



ESTUARIES

OFFSHORE WIND FARM

# FIVE ESTUARIES OFFSHORE WIND FARM

## 3.2 DRAFRT EXPLANATORY MEMORANDUM (CLEAN)

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## **1 SUMMARY**

- 1.1 This memorandum explains the purpose and effect of each article of, and Schedule to, the draft Five Estuaries 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>1</sup> (the "Regulations").
- 1.2 Regulation 5(2)(c) requires explanatory memoranda to explain "*the purpose and effect of provisions in the draft order*".

## **2 PURPOSE OF THE ORDER**

- 2.1 Five Estuaries Offshore Wind Farm Limited (incorporated under company number 12292474 and having its registered office at Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, United Kingdom, SN5 6PB) (the "undertaker") is applying (the "Application") 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").
- 2.2 In summary the authorised development consists of an offshore energy generating station and electrical connections comprising:
- (a) up to 79 offshore wind turbine generators (WTG);
  - (b) other offshore infrastructure including substation platforms;
  - (c) up to two offshore export cable circuits to bring the power generated to shore;
  - (d) landfall and onshore electrical connections and cabling; and
  - (e) a new onshore substation to allow transmission of electricity to the National Grid.
- 2.3 The offshore windfarm array will be located approximately 37km off the coast of Suffolk to the east of the existing Galloper windfarm. Once

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<sup>1</sup> S.I. 2009/2264

onshore, electricity export cables will transfer the energy to an onshore substation in Tendring, approximately 22 km from the coast, before final export to the National Grid Electricity Transmission network.

- 2.4 The existing Galloper Offshore Wind Farm consists of 56 WTGs and supplies electricity to approximately 380,000 households annually. A 60-strong team operates and maintains the wind farm from a state-of-the-art, purpose-built Operations & Maintenance (O&M) facility in Harwich International Port.
- 2.5 The offshore WTGs will be connected via subsea cables to Offshore Substation Platforms that will transform the voltage and transmit the power generated via further subsea cables within the offshore Export Cable Corridor (ECC) to a landfall compound located at Sandy Point, to the north west of the golf course, adjacent to Short Lane between Holland-on-Sea and Frinton-on-Sea on the Essex coast.
- 2.6 A detailed description of the authorised development is included in Volume 6 of the Environmental Statement (application documents 6.2.1 Offshore project description and 6.3.1 Onshore project description).
- 2.7 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”).
- 2.8 Deemed marine licences for the offshore wind turbines and the export cables are included in Schedules 10 and 11 with appropriate conditions.
- 2.9 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.

### **Nationally Significant Infrastructure Project**

- 2.10 The authorised development is a nationally significant infrastructure project ("NSIP") within sections 14(1)(a) and 15(3) of the 2008 Act. Under section 15(3) a generating station is an NSIP if:
- (a) it is an offshore generating station,; and
  - (b) its capacity is more than 100 megawatts (MW).
- 2.11 The authorised development is an offshore generating station and its capacity will be more than 100MW. It accordingly falls within section 15(3).
- 2.12 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.
- 2.13 Schedule 1 (Authorised Development) to the Order contains a list of numbered works comprising the authorised development.

### **Associated development**

- 2.14 The draft Order specifically authorises development which is associated with the NSIP. The Secretary of State may, under the provisions of section 115 of the 2008 Act, grant consent for development that is associated with the NSIP ("associated development").
- 2.15 Guidance on associated development has been issued by the Secretary of State<sup>2</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).

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<sup>2</sup> 'Guidance on associated development applications for major infrastructure projects' (Department for Communities and Local Government) (April 2013)

- 2.16 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 of the 2008 Act, and so can properly be authorised by the Order.

### **Co-ordination with National Grid and the proposed Norwich to Tilbury Reinforcement Project DCO**

- 2.17 Connection to the National Grid will be at a new substation to be called the East Anglia Connection Node (EACN) which is part of the Norwich to Tilbury overhead line DCO proposal. From the landfall cables will be installed underground that will take the energy to a new onshore substation. This new substation will transform the power to be grid compatible, before progressing onward via more underground cables to the EACN substation. The DCO includes an area for the construction of the cable connection to the EACN and acquisition of rights to install and retain the cables (Work No. 16), (Plots 17-030, 17-031, 18-001, 18-002).
- 2.18 Some flexibility is required in this area as it is not yet known where within this area the connection to the substation will be created. National Grid are currently designing this substation, and the undertaker requires to be able to connect into the substation as directed by National Grid having regard to the design of those works. Accordingly, the cable corridor currently allows connection to the substation at any location within the area in order to be routed to any point around the EACN to ensure that the appropriate connection can be made once the connection location (which will be within Work No. 16) is specified by National Grid.
- 2.19 The undertaker and National Grid are also seeking to co-ordinate on road and access proposals with the intention of such works being able to serve both projects where possible.
- 2.20 This reduces the overall cumulative impacts of the projects' construction.

### **Co-ordination with North Falls Offshore Windfarm and build options**

- 2.21 The onshore export cable corridor and substation arrangement have been designed in co-ordination with the adjacent North Fall Offshore Windfarm project (“North Falls”) so that the authorised works include flexibility for the installation of a second set of cable ducts at the same time as the undertaker installs its ducts; this second set of ducts could then be used by the North Falls project.
- 2.22 The onshore cables of the two projects will run approximately parallel to each other within the same cable corridor, and the substations have been co-located in the same location to the west of Little Bromley. Due to electrical requirements separate cables and transformers are required for each project. This approach allows for opportunities to minimise environmental and community disruption through co-ordinated delivery, sharing of accesses and reducing the areas affected by construction.
- 2.23 In order to allow the flexibility for coordinated construction, the Order has been drafted to allow for scenarios based on the time difference between the two projects meeting their respective Final Investment Decisions (“FIDs”). Two ‘build options’, which cover the onshore delivery scenarios are being presented as part of the application:
- (a) Build option 1: Each project consents the ducts for the other’s cables within each DCO and delivers these as part of its own build. If the FID decisions are reached within a year of each other, this would then also allow for the use of a single civils contractor. This has the potential to significantly reduce construction impacts, particularly traffic.
  - (b) Build option 2: Each project delivers its own ducts and cable works, if the projects reach FID within three years of each other, overlapping order limits in this option will allow for elements of the construction work (such as elements of the haul roads and temporary construction sites) to be transferred for use by the second project. If the second project does not reach FID within three years of the first, or is not progressed, then there is limited scope for coordination. In this case, the first project would be



constructed so as not to stop the second project being built, but without the potential coordination on construction elements.

