This article requires the undertaker, before it carries out any development or works which will or may disturb any human remains, to remove those remains. This article is included on a precautionary basis in case human remains are discovered while carrying out the authorised development.

67 Without this article, authorisation from the appropriate Minister would be required to remove remains. The Article sets out a process of notification of the discovery of remains and for their removal and reinternment or cremation. The removal of any remains is required to be carried out in accordance with any directions which may be given by the Secretary of State. Article 18 follows Model Provision 17 and was included in the Glyn Rhonwy DCO<sup>xiii</sup>, and as article 17 of Norfolk Vanguard.

## 3.5 Part 5 - Powers of Acquisition

### 3.5.1 Article 18 - Compulsory acquisition of land

68 This article authorises the acquisition of land by compulsory purchase. It grants the power to acquire the land that is required for the authorised development. This is subject to articles 20 (compulsory acquisition of rights), and 27 (temporary use of land for carrying out authorised development) which are explained below.

69 Article 18 is based on article 18 of the Model Provisions. This power applies to all of the land required for the authorised development. Power to acquire other land including the permanent ecological mitigation land is required as these elements must be able to be delivered for the authorised development to be acceptable in environmental and ecological terms.

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<sup>xiii</sup> Article 28 of The Glyn Rhonwy Pumped Storage Generating Station Order 2017

### 3.5.2 Article 19 - Time limit for exercise of authority to acquire land compulsorily

- 70 This article gives the undertaker seven years to issue notices to treat or to execute a general vesting declaration to acquire the land that may be compulsorily acquired under the Order. These are the two main procedural methods by which the process of compulsorily acquiring land may be undertaken should the Order be made.
- 71 The article also sets a seven year time limit on the power to take temporary possession of land under article 27, although it does not prevent the undertaker from remaining in possession of land after that time possession was taken within the seven year limit.
- 72 This article was included in the Model Provisions as article 20. The seven year time limit was included in article 19 of Hornsea Three and article 19 of Norfolk Boreas and is considered appropriate for Awel y Môr given the scale of the project and the need to secure a contract for difference award prior to the commencement of construction.

### 3.5.3 Article 20 - Compulsory acquisition of rights

- 73 This article allows for rights over land to be acquired as well as the land itself, and also for new rights to be created over land. This includes the power to impose restrictive covenants. The public benefit of this is that it would allow the undertaker to reduce the land subject to outright acquisition if possible and rely on rights instead.
- 74 Paragraph (2) provides that for the land described in Schedule 7, the undertaker's powers of compulsory acquisition are limited to the acquisition of such rights, and the imposition of such restrictive covenants, as set out in that Schedule.
- 75 The power to impose restrictive covenants will allow for the possibility of reducing the land subject to outright acquisition and thus enable a more proportionate exercise of compulsory powers. It is therefore in the public interest.

- 76 Paragraph (3) provides that where the undertaker only needs to acquire rights over land it is not obliged to acquire any greater interest in that land.
- 77 Paragraph (4) applies Schedule 8, which imposes modifications to the compulsory purchase and compensation provisions under general legislation. They do not affect the entitlement to compensation, but generally ensure that the compensation code applies to the additional categories of acquisition covered by the Order and the creation of new rights and the imposition of restrictive covenants in particular. This is a consequence of the extension of land acquisition powers to these categories (done to allow lesser land interests to be acquired).
- 78 Article 20 is based on article 21 of the Model Provisions. It differs from the Model Provisions in the following respects:
- ▲ Paragraph (1) allows the undertaker to acquire existing rights and create new rights over any of the Order land. Although the undertaker has sought to identify all of the plots which are to be subject to the acquisition or creation of rights and has set these out in Schedule 7, this provision ensures that the undertaker retains the flexibility to acquire or create rights over land where that land might otherwise have to be acquired outright.
  - ▲ Paragraph (2) is included to clarify that the land identified in Schedule 7 may only be subject to the acquisition or creation of rights or imposition of restrictive covenants, and may not be subject to outright acquisition.
  - ▲ Paragraph (4) refers to Schedule 2A of the Compulsory Purchase Act 1965, as modified by Schedule 8, rather than section 8 of the Compulsory Purchase Act 1965. The effect is to limit the possible exceptions to this article to cases where part only of a house, building, factory, park or garden belonging to a house is being acquired.
  - ▲ Paragraph (4) confirms that Schedule 8 has effect for the purpose of modifying compensation provisions to ensure that they apply to the compulsory acquisition or creation of rights, or imposition of restrictive covenants, under this article.