- 2.24 The Order includes a requirement providing that the undertaker must notify the discharging authority as to which build option will be taken forward.
- 2.25 From the transition joint bays above landfall to the substation location, the corridor has been designed to allow the installation of cables for the undertaker and cable ducts for North Falls. North Falls would then install and operate the cables within the buried ducts under its own DCO. Within each cable section the Five Estuaries cables and North Falls ducts are both shown as one work area, with the North Falls cable ducts being work number 'A' to the relevant Five Estuaries cable works number<sup>3</sup>, beginning with Work No.5 onwards (Work No.4 A is not a cable section work).
- 2.26 The inclusion of Works to install a second set of ducts for North Falls means that the width of the corridor which may be acquired is slightly wider than it would be for Five Estuaries in isolation. However, by following this approach, the following project efficiencies, with associated reduction in overall land take and environmental impacts, can be realised:
- (a) A single haul road with the cable corridor to support construction;
  - (b) Single access points at Temporary Construction Compounds (TCCs) from the highway network to service both projects, reducing both the number of physical works and reducing the extent of any traffic management measures required to ensure safety;
  - (c) Single crossing points on roads where site access is not required;
  - (d) Use of the same TCCs therefore reducing the total number of TCCs and the area required (minimising the interference with use of land and area of land, volume of soils and extent of vegetation which is disturbed and requires to be restored); and

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<sup>3</sup> Work No. 4 is where the Fives Estuaries cables come onshore and into the transition joint bay, which bay is where the offshore cables are jointed to the onshore cables. The aligned cable corridor does not start until after the transition joint bays located in Work No. 5.. Therefore, while Work No. 4 is an onshore cable section the second set of ducts does not begin until Work No.5 the installation of cables for North Falls up to the transition joint bay area will come in from a different point and be consented and installed under the North Falls DCO.

- (e) Coordinated service connection (such as mains power, water, sewage) for TCCs.
- 2.27 The substation sites for Five Estuaries and North Falls have been co-located in one area designed to co-ordinate with the National Grid EACN proposals. While each project would retain the responsibility for separate substation builds, the following would be delivered jointly under build option 1 to reduce environmental impacts:
- (a) Common access route to the substations from Bentley Road;
  - (b) Common permanent access point and bellmouth from Ardleigh Road; and
  - (c) Aligned screening principles and advance planting for both projects.
- 2.28 Reduction in the potential impacts would mainly be associated with the reduction in overall land take, which include avoiding duplication of construction access works, and the associated reduction in construction traffic volumes.
- 2.29 Regardless of build option approach taken to deliver the onshore substation, co-locating with North Falls allows VE to keep impacts to a single area when considering cumulative development effects and have a lower overall land take when compared to locating the substations in different search areas.
- 2.30 Some elements of onshore construction (e.g. cable installation) would be reserved for each project regardless of the level of coordination for technical and commercial reasons.
- 2.31 The background to the consenting options, is set out in more detail in the Co-ordination Document (application document 9.30).

### **3 ANCILLARY MATTERS**

- 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.

- 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 (application document 4.1) 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 document 4.3) which accompanies the Application and sets out the justification for the acquisition of or interference with the Order land.
- 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.

#### **4 THE DRAFT ORDER**

- 4.1 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, February 2019’ 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.
- 4.2 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, and under the conditions of the deemed marine licences in Schedules 10 and 11.

4.3 The form of the Order has had regard to recent, comparable precedent orders including:

- (a) the Awel y Môr Offshore Wind Farm Order 2023<sup>4</sup> (“Awel y Mor Order”);
- (b) the Hornsea Four Offshore Wind Farm Order 2023<sup>5</sup> (Hornsea Four DCO”);
- (c) the East Anglia ONE North Offshore Wind Farm Order 2022<sup>6</sup> (“East Anglia One North”);
- (d) the Hornsea Three Offshore Wind Farm Order 2020<sup>7</sup> (“Hornsea Three DCO”);
- (e) the Norfolk Vanguard Offshore Wind Farm Order 2022<sup>8</sup> (“Norfolk Vanguard DCO”); and
- (f) the Norfolk Boreas Offshore Wind Farm Order 2021<sup>9</sup> (“Norfolk Boreas DCO”).

4.4 In reviewing and updating the dDCO, regard has also been had to the Sheringham Shoal and Dudgeon Extensions Offshore Wind Farm Order 2024<sup>10</sup> which was made on 17 April 2024, after the application for this Order had been submitted (“SEDEP DCO”).

## **Part 1 – Preliminary**

### ***Article 1 - Citation and commencement***

4.5 Article 1 sets out the name of the Order and the date on which it comes into force.

4.6 This article did not appear in the Model Provisions. However, it is a standard article that is included in all development consent orders.

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<sup>4</sup> S.I. 2023/1033

<sup>5</sup> S.I. 2023/800

<sup>6</sup> S.I. 2022/432

<sup>7</sup> S.I. 2020/1615

<sup>8</sup> S.I. 2022/138

<sup>9</sup> S.I. 2021/1414

<sup>10</sup> S.I. 2024/564

## ***Article 2 - Interpretation***

- 4.7 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.
- 4.8 Definitions to note include:
- (a) "Commence". The definition of "commence" is based on the wording used in the Hornsea Four DCO. This allows certain onshore works (defined as onshore site preparation works) to be undertaken without all of the details to be provided under requirements needing to be approved. This also specifies which activities if undertaken, will not constitute "commencement".
  - (b) "Maintain". A definition of "maintain" has been added to make clear what is authorised under article 6 (power to maintain the authorised development), 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). The drafting of this definition follows that in the Hornsea 4 DCO.
  - (c) "Order land" which means the onshore red line boundary for the authorised development as shown on the Land Plans and described in the Book of Reference.
  - (d) "Order limits" which means the red line boundary for authorised development as shown on the Works Plans.
  - (e) The "undertaker" is defined as Five Estuaries Offshore Wind Farm Limited who has the benefit of the provisions of the Order.
- 4.9 Article 2(2) expands the definition of rights over land. This was included in the Model Provisions as article 1(2).
- 4.10 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 Order limits. It is now common practice to include such provision in development consent orders; the Model Provisions included similar wording in article 2(3) and similar wording is used in the Hornsea Three DCO ,the Norfolk Boreas DCO and the SEPDEP DCO.

- 4.11 Article 2(6) confirms that references to works are to the works numbered in Schedule 1.

## **Part 2 Principal Powers**

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

- 4.12 Article 3 provides the principal power to construct and operate the authorised development within the Order limits. Schedule 1 describes the authorised development.
- 4.13 Development consent is subject to the provisions of the Order, including the requirements listed in Part 1 of Schedule 2. This is based on article 2 of the Model Provisions, with the only substantive difference being that model article does not refer to consent being granted for ancillary works. This wording was used in the Norfolk Vanguard DCO and is in the SEPDEP DCO.
- 4.14 Paragraph (2) confirms the geographic extent of the onshore works and offshore works as defined in the Order.

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

- 4.15 Article 4 provides the principal power to construct and operate 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.
- 4.16 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 be required 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 Details of other consents and licences (application document 5.8).

***Article 5 – Deemed marine licences under the 2009 Act***

- 4.17 This article grants the deemed marine licences set out in Schedules 10 and 11 of the Order under Part 4 of the Marine and Coastal Access Act 2009 (the 2009 Act). There is one deemed marine licence for the generation assets and one for the transmission assets. The approach of including separate generation and transmission deemed marine licences for offshore wind farm development consent orders is a standard approach for offshore schemes. It allows for the separate transfer of the transmission assets within the transmission licences to an Offshore Transmission Owner (OFTO), whilst the generation assets can be retained by the undertaker. This approach has been taken on numerous DCOs for offshore generating stations including Hornsea Three DCO, Hornsea Four DCO, Norfolk Boreas, Norfolk Vanguard, East Anglia One North and the SEPDEP DCO.

***Article 6 - Power to maintain the authorised development***

- 4.18 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 East Anglia One North DCO.

***Article 7 - Benefit of the Order***

- 4.19 Article 7 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.

- 4.20 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.
- 4.21 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.
- 4.22 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.
- 4.23 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>11</sup>.
- 4.24 Paragraph (8) 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

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



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.

***Article 8 - Application and modification of legislative provisions***

- 4.25 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 2008 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.
- 4.26 Article 8(a) and (b) disapply byelaws where the carrying out of the authorised development would conflict with such byelaws.
- 4.27 Article 8(c) 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 the Hornsea Three DCO.
- 4.28 Article 8(d) disapplies regulation 12 of the Environmental Permitting (England and Wales) Regulations 2016<sup>12</sup> relating to the need for an environmental permit in relation to flood risk activities only. This subsection of article 8 is preceded in article 6(1)(c) of the Hornsea Four DCO, which was based on the drafting in the Norfolk Boreas DCO and the Norfolk Vanguard Offshore Wind Farm Order 2022.

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<sup>12</sup> S.I. 2016/1154

- 4.29 Article 8(e) disapplies the provisions of the Neighbourhood Planning Act 2017 (the “2017 Act”) relating to the temporary possession of land. This is on the basis that the temporary possession of land is dealt with by articles 30 (temporary use of land for carrying out the authorised development) and 31 (temporary use of land for maintaining the authorised development) 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 the Norfolk Vanguard DCO as article 6(2).
- 4.30 Article 8 (f) disapplies Sections 6 and 30 of the Essex Act 1987. Section 6 applies to land which is adjoining or accessible from a highway such as grass verge. Section 30 includes miscellaneous provisions in respect of unauthorised structures on seashore and its disapplication is relevant due to the need to temporarily place equipment on seashore which may create a temporary obstruction.
- 4.31 Article 8(g) disapplies Holland Haven Country Park Local Nature Reserve byelaws made by Tendring District Council on 5<sup>th</sup> July 1995 under sections 20, 21(4) and 106 of the National Parks and Access to the Countryside Act 1949<sup>(13)</sup> in accordance with section 236 of the Local Government Act 1972<sup>(14)</sup>. These byelaws prohibit *inter alia*, disturbing living creatures, using vehicles on any part of the reserve other than on a highway or a road, erecting any structure and engaging in any activity which is likely to cause a disturbance. The authorised development would involve taking access to land by vehicles to carry out construction activity which may result in some disturbance.
- 4.32 Article 8(h) modifies the regulation 6 of the Hedgerows Regulations 1997 so that consent granted under this Order forms an exception to the requirements of those regulations. This was included in the Hornsea Four DCO as article 6(1).

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<sup>13</sup> [1949 c.97](#).