### 3.5.4 Article 21 – Compulsory acquisition of land: minerals

79 This article incorporates Parts 2 and 3 of Schedule 2 to the Acquisition of Land Act 1981, exempting existing rights in minerals from the scope of compulsory acquisition unless they are expressly named and conveyed. It also makes provision for a situation where the owner of mines or minerals wishes to work such mines or minerals.

### 3.5.5 Article 22 - Private rights

80 This article provides for the extinguishment of private rights over land that is subject to compulsory acquisition pursuant to the Order. In so far as the undertaker acquires land or creates new rights over land under the Order, where the continuance of private rights over that land would be inconsistent with the exercise of the right being acquired or created then the private rights in question will be extinguished.

81 Paragraph (3) provides that rights over the Order land that is already owned by the undertaker are extinguished on commencement of any activity authorised by the Order which interferes with or breaches those rights.

82 Paragraph (4) provides that all private rights over land which the undertaker takes temporary possession of under the Order will be suspended and unenforceable for as long as the undertaker remains in lawful possession of the land.

83 Paragraphs (5) to (8) make provision for compensation and for circumstances where rights are preserved.

84 Article 22 is based on article 22 of the Model Provisions. It differs from the Model Provisions in the following respects:

- ▲ It applies to all private rights, not just private rights of way. This is to reflect the broad nature of private rights that may exist over the Order land including easements.
- ▲ Paragraph (2) is included to confirm that where land is subject to the acquisition or creation of rights or the imposition of restrictive covenants, any other rights in that land are extinguished if their continuance would be incompatible with the right or covenant being acquired or created by the undertaker.

- ▲ Paragraph (3) (paragraph (2) of the Model Provision) is amended to refer to the Order land, rather than “the limits of land which may be acquired shown on the land plan”, and to clarify the circumstances in which other rights in land owned by the undertaker will be extinguished.
- ▲ Paragraph (4) is included to clarify the position where the undertaker takes temporary possession of land.

85 This article is preceded in article 21 of Norfolk Vanguard and article 21 of Hornsea Three.

### 3.5.6 Article 23 – Application of the 1981 Act

86 This article applies (with minor modifications to ensure consistency between the terms of the Order and the 1981 Act) the provisions of the Compulsory Purchase (Vesting Declarations) Act 1981 to compulsory acquisition under the Order so that the undertaker has the option to acquire land via the vesting declarations procedure.

87 Vesting declarations are one of two ways of acquiring land that is subject to compulsory purchase (the other being by means of a notice to treat). They allow several parcels to be acquired at once and therefore more efficiently than under the notice to treat procedure.

88 The modifications to the 1981 Act contained in this article can be summarised as follows:

- ▲ Paragraph (3) modifies section 1(2) so that section 1 applies to the undertaker.
- ▲ Paragraph (4) modifies section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.
- ▲ Paragraph (5) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 21.
- ▲ Paragraph (6) modifies the statutory reference in section 5B(1), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders. The cross-reference to section 5A is also modified, to reflect that the time limit is set out in article 21.
- ▲ Paragraph (7) modifies the statutory references in section 6(1)(b), on the basis that the 2008 Act contains equivalent provisions that apply in respect of development consent orders.

- ▲ Paragraph (9) modifies paragraph 1(2) of Schedule A1 to change the reference to compulsory purchase orders excluding land that is 9 metres or more below the surface from the counter-notice procedure.
- ▲ Paragraph (10) clarifies that references to the Compulsory Purchase Act 1965 in the 1981 Act are to be construed as references to the 1965 Act as applied by section 125 of the 2008 Act and as modified by article 29, on the basis that both section 125 and article 29 modify the provisions of the 1965 Act.

89 Article 23 is based on article 23 of the Model Provisions. Due to extensive changes to the relevant provisions of the 1981 Act since the Model Provisions came into force, the wording of this article departs significantly from the Model Provisions. The drafting of this article follows article 22 of Hornsea Three.