<sup>14</sup> [1972 c.20](#)

- 4.33 Article 8(i) disapplies sections 28E (duties in relation to sites of special scientific interest) and 28H (Statutory undertakers, etc.: duty in relation to carrying out operations) of the Wildlife and Countryside Act 1981 .This disapplication was included in the M3 Junction 9 Improvement DCO 2024<sup>15</sup> and the A66 Northern Trans-Pennine Project DCO 2024<sup>16</sup>. This disapplication is required to allow the undertaker to carry out works within the SSSI in the unlikely event that where the use of the trenchless crossing technique causes unexpected 'Hydro-fracture breakout'. Hydro-fracture breakout occurs where the drilling medium, bentonite, a naturally occurring inert clay, escapes from the drill route into surrounding land.
- 4.34 Section 28E prevents the owner or occupier carrying out, or allowing to be carried out, works in a SSSI without consent unless that work is under a management scheme. Section 28H requires statutory undertakers to give notice of operations which may damage any feature of the SSSI, in response to which Natural England may refuse to assent to the proposed operations.
- 4.35 The Code of Construction Practice (secured under Requirement 7) requires that further ground investigation is undertaken prior to construction to inform drilling parameters, such as drilling pressures which will reduce the risk of Hydro-fracture breakout occurring. During drilling activity, drilling fluid properties will be actively monitored (i.e. mud weight, viscosity, gel strength, volume and pressure) in order to detect early and minimise the potential for Hydro-fracture breakout.
- 4.36 In the unlikely event that breakout occurs within the SSSI occurs while drilling under it, the undertaker would require to undertake clean up works as soon as practicable to avoid further spreading of the bentonite. The Holland Haven SSSI designation includes water dependent ecosystems through which any Hydro-fracture breakout could spread if not addressed quickly. It is not desirable for the undertaker to be required to wait for

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<sup>15</sup> S.I. 2024/752

<sup>16</sup> S.I. 2024/360

consent or assent for works in those circumstances, or for such consent or assent to be refused.

***Article 9 - Defence to proceedings in respect of statutory nuisance***

- 4.37 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), (fb), (g) and (ga) covering dust, noise and vibration and artificial light.
- 4.38 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.
- 4.39 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 (application document 5.7) 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.
- 4.40 The defence is available if the nuisance relates to:

- (a) 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
- (b) the construction, maintenance or use of the authorised development and cannot reasonably be avoided.

4.41 This article is based on article 7 of the Model Provisions and recent orders<sup>17</sup>. The references to section 65 of the Control of Pollution Act 1974 are omitted because that section has been repealed.

### ***Part 3 Streets***

#### ***Article 10 – Street works***

4.42 Article 10 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 11 (application of the 1991 Act).

4.43 Article 10 is based on article 8 of the Model Provisions.

#### ***Article 11 – Application of the 1991 Act***

4.44 Article 11 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>18</sup>.

4.45 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

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<sup>17</sup> See for example article 7 of the Hornsea Three DCO, article 7 of the East Anglia One North DCO

<sup>18</sup> See for example article 9 of the Port of Tilbury (Expansion) Order 2019, and article 9 of the Hornsea Three DCO.

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.

***Article 12 – Construction and maintenance of new or altered highway***

4.46 Under the Highways Act 1980 the standard position in respect of maintenance and construction of highways is that the local highway authority will be responsible in respect of any highways within their administrative area. Liability for maintenance would transfer to the local highway authority or to the street authority as appropriate on completion of the works.

4.47 This article has been included in numerous previous orders<sup>19</sup>.

***Article 13 – Temporary closure up of public rights of way***

4.48 This article allows the undertaker, where it is in connection with the carrying out of the authorised development, to temporarily close 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 recently preceded in article 11 of the Hornsea Four DCO.

***Article 14 – Temporary restriction of use of streets***

4.49 This article allows for the temporary closure, alteration or diversion 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.

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<sup>19</sup> See for example article 11 of the M25 Junction 28 Development Consent Order 2022, article 12 Junction 10a Order 2017, article 12 of the A47 Blofield to North Burlingham Development Consent Order 2022 and article 13 of the A12 Chelmsford to A120 Widening Scheme Development Consent Order 2024.

- 4.50 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.
- 4.51 Paragraph (5) 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.
- 4.52 Paragraph (6) states that where the street authority fails to notify the undertaker of its decision in respect of an application for consent within 56 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.
- 4.53 This provision has been included in numerous previous orders<sup>20</sup>.

***Article 15 - Access to works***

- 4.54 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.
- 4.55 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.

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<sup>20</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.

## ***Article 16 – Traffic regulation***

- 4.56 Paragraph (1) provides the powers necessary for the undertaker to control the use of the street by traffic so as to implement the authorised development, by for example preventing parking or placing traffic signals where part of a carriageway is temporarily closed.
- 4.57 The purpose of paragraphs (2) and (3) of this article is to provide the undertaker with powers to suspend certain existing traffic regulation orders (e.g. restrictions on the use of roads) where that is necessary to construct the project. The traffic regulation order that may be suspended is included in column 3 Part 3 (traffic regulation orders not to be applicable to the undertaker) of Schedule 4 (traffic regulation) to the order which will not apply to any vehicle being used for or in connection with the construction or maintenance of the project.
- 4.58 Paragraphs (4) and (5) allows the undertaker to impose the temporary (lower) speed limits on streets affected by the Order listed in Schedule 4. This has been established as necessary in early stages of the road safety audit work for the project and through discussions with the highway authorities and other relevant stakeholders.
- 4.59 Article 16(7) would, at any time up to 12 months after the commencement of operation of the project and with consent of the traffic authority, allow the undertaker to revoke, amend or suspend in whole or in part any order (not listed in Schedule 4) made or having effect under the Road Traffic Regulation Act 1984.
- 4.60 Under paragraph (8) any restriction etc. made before the end of the 12-month period may continue to have effect after that period has expired.
- 4.61 Implementation of any of the measures is subject to the consent of the traffic authority in whose area the roads are situated. Requirement is made in the article for the chief officer of police and the relevant traffic authority to be consulted and notified in advance.