### 3.5.7 Article 24 - Acquisition of subsoil only

90 This article allows the undertaker to acquire, or acquire or create rights in, the subsoil below land, rather than having to acquire the land itself.

91 The purpose of article 24 is to give the undertaker the flexibility to minimise so far as is possible the extent of interests to be acquired, with consequently less impact on landowners which is in the public interest.

92 This article is based on article 24 of the Model Provisions.

### 3.5.8 Article 25 – Modification of Part 1 of the 1965 Act

93 The purpose of this article is to ensure consistency between the terms of the Order and the Compulsory Purchase Act 1965, as applied by section 125 of the 2008 Act.

### 3.5.9 Article 26 - Rights under or over streets

94 The purpose of this article is to allow the undertaker to appropriate and use land above or below streets within the Order limits, without having to acquire the street or any right or easement in it. The exercise of this power, without acquisition, is prohibited in the circumstances set out in paragraph (3). Compensation is payable for any loss or damage caused to an owner or occupier of land affected by the power of appropriation where no acquisition has taken place.

95 The authorised development requires to cross streets and create new accesses onto existing streets in several places. This article allows those works to be undertaken without interfering with the ownership of land under and above streets which is often separately held from the highway authority interest in the street itself.

96 This article was included in the Model Provisions as article 27.

### 3.5.10 Article 27 - Temporary use of land for carrying out the authorised development

97 The purpose of this article is to allow the land set out in Schedules 6 and 7 to be occupied temporarily while the works are carried out. This is land which is required during construction of the authorised development but which is not required permanently. Article 27 also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.

98 The article is based on article 28 of the Model Provisions, with a number of changes:

- ▲ First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(iii)) has been added. This allows the undertaker to occupy land without having to acquire it immediately.
- ▲ Secondly, paragraph (1)(d) has been added so that permanent works specified in column (2) of Schedule 6, and any other permanent mitigation works in connection with the authorised development, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The rationale for this is that it reduces the amount of land that is required to be subject to outright acquisition. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the authorised development (e.g. landscaping or ecological mitigation works).
- ▲ The notice period has been increased from 14 days to 3 months. This reflects the notice period for the taking of temporary possession set out in the (not yet in force) provisions of the Neighbourhood Planning Act 2017 to reflect the notice period provided by Parliament in relation to such powers.

- 99 The inclusion of this article is important to ensure that the authorised development can be carried out efficiently and expeditiously following the making of the Order. The undertaker is entitled to either occupy and use land pending its permanent acquisition, or to temporarily occupy and use land that is not to be permanently acquired, with provision made for the restoration of the land and the payment of compensation to the affected landowners and occupiers for any loss or damage arising. These powers are considered to be reasonable given the status of the authorised development as a nationally significant infrastructure project.
- 100 If the powers conferred by this article were not included then the undertaker would be forced to seek permanent rights over, or the permanent acquisition of, all of the land required for the authorised development, which would be disproportionate for those plots which have been identified as being suitable for temporary occupation and use.

### 3.5.11 Article 28 - Temporary use of land for maintaining the authorised development

- 101 This article provides that the undertaker may take temporary possession of land within the Order limits, as required for the purpose of maintaining the authorised development, at any time within a period of five years from the date on which the generating station first exports electricity to the national electricity transmission network. This power could be used for example to create a safe working area around the electrical cables should maintenance works be required.
- 102 Paragraph (1)(b) authorises the construction of such temporary works and buildings on the land as may be reasonably necessary for that purpose. Under paragraph (5) all temporary works must be removed before the undertaker gives up possession under this article and the land must be restored to the reasonable satisfaction of the owners.
- 103 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 104 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.

- 105 Paragraphs (6) to (8) provide for compensation to be paid to owners and occupiers of land of which temporary possession is taken under this article.
- 106 This article was included in the Model Provisions as article 29 in Hornsea Three as article 27 and Norfolk Vanguard as article 27.