4.62 Any restrictions etc. may be suspended, varied or revoked by the undertaker within a period of 24 months from the opening of the project (paragraph (12)).

4.63 There is a precedent for this article in article 15 of the Thurrock Flexible Generation Plant Development Consent Order 2022.

#### **Article 17 – Power to alter layout etc of streets**

4.64 This article allows for the alteration of the layout of any street for the purposes of construction, operation or maintenance, subject to obtaining the consent of the street authority and with the restoration of such streets to the reasonable satisfaction of the street authority. This article is necessary because, in order to construct, operate, and maintain the Authorised Development, the undertaker will need to alter street layouts and establish suitable accesses to ensure that the Authorised Development can be accessed effectively while ensuring there is minimal disruption to the local highway network.

4.65 Paragraph (6) provides that where the street authority fails to notify the undertaker of its decision in respect of an application for consent within 56 days of the application being made is deemed to have given its consent.

4.66 Similar wording has been used in other made Orders, including the Hornsea Three DCO and the Hornsea Four DCO.

#### **Part 4 – Supplemental powers**

##### ***Article 18 - Discharge of water***

4.67 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.

4.68 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.

- 4.69 Paragraph (5) requires the undertaker to seek the approval of the Environment Agency to any works potentially affecting or within 16 meters of a main river.
- 4.70 Paragraph (6) 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.
- 4.71 This article is the same as that set out in previous DCOs<sup>21</sup>.

***Article 19 - Authority to survey and investigate the land***

- 4.72 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.
- 4.73 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>22</sup> and Port of Tilbury DCO<sup>23</sup> as well as article 17 of the Hornsea Three DCO and article 16 of the Norfolk Vanguard DCO.

***Article 20 – Protective work to buildings***

- 4.74 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.

***Article 21 - Removal of human remains***

- 4.75 This article requires the undertaker, before it carries out any development or works which will or may disturb any human remains, to remove those

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<sup>21</sup> Article 15 of the Norfolk Vanguard DCO, Article 15 of the Hornsea Three DCO

<sup>22</sup> Article 16 of The Silvertown Tunnel Order 2018

<sup>23</sup> Article 19 of The Port of Tilbury (Expansion) Order 2019

remains. This article is included on a precautionary basis in case human remains are discovered while carrying out the authorised development.

- 4.76 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 unless the remain are of such an age that establishing their identity is likely to be imposed and they are more appropriately treated as of archaeological value. 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 21 follows Model Provision 17 and was included in the A428 Black Cat Development Consent Order 2022.

## **Part 5 - Powers of Acquisition**

### ***Article 22 - Compulsory acquisition of land***

- 4.77 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 24 (compulsory acquisition of rights), and 31 (temporary use of land for carrying out authorised development) which are explained below.

- 4.78 Article 22 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.

### ***Article 23 - Time limit for exercise of authority to acquire land compulsorily***

- 4.79 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.

- 4.80 The article also sets a seven-year time limit on the power to take temporary possession of land under article 31, although it does not prevent the undertaker from remaining in possession of land after that time possession was taken within the seven-year limit.
- 4.81 This article was included in the Model Provisions as article 20. The seven-year time limit was included in article 19 of the Hornsea Three DCO, article 19 of the Norfolk Boreas DCO and article 18 of the SEPDEP DCO and is considered appropriate for this project given the scale of the project, the need to deliver habitats compensation in advance of offshore works, the objective to co-ordinate with North Falls and the need to secure a route to market; for example by securing a contract for difference (CFD) award via auction; prior to the commencement of construction.

***Article 24 - Compulsory acquisition of rights***

- 4.82 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.
- 4.83 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.
- 4.84 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.
- 4.85 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.
- 4.86 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).

4.87 Article 24 is based on article 21 of the Model Provisions. It differs from the Model Provisions in the following respects:

- (a) 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.
- (b) 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.
- (c) Paragraph (3) 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.
- (d) 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.

***Article 25 – Compulsory acquisition of land: minerals***

4.88 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.

***Article 26 - Private rights***

4.89 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.

4.90 Paragraph (2) 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.

4.91 Paragraph (3) 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.

4.92 Paragraphs (4) to (7) make provision for compensation and for circumstances where rights are preserved.

4.93 Article 26 is based on article 22 of the Model Provisions. It differs from the Model Provisions in the following respects:

- (a) 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.
- (b) 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.

- (c) 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.
- (d) Paragraph (3) is included to clarify the position where the undertaker takes temporary possession of land.

4.94 This article is preceded in article 21 of the Norfolk Vanguard DCO, article 21 of the Hornsea Three DCO and article 20 of the SEPDEP DCO.

***Article 27 – Application of the 1981 Act***

4.95 This article applies (with minor modifications to ensure consistency between the terms of the Order and the Compulsory Purchase (Vesting Declarations) Act 1981 or 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.

4.96 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.

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

- (a) Paragraph (3) modifies section 1(2) so that section 1 applies to the undertaker.
- (b) Paragraph (4) omits section 5 to remove the reference to situations where the compulsory purchase order is subject to special parliamentary procedure.

- (c) Paragraph (5) omits section 5A, on the basis that the Order prescribes the time limit for compulsory acquisition in article 23.
- (d) 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 23.
- (e) 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.
- (f) 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.
- (g) 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.

4.98 Article 27 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 the Hornsea Three DCO.

***Article 28 - Acquisition of subsoil only***

4.99 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.

4.100 The purpose of article 28 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.



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

***Article 29 – Modification of Part 1 of the 1965 Act***

4.102 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.

***Article 30 - Rights under or over streets***

4.103 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.

4.104 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.

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

***Article 31 - Temporary use of land for carrying out the authorised development***

4.106 The purpose of this article is to allow the Order land 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 31 also allows for the temporary occupation of any of the land intended for permanent acquisition that has not yet been acquired.

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

- (a) 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)(ii)) has been added. This allows the undertaker to occupy land without having to acquire it immediately.
- (b) Second, paragraph (1)(e) has been added so that permanent works specified in column (3) 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).
- (c) The notice period has been increased from 14 days to 28 days to reflect recent precedent and is the same as article 25 of the SEPDEP DCO.

4.108 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.

4.109 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.

***Article 32 - Temporary use of land for maintaining the authorised development***

- 4.110 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.
- 4.111 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.
- 4.112 This power does not apply in relation to houses, gardens or any other buildings for the time being occupied (paragraph (2)).
- 4.113 Paragraph (3) requires at least 28 days' notice of intended entry to be served on the owners and occupiers of the land in question.
- 4.114 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.
- 4.115 This article was included in the Model Provisions as article 29 in the Hornsea Three DCO as article 27 and the Norfolk Vanguard DCO as article 27.

***Article 33 - Statutory undertakers***

- 4.116 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.

4.117 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.

4.118 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.

#### ***Article 34 - Recovery of costs of new connections***

4.119 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.

4.120 This article was included in the Model Provisions as article 33.

#### ***Article 35 – Funding***

4.121 Article 35 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 for the affected land which is approved by the Secretary of State.

4.122 This article is preceded in a number of DCOs including the SEPDEP DCO, Awel y Mor DCO, Cleve Hill DCO<sup>24</sup>, the VPI Immingham OCGT DCO<sup>25</sup> and the Drax Re-power DCO<sup>26</sup>.

### **Part 7 - Miscellaneous and General**

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<sup>24</sup> The Cleve Hill Solar Park Order 2020

<sup>25</sup> The Immingham Open Cycle Turbine Order 2020

<sup>26</sup> The Drax Power (Generating Stations) Order 2019

### ***Article 36 – Application of landlord and tenant law***

4.123 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.

4.124 This article follows article 35 of the Model Provisions.

### ***Article 37 - Felling or lopping of trees and removal of hedgerows***

4.125 This article allows (subject to paragraph (2)) 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 authorised development or endanger anyone using it. Compensation is payable for any loss or damage caused.

4.126 Further, this article also authorises the removal of any hedgerow as defined in the Hedgerow Regulations 1997. This article is based on article 39 of the Model Provisions and recent orders<sup>27</sup>.

### ***Article 38 - Trees subject to tree preservation orders***

4.127 Article 38 provides that the undertaker may not fell or lop or cut back the roots of any tree which is subject to a tree preservation order except those listed in Part 1 of Schedule 12. The listed trees may be felled, lopped or cut back in order to prevent them 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.

4.128 The article is a model provision save for that the article applies generally to any tree subject to a tree preservation order made after 12 March 2024 and either within or overhanging the Order limits.

4.129 The article allows the undertaker to fell or lop a tree encroaching on the Order Limits where it may constitute a danger. This is because where the

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<sup>27</sup> Article 35 of the Norfolk Vanguard DCO, article 34 of the Hornsea Three DCO

undertaker is in occupation of land it must take all reasonable steps to ensure that danger to persons does not arise. In occupation the undertaker will have the same duty of care to persons accessing land within their control as any other occupier and cannot allow the condition of the land to become dangerous. As an example, trees may be cut back where they overhang a route being used as a temporary diversion of a public right of way in order to ensure that diversion is fit and safe for use.

***Article 39 - Abatement of works abandoned or decayed***

4.130 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.

***Article 40 - Saving provisions for Trinity House***

4.131 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.

***Article 41 - Crown rights***

4.132 Article 41 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 SEPDEP DCO (article 36), East Anglia Three Offshore Wind Farm Order 2017 and the Hornsea Three DCO.

***Article 42 – Protective provisions***

4.133 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.

***Article 43 - Application of the 1990 Act***

- 4.134 The effect of paragraph (1) 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*”, subsection (3) sets out cases in which land is to be treated as operational land.
- 4.135 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.
- 4.136 Paragraph (2) of this article permits certain development authorised by way of a planning permission which has been initiated prior to the commencement of the project, to continue to be implemented despite physical incompatibility with the authorised development.
- 4.137 Paragraph (2) to (6) address inconsistencies between the order and implementation of the project and developments previously consented under the planning regime which have already been implemented.
- 4.138 These provisions seek to address any overlap with other planning conditions and planning obligations, and to provide clarity (to the extent there is inconsistency) in terms of enforcement and which consent has effect.
- 4.139 This article ensures that the Supreme Court’s ruling in *Hillside Parks Ltd v Snowdonia National Park Authority* 2022 UKSC [30] is addressed appropriately. That judgment relates to planning permissions granted under the Town and Country Planning Act 1990. It holds that, unless there is an express provision otherwise, where development has taken place under one permission, whether another planning permission may lawfully

be implemented depends upon whether it remains physically possible to carry out the development authorised by the second permission considering what has already been done under the first permission.

4.140 Paragraph (6) ensures that enforcement action is not taken in respect of planning permissions granted under the 1990 Act which are inconsistent with the works and exercise of powers under the Order.

4.141 This article is based on and broadly comparable to article 8(2) of the Drax Power Station Bioenergy with Carbon Capture and Storage Extension Order 2024.

***Article 44 – Certification of plans etc.***

4.142 This article provides for various application plans and documents listed in Schedule 15 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. However, the list has been moved to Schedule 15 as, with the inclusion of all parts of the Environmental Statement it is of considerable length.

***Article 45 - Service of notices***

4.143 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)).