### 3.5.12 Article 29 - Statutory undertakers

- 107 This article allows the undertaker to extinguish rights of statutory undertakers and remove and reposition their apparatus. Reference is made to the Order land so that this power is not restricted to apparatus which has been specifically shown on the Land Plans and described in the Book of Reference. In practice it is impractical to show and describe all such apparatus and so a general power for the extinguishment of rights and the removal or relocation of apparatus belonging to statutory undertakers over or within any of the Order land is required.
- 108 As the land over which this power may be exercised is shown on the Land Plans, and the beneficiaries of such rights are described in the Book of Reference, the requirements of Regulations 5(2)(i)(iii) and 7(1)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 are satisfied.
- 109 This article is based on article 31 of the Model Provisions. It differs from the Model Provisions in that the article is expressed to be subject to the protective provisions in Schedule 9.

### 3.5.13 Article 30 - Recovery of costs of new connections

- 110 This article provides that if any statutory undertaker's apparatus is removed and this halts a supply from that apparatus to owners or occupiers of premises such that they have to seek a connection to other apparatus, then their reasonable costs in obtaining a new supply can be claimed from the undertaker.
- 111 This article was included in the Model Provisions as article 33.

### 3.5.14 Article 31 – Funding

- 112 Article 33 provides that the undertaker may not exercise a number of powers prior to it putting into place a guarantee or security equal to its potential liability to compensation payable under the DCO which is approved by the Secretary of State.
- 113 This article is preceded in a number of DCOs including the Cleve Hill DCO<sup>xiv</sup>, the VPI Immingham OCGT DCO<sup>xv</sup> and the Drax Re-power DCO<sup>xvi</sup>.

## 3.6 Part 7 - Miscellaneous and General

### 3.6.1 Article 32 – Application of landlord and tenant law

- 114 This article provides that any agreement for the transfer of the benefit of the Order overrides landlord and tenant law so far as it would prejudice the operation of any agreement for leasing the whole of the authorised development or the right to operate it.
- 115 This article follows article 35 of the Model Provisions.

### 3.6.2 Article 33 - Felling or lopping of trees and removal of hedgerows

- 116 This article allows (subject to the restrictions in paragraphs (6) and (7)) any tree or shrub that is within or encroaching upon the authorised development to be felled or lopped, or have its roots cut back, if it is considered to obstruct the construction, operation or maintenance of the Scheme or endanger anyone using it. Compensation is payable for any loss or damage caused.
- 117 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997. The scheme includes the removal of a number of hedgerows. This article is based on article 39 of the Model Provisions and recent orders<sup>xvii</sup>.

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<sup>xiv</sup> The Cleve Hill Solar Park Order 2020

<sup>xv</sup> The Immingham Open Cycle Turbine Order 2020

<sup>xvi</sup> The Drax Power (Generating Stations) Order 2019

<sup>xvii</sup> Article 35 of Norfolk Vanguard, article 34 of Hornsea Three

### 3.6.3 Article 34 - Trees subject to tree preservation orders

- 118 Article 34 provides that the undertaker may fell or lop or cut back the roots of any tree which is subject to a tree preservation order or shrub to prevent it obstructing or interfering with onshore site preparation works, the construction, maintenance or operation of the authorised development. Compensation is provided for if loss or damage is caused.
- 119 The article is a model provision save for that the article applies generally to any tree subject to a tree preservation order made before and after the date of the Order coming into effect and either within or overhanging the Order limits.

### 3.6.4 Article 35 - Abatement of works abandoned or decayed

- 120 This article is intended to make sure that the undertaker will not abandon or allow to fall into decay the Offshore works. It provides a power which enables the Secretary of State, following consultation with the undertaker, to serve notice on the undertaker requiring it, at its own expense, to remove or restore those works. Section 105 of the Energy Act 2004 makes provision for the Secretary of State being able to serve notice on the undertaker requiring it to submit a decommissioning programme for approval. The provisions of this article do not cut across this statutory provision but supplement it.

### 3.6.5 Article 36 - Saving provisions for Trinity House

- 121 This is a model provision for harbours and is commonly used in DCOs for offshore wind farm turbine generating stations. It is intended to provide protection to Trinity House.

### 3.6.6 Article 37 - Crown rights

- 122 Article 37 is not a model provision, but it reflects the terms of section 135 of the 2008 Act and is also precedented. It has been used in many made orders, including the East Anglia Three Offshore Wind Farm Order 2017 and Hornsea Three.