4.144 This article was not included in the Model Provisions but is a sensible addition that has been included in previous orders<sup>28</sup>.

***Article 46 – No double recovery***

4.145 This article provides that compensation is not payable both under this Order and other compensation regimes for the same loss or damage. In

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<sup>28</sup> See for example article 44 of the Hornsea Three DCO, article 59 of The Port of Tilbury (Expansion) Order 2019 and article 39 of The Eggborough Gas Fired Generating Station Order 2018



addition, the article provides that there is not to be double recovery under two or more different provisions of this Order.

4.146 This article was not provided for in the Model Provisions but has been included in granted orders<sup>29</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. This article is also commonly incorporated into some protective provisions where an ability to claim under an article and a protective provision cannot be relied on to make two claims for the same loss, see for example paragraph 13 of the protective provisions in favour of Network Rail.

***Article 47 - Requirements, appeals, etc.***

4.147 This article provides for an appeal process for the refusal or non-determination of any application under this Order. It also provides a time limit for a decision. 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>30</sup> and the West Burton C (Gas Fired Generating Station) Order 2020<sup>31</sup>.

***Article 48 - Arbitration***

4.148 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.

4.149 Article 48(2) provides that no decision of the Secretary of State is subject to arbitration. This article is also subject to article 40 (saving provisions for Trinity House).

4.150 This article was included in the Model Provisions as article 42.

***Article 49 – Compensation***

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<sup>29</sup> See for example article 40 of The Port of Tilbury (Expansion) Order 2019

<sup>30</sup> S.I. 2013/648

<sup>31</sup> S.I. 2020/1148

4.151 This article gives effect to Schedule 13 which sets out the requirement for delivery of compensation for impacts on Lesser Black Backed Gulls.

## 5 SCHEDULES

### ***Schedule 1 – Authorised development***

5.1 Schedule 1 describes the authorised development, which is described in detail in Volumes 2 and 3 of the Environmental Statement (application 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.

### ***Schedule 2 – Part 1 Requirements***

5.2 The requirements in Part 1 of 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.

5.3 The requirements also provide that the approved details and plans must be implemented as approved, unless further amendments to them are approved. Following agreement between Essex County Council and Tendring District Council, Essex has been defined as the ‘decision authority’ for the onshore works requirements. The relevant local planning authority for the compensatory works will be East Suffolk District Council.

5.4 **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.

5.5 **Requirement 2** provides the maximum area within which the wind turbine generators may be situated. This delineates the area of Work No. 1 within which turbines can be placed. The levels at which the offshore export must be situated where the cable corridor crosses Deep Water Routes are specified in these parameters. This is to ensure that the cables do not

inhibit future, deeper, dredging to accommodate larger vessels. The table provides maximum parameters for the offshore works.

- 5.6 **Requirement 3** impose restrictions on the operation of the authorised development in the interests of aviation safety.
- 5.7 **Requirement 4** provides that the authorised development's onshore works may be carried out in stages.
- 5.8 **Requirements 5 to 12, 16** require the preparation and approval of detailed plans relating to the construction and operation of the authorised development.
- 5.9 **Requirement 13** details the requirements in relation to ground water monitoring.
- 5.10 **Requirement 15** controls the operational noise which can be generated by the substation in order to protect the amenity of nearby properties.
- 5.11 **Requirement 16** requires the preparation and approval of an employment and skills strategy prior to commencement of the main onshore works excluding highway improvements which may be undertaken early in order for that mitigation to be in place before the main works commence.
- 5.12 **Requirement 17** requires the undertaker to notify the discharging authority as to which build option is being taken forward before commencing construction.
- 5.13 **Requirement 18** controls the delivery of the works required to put in place the compensation secured by article 49 and Schedule 13.
- 5.14 **Requirement 19** provides an ability to transfer construction areas such as haul roads and compounds to North Falls for their use without these first having to be restored in order to support reductions in traffic movements, soil handing and construction duration.
- 5.15 **Requirement 20** requires the preparation and approval of a bio-diversity net gain strategy for each stage of the onshore works prior to commencement of that stage.

- 5.16 **Requirements 21 and 22** relate to the offshore and offshore (respectively) decommissioning schemes which must be prepared and approved in advance of decommissioning.
- 5.17 **Requirement 23** provides that all approvals must be in writing.
- 5.18 **Requirement 24** 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.

***Schedule 2 – Part 2 Approval of matters specified in requirements***

- 5.19 This Part of 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 Hornsea 4 DCO

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

- 5.20 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.

***Schedule 4 – Traffic Regulation***

- 5.21 This Schedule lists the street (Part 1) and rights of way (part 2) which will be temporarily restricted during construction. It also lists the traffic regulation measures not applicable to abnormal loads for the authorised development (Part 3) and the temporary speed limits the undertaker would impose during construction (Part 4)

***Schedule 5 – Access to works***

- 5.22 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.

### ***Schedule 6 – Land of which temporary possession may be taken***

- 5.23 This Schedule lists the plot of which the undertaker may take temporary possession.

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

- 5.24 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.

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

- 5.25 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.

### ***Schedule 9 – Protective Provisions***

- 5.26 This Schedule sets out a number of protections for various bodies to ensure that the powers sought in the Order are exercised appropriately.
- 5.27 Protections for utilities are routinely included in orders and are set out in Part 1. Protections for electronic communication code providers are routinely included in orders and are set out at Part 2.
- 5.28 Protections for named parties whose interests would be affected by the Order are set out in the following parts. It is possible that bespoke protections provisions for specific utilities will emerge from ongoing

dialogue, such that they will then be removed from the ambit of Part 1, which currently applies to them.

- 5.29 Crossing of and connections to drainage works are proposed and protections for the Environment Agency are included as Part 3. Protections for the drainage authority are included as Part 4.
- 5.30 As the project will cross under a rail line, protections for Network Rail are included in Part 5.
- 5.31 Part 7 sets out protective provisions for the protection of London Gateway Port to ensure that the installation of the offshore electrical cables does not prejudice the ongoing operation and maintenance of the route into and out of the Port.
- 5.32 Part 8 includes protective provisions for the protection of North Falls Offshore Wind Farm given the overlapping order limits each project is seeking.
- 5.33 Protection of Port of London Authority (onshore) is provided in Part 9. This protects PLA's access to and use of onshore infrastructure which is located near the access proposed to be used to access the beach. The Port of London (offshore) is set out in Part 10. The authorised development is situated entirely outside the Port, however the Port has an interest in the use of the Deep Water Routes used to access the Port.
- 5.34 Part 11 provides protection for Essex County Council as local highway authority.
- 5.35 Parts 12 and 13 provide protections for Anglian Water and Affinity Water as statutory undertakes.

***Schedule 10 –Deemed marine licence – Generation assets, and  
schedule 11 Deemed marine licence – transmission assets***

- 5.36 The licences are deliberately drafted as standalone documents as they are managed and enforced by the MMO not the relevant planning authority. The licences follow the approach taken on numerous offshore generating

station DCOs including Hornsea 3, Norfolk Vanguard, Norfolk Boreas, East Anglia One North and East Anglia Two.

5.37 Schedule 10 sets out the deemed marine licence for generation assets. Schedule 11 sets out the deemed marine licence for the transmission assets.

5.38 The structure of both licences is broadly the same as follows:

**Part 1 – licensed activities**

5.39 Paragraph 1 (interpretation) provides interpretation of certain words and phrases used in the licence. Many of which are identical to the main Order or have been amended to make sense in the offshore only context.

5.40 Paragraphs 2 to 5 (Details of licensed activities) sets out a description of the licensed activities by reference to the relevant Work Nos. in Schedule 1 of the Order.

5.41 Paragraph 6 confirms the deemed marine licence will remain in force until the scheme has been decommissioned.

5.42 Paragraph 7 confirms that section 72(7) and (8) (Variation, suspension, revocation and transfer) of the 2009 Act does not apply to a transfer of the deemed marine licences falling within article 7 (Benefit of the Order). Section 72(7) permits the licensing authority to transfer a marine licence to another person. Section 72(8) provides that "a licence may not be transferred except in accordance with subsection 7". Article 7(Benefit of the Order) however provides for a transfer to take place in a different way to section 72(7). Since article 7 is different from the precise wording of section 72(7) of the 2009 Act it is necessary to specify that section 72(7) only applies to a transfer not falling within article 7 in order to enable article 7 to operate. Without specifying this, article 7 might be claimed to be inoperative because of adopting a different wording from section 72(7).

5.43 Paragraph 8 confirms that where any condition requires the licensed activities be carried out in accordance with the plans, protocols or statements approved under the licence, the approved details, plan or

scheme are taken to include any amendments that may subsequently be approved by the MMO.

- 5.44 Paragraph 9 confirms that any amendments to approved details must be in accordance with the principles and assessments set out in the Environmental Statement and that approval by the MMO of any amendment or variation may only be given where it has been demonstrated to the satisfaction of the MMO that it is unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.

## **Part 2 – conditions**

- 5.45 Conditions specify the design parameters associated with the works comprised within the authorised project relevant to each deemed marine licence. This largely replicates the design parameters in the requirements but also include some restrictions which are not included in Schedule 1 of the Order, this is because it is considered more appropriate for these parameters to be controlled within the deemed marine licences due to their nature (e.g. parameters associated with hammer energy).
- 5.46 Condition 12 of Schedule 10 and Condition 13 of Schedule 11 (Pre-construction plans and documentation) provides for the submission for approval, before the commencement of licensed activities, of a plan showing the proposed location, dimensions and choice of foundation of all elements of the authorised scheme to ensure that the licensed activities conform with the description of the works and the design parameters specified within the conditions.
- 5.47 Conditions also secure safety and mitigation measures including marking and lighting of structures and the requirement for approval of detailed plans.

## ***Schedule 12 – Tree preservation order and removal of hedgerows***

- 5.48 Part 1 of this Schedule sets out the trees which may be damaged, lopped or cut back, or the roots of which may be encroached upon, as listed in the



relevant Tree Preservation Order. Parts 2 and 3 of this schedule set out the lengths of hedgerows which may be interfered with or removed under the Order. It is divided into 'important' hedgerows and other hedgerows.

***Schedule 13 – Compensation***

- 5.49 This Schedule secures compensatory measures to ensure the overall coherence of the national site network as regards Lesser Black Backed Gulls.

***Schedule 14 – Arbitration Rules***

- 5.50 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 the Hornsea Three DCO.

***Schedule 15 – Documents to be certified***

- 5.51 This schedule lists the documents to be certified under article 44 referencing both the relevant application document numbers (as updated during the examination) and the Planning Inspectorate's examination library reference.

***Schedule 16 – offshore co-ordinates***

- 5.52 This schedule contains the table of offshore co-ordinates. This information has been placed in a schedule given the number of points required and that repeating this information in multiple places in the Order would add substantially to the length of the draft.



F I V E   
ESTUARIES  
OFFSHORE WIND FARM

PHONE  
EMAIL  
WEBSITE  
ADDRESS

COMPANY NO

0333 880 5306

[fiveestuaries@rwe.com](mailto:fiveestuaries@rwe.com)

[www.fiveestuaries.co.uk](http://www.fiveestuaries.co.uk)

Five Estuaries Offshore Wind Farm Ltd  
Windmill Hill Business Park  
Whitehill Way, Swindon, SN5 6PB  
Registered in England and Wales  
company number 12292474