### 3.6.7 Article 38 – Protective provisions

123 This article gives effect to Schedule 9, which contains provisions protecting the interests of third parties. It was not included in the Model Provisions but is a standard article in development consent orders that include protective provisions.

### 3.6.8 Article 39 - Operational land for purposes of the 1990 Act

124 The effect of this article is that the land within the Order limits is to be treated as the operational land of a statutory undertaker for the purposes of the Town and Country Planning Act 1990. Although section 264 of the 1990 Act is entitled "*cases in which land is to be treated as not being operational land*", subsections (3) and (4) set out cases in which land is to be treated as operational land.

125 This article was included in the Model Provisions as article 36. This article is necessary to ensure that development is correctly classified under the Town and Country Planning Act 1990 and benefits from the appropriate permitted development rights.

### 3.6.9 Article 40 – Certification of plans etc.

126 This article provides for various application plans and documents listed to be certified by the Secretary of State as true copies of those documents following the making of the Order. This is based on article 41 of the Model Provisions.

### 3.6.10 Article 41 - Service of notices

127 This article governs the service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient (paragraph (1)(c)), and deals with the situation of service on an unknown landowner (paragraph (4)).

128 This article was not included in the Model Provisions but is a sensible addition that has been included in previous orders<sup>xviii</sup>.

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<sup>xviii</sup> See for example article 44 of Hornsea Three, article 59 of The Port of Tilbury (Expansion) Order 2019 and article 39 of The Eggborough Gas Fired Generating Station Order 2018

### 3.6.11 Article 42 – No double recovery

- 129 This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In addition, the article provides that there is not to be double recovery under two or more different provisions of this Order.
- 130 This article was not provided for in the Model Provisions but has been included in granted orders<sup>xix</sup>. This article simply reflects the established position that a claimant in a compulsory purchase matter shall be compensated for no more than and no less than their loss.

### 3.6.12 Article 43 - Requirements, appeals, etc.

- 131 This article provides for an appeal process for the refusal or non-determination of any details under a requirement by the relevant planning authority. It also provides a time limit for a decision by the relevant planning authority on the submission of any details submitted pursuant to a requirement. The details of the appeal procedure are provided in Schedule 2. It is required to ensure that subsequent applications for approval are determined appropriately. This provision has precedent in the Hinkley Point C (Nuclear Generating Station) Order 2013<sup>xx</sup> and the West Burton C (Gas Fired Generating Station) Order 2020<sup>xxi</sup>.

### 3.6.13 Article 44 – Arbitration

- 132 This article governs any disagreement about any provision of the Order. Unless the Upper Tribunal (Lands Chamber) has jurisdiction the matter is to be settled by arbitration. If the parties cannot agree on who the arbitrator should be then this will be decided by the Secretary of State.
- 133 Section 44(2) provides that no decision of the Secretary of State is subject to arbitration.
- 134 This article was included in the Model Provisions as article 42.

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<sup>xix</sup> See for example article 40 of The Port of Tilbury (Expansion) Order 2019

<sup>xx</sup> S.I. 2013/648

<sup>xxi</sup> S.I. 2020/1148

# 4 Schedules

## 4.1 Schedule 1 – Authorised development

135 Schedule 1 describes the authorised development, which is described in detail in Chapter 2 of the Environmental Statement (documents 6.2.1, Offshore project description and 6.3.1 Onshore project description). This has been set out in sections for the nationally significant infrastructure project, the associated development and the ancillary works.

## 4.2 Schedule 2 – Requirements

136 The requirements in Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development and reflect the processes and procedures usually employed by the undertaker when implementing a project such as this.

137 The requirements provide that the various details and plans to be approved must, where appropriate, reflect the measures included in the Environmental Statement. The requirements also provide that the approved details and plans must be implemented as approved, unless further amendments to them are approved.

138 Requirement 1 specifies the time limit for commencing the authorised development as being seven years from the date on which the Order comes into force. This was included in the Model Provisions as requirement 2.

139 Requirement 2 Table 2 provides the maximum co-ordinates within which the wind turbine generators may be situated. This delineates the area of Work No. 1 within which turbines can be placed and excludes the 'other infrastructure' area where no turbines may be located. Table 3 provides maximum parameter for the offshore works.

140 Requirements 3 and 4 impose restrictions on the operation of the authorised development in the interests of air safety and protection of amenity from noise.

- 141 Requirements 5 to 21 require the preparation and approval of detailed plans relating to the construction and operation of the authorised development. Table 4 provides maximum parameters for onshore works.
- 142 Paragraph 22 provides that all approvals must be in writing.
- 143 Paragraph 23 confirms that details approved pursuant to the requirements include any amendments that may subsequently be approved. This was included in the Model Provisions as requirement 37.

### **4.3 Schedule 3 – Streets subject to street works**

- 144 This Schedule lists the streets subject to street works. Street works are mainly required to form new accesses, create visibility splays to allow for safe use of accesses and to improve existing visibility splays. Much of the work required will be undertaken in highway verges but occupation of some areas of carriageways may be required to create new accesses or provide safe working areas.

### **4.4 Schedule 4 – Streets and rights of way to be temporarily stopped up or restricted**

- 145 This Schedule lists the rights of way which will be temporarily stopped up during constructions.

### **4.5 Schedule 5 – Access to works**

- 146 A number of accesses to works will require to be made. This Schedule lists the locations of those accesses and where accesses will be taken from. It identifies the public highways from which access can be taken and the plans show the area of those highways where access will be taken.

### **4.6 Schedule 6 - Land of which only temporary possession may be taken**

- 147 This Schedule lists the plot of which the undertaker may only take temporary possession and cannot acquire rights or ownership of the land.

## **4.7 Schedule 7 - Land in which only new rights etc may be acquired**

148 5.14 This Schedule lists the plot within which the undertaker may only acquire rights and cannot acquire ownership. The rights which the undertaker may acquire are set out in Column (2). The rights to be acquired have been divided into categories in order to ensure that only those rights necessary are taken over each plot. Restrictive covenants are also to be imposed to protect the electrical cables, to ensure that planting or habitat works carried out by the undertaker can be retained and maintained for the required period and to prevent future construction on land required for drainage.

## **4.8 Schedule 8 – Modification of compensation and compulsory purchase enactments for creation of new rights and imposition of restrictive covenants**

149 Modifies existing compensation legislation including the Land Compensation Act 1973 and the Compulsory Purchase Act 1965 to provide for the acquisition of rights and imposition of restrictive covenants as well as acquisition of ownership of the land.

## **4.9 Schedule 9 – Protective Provisions<sup>xxii</sup>**

150 This Schedule sets out a number of protections for various bodies to ensure that the powers sought in the Order are exercised appropriately.

151 Protections for utilities are routinely included in orders and are set out in Part 1.

152 Part 2 provides for the protection of Dwr Cymru Cyfyngedig.

153 Protections for National Grid are set out in Part 3 and for SP Manweb as an electricity undertaker in Part 4.

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<sup>xxii</sup> In the final version the numbering will run on from each part to the next. In the application draft the detail is still subject to ongoing negotiation and the numbering restarts at 1 in each case in order that these can be finalised separately.

- 154 Protections for electronic communication code providers are routinely included in orders and are set out at Part 5.
- 155 Part 6 sets out protection for Network Rail.

#### **4.10 Schedule 10–Removal of hedgerows**

- 156 This schedule sets out the lengths of hedgerows which may be interfered with or removed under the Order. It is divided into ‘important’ hedgerows and other hedgerows.

#### **4.11 Schedule 11 – Approval of matters specified in requirements**

- 157 This Schedule sets out a procedure for the approval of matters under the Requirements and any appeals related thereto. This procedure follows that set out in the recent energy DCO, the Thurrock Flexible Generation Plant Development Consent Order 2022<sup>xxiii</sup>

#### **4.12 Schedule 12 –Arbitration Rules**

- 158 This Schedule provides an arbitration process. It is considered that this approach will provide greater certainty to all parties involved in the process and is preferential to the approach adopted in the Model Provisions. This was preceded in Hornsea Three.

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<sup>xxiii</sup> S.I. 2022/157



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